

SOUTH AFRICA / JUDGMENT

Kshatriya Investment Holdings (Pty) Ltd v Sub Sahara Equity Investments (Pty) Ltd (A51/2022) [2024] ZAGPPHC 1084 (23 October 2024)

[2024] ZAGPPHC 1084

COURT

North Gauteng High Court, Pretoria

BEFORE

G Myburgh, M P Kumalo

CASE / FILE NUMBER

A51/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: A51/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE: 23/10/24

SIGNATURE

In

the matter between:

Kshatriya
Investment Holdings (Pty) Ltd
Appellant
and
Sub
Sahara Equity Investments (Pty) Ltd
Respondent

JUDGMENT

Myburgh AJ:

1. This matter comes to us on appeal from the magistrate's court for the district of Tshwane Central. For the sake of convenience we will refer to the parties as in the proceedings in the court of first instance – i.e. as “plaintiff” and “defendant” respectively.
2. The plaintiff sued the defendant for moneys which were allegedly advanced pursuant to an oral agreement which was alleged to have been concluded over the phone by a Mr Chetty on behalf of the plaintiff and a Mr Singh on behalf of the defendant on or about 28 October 2014. The amount claimed was R70 000.00. The plaintiff's case was that this constituted an advance in respect of certain services which the defendant would render. These were described as “marketing services by recruiting financial advisers” and “further services in the form of publicity and brand awareness for the plaintiff's product offerings such as information seminarsgolf day events and the like”. The plaintiff also alleged that it was a term of the agreement that the defendant was required to, “regularise its Financial Services Board license in order to legally market, distribute and advise on the Plaintiff's investment solutions.” The plaintiff's case was that the defendant had failed to render the services contracted for and that it had cancelled the agreement following a repudiation on the part of the defendant. It accordingly sought the return of the money which had been advanced.
3. In its plea the defendant admitted having received the payment in question but denied that it had been paid on the basis contended for by the plaintiff. The defendant's case was that the payment had been made in terms of an entirely different agreement which, according to the defendant was concluded orally at Centurion during or about November 2013 – i.e. approximately one year prior to the agreement contended for by the plaintiff. As to the services to be rendered, the terms averred by the defendant were essentially the same as those contended for by the plaintiff save for the requirement relating to the Financial Services Board (“the FSB”). The defendant moreover contended that the payment had constituted services which had already been rendered pursuant to the agreement which it contended for.
4. The learned magistrate found in favour of the plaintiff, and it is that judgment which forms the subject matter of the appeal. The appellant's case is that the claim ought to have been dismissed with costs; alternatively that the learned magistrate ought to have granted absolution from the instance and ordered the plaintiff to pay costs.
5. Three witnesses testified at the trial: Mr Chetty, Mr Singh and a Mr Rayman.
6. Mr Chetty, who was a director of the plaintiff, testified as follows:
 - 6.1. The plaintiff was involved in the financial sector.

6.2. He received a request from a Mr Rayman[1], who was known to both the plaintiff and the defendant, to pay the defendant an advance of R70 000,00 in respect of marketing and promotional services to be rendered by the defendant.

6.3. He also discussed the issue of licensing with Mr Rayman on that occasion and reference was made to the need for- the defendant to have what was referred to as a “category 1.10 license.” According to the evidence such licenses , which are issued by the Financial Sector Conduct Authority (“FSCA”) are required for the purpose of rendering services in connection with investment products of the kind which the plaintiff was offering.

6.4. He took the matter up with his board of directors, which approved of the proposal and the payment in question was made on that basis. This was simply an advance , and more payments would potentially have been made, depending on the nature and extent of services actually rendered.

6.5. He knew Mr Singh at that time. He first met him during March or April of that year and Mr Singh had been assisting him (i.e. as an advisor) relative to his personal affairs. Particular reference was made to a medical aid scheme, but it appeared that several policies were involved. That said, nothing turns on the detail.

6.6. He denied the conclusion of the agreement contended for by the defendant and hence also denied that the payment in issue had been made in terms of that (alleged) agreement.

6.7. When referred to an invoice from the defendant dated 5 November 2014, which , according to the defendant, related to services which had been rendered pursuant to the agreement contended for by it, he stated that he first saw the invoice around about the middle of 2015. He also stated that this was in the context of correspondence which passed regarding the services which the defendant was (on the plaintiff’s version) , supposed to have rendered and the plaintiff’s demand for the money to be returned – this after the defendant had refused to give an account in respect of exactly what services it had rendered and how the money had been utilized.

6.8. In cross examination he stated that he did not deal directly with Mr Singh or the defendant; instead Mr Raymond acted as a go between. He also conceded that the first time a written request calling for an account in respect of the services which were to have been rendered was during April 2016. This was followed by further correspondence, which passed between Mr Rayman and Mr Singh, but which he (i.e. Mr Chetty) was kept abreast of.

6.9. He also confirmed that the defendant had rendered other services (this in the form of generating business in the form of investments) for the plaintiff and that the defendant had received commissions in respect of that business – which commissions had been split between the defendant and either Mr Rayman personally or his company/employer, Retiz McKenzie.

6.10. In addition he confirmed or at least did not dispute that there had been a souring of relationships as result of the plaintiff having made payments into the defendant's bank account in respect of moneys which were in fact due to the aforesaid investors. This was in 2016. (Why this occurred was never explained, but that it occurred was not in issue).

7. Mr Rayman's evidence can conveniently be summarised as follows:

7.1. He was employed by Reitz McKenzie as a business manager.

8. He had a pre-existing and long-standing relationship with Mr Chetty. They had grown up together.

9. Reitz McKenzie rendered consulting services to the defendant.

10. He introduced the defendant (via Mr Singh) to the plaintiff's product. In doing so he described the product as his own, which was not true – it was the plaintiff's product, albeit that he/Reitz McKenzie may have had an exclusive right to market it. We specifically make no finding on this issue).

11. He acted as a go between in facilitating the agreement contended for by the plaintiff. In doing so he dealt with Mr Chetty and Mr Singh and the agreement was concluded telephonically.

12. Part of the arrangement was that the defendant would become a "preferred distributor" of the product, from which he would earn revenue in the form of commissions.

13. The defendant would also receive an upfront payment of R70 000,00 in anticipation of marketing and promotional services which it would render – by way of example organising golf days.

14. He was not aware of any agreement between the plaintiff and the defendant prior to 2014, which he thought not to have been possible given that Mr Chetty and Mr Singh first met one another during 2014.

15. The defendant did indeed secure business for the plaintiff, in return for which it received commissions. Reitz McKenzie received the commissions from the plaintiff and, in turn, paid the defendant its share.

16. He first had sight of the defendant's invoice dated 5 November 2014 during 2016. This was in the context of him having requested an account in respect of the specific marketing and promotional services which were to have been rendered, alternatively the return of the advance. By that time Mr Singh had become unhappy with the relationship between itself and the plaintiff and they were working on "unbundling" it – a divorce, so to speak.

17. Mr Singh's evidence was, briefly, as follows:

17.1. He had a prior relationship with Mr Rayman – the two had been at school together and they had also worked together for a period. He regarded Mr Rayman as a mentor.

17.2. He was introduced to Mr Chetty by Mr Rayman (sometimes referred to as Mr Rahman) . There were initial telephonic conversations between him and Mr Rayman, but the first proper introduction took place at his home. This was during the latter part of 2013.

18. The agreement contended for by the defendant was concluded orally at the Wimpy restaurant in Irene Mall in November 2013. Present were Mr Chetty, Mr Rayman and Mr Singh. What was in essence required was work of a fairly diverse nature in advance of the “roll out” of the product. The services to be rendered a marketing, promoting and raising awareness of the offering. The parties agreed on an initial amount of R70 000.00, but that could potentially have increased, depending on the services actually rendered
 - and presumably expenses incurred – i.e. it seems to have been more in the nature of an initial budgetary cap than a fixed fee.
19. The defendant would also earn commissions (referred to as a “facilitation fee”) in respect of business generated, which commissions would be split between the defendant and Mr Rayman’s firm, Reitz McKenzie. This was separate from and in addition to the marketing and related services referred to above.
20. He/the defendant in fact assisted the plaintiff with advice relative to the product and the marketing thereof prior to its “roll out”. Although the initial meeting with Mr Chetty had taken place during November 2013, he only really began working on the assignment during or about March of the next year. He gave the plaintiff advice in relation to the product and reviewed certain key documents. He also spent time and energy promoting awareness of the product/offering. This was mainly done on at a personal level – i.e. he spoke to people he knew. He also said that the defendant had organised a seminar, in which Mr Rayman had participated. The payment of R70 000.00 was in respect of those services.
21. The defendant also generated investments, for which the defendant was paid commissions – i.e. as explained by Mr Rayman.
22. He/the defendant also assisted Mr Chetty with financial advice in his (i.e. Mr Chetty’s) personal capacity. He started rendering those services some time in 2014.
23. The invoice of 5 November 2014 was sent pursuant to a telephonic request made by Mr Chetty at the time the payment of R70 000.00 was made (i.e. on 4 November 2014). As he had done approximately the same amount of work on the project every month, and as there was work which had yet to be done, which he intended to do in December, he divided the R70 000.00 evenly over the period March to December – i.e. R7 000.00 per month. He also phoned Mr Chetty to confirm that he had received it and that everything was in order.
24. The fee of R70 000,00 had nothing to do with obtaining a category 1.10 license. In fact he had initially been under the impression that that no such license was required for marketing the plaintiff’s product. . That was because Mr Rayman, whom he trusted, had told him that the marketing of debentures was covered by the provisions of the Companies Act and

that a license was not required for that purpose. He was informed otherwise by the defendant's compliance officer late

in 2014 or early in 2015. The defendant did apply for the relevant license, but some difficulties were encountered, and the

process was not seen through as the defendant was, by then, no longer involved in marketing the product.

25. The relationship between the plaintiff and the defendant broke down. The breakdown was triggered by the fact that the plaintiff deposited moneys which ought to have been paid directly to investors into the defendant's bank account – something which the defendant was not happy about. This was around March 2016.
26. He admitted that he had refused to give a detailed account of services rendered and expenses incurred in respect of the R70 000.00 . The reason given was that it was a ridiculous request, especially given the amount of time that had passed. (He also testified that there was documentary proof of a relationship and of the rendering of services which pre-dated October 2014; however no such documents were introduced into evidence – this as they had apparently not been discovered).
27. The learned magistrate did not comment negatively on the credibility of any of the witnesses. The assessment of the evidence must accordingly be carried out with reference to the inherent probabilities – i.e. which (if either) of the two versions is the more plausible. In this regard it is pertinent to note the fact that two witnesses testified to a particular set of facts whereas only one testified to a different set is neither dispositive of anything nor necessarily of any particular relevance. The assessment of evidence is not to be equated to the counting of noses. This is especially so in cases where relationships exist between witnesses which may potentially cause them to side with a particular version or party. In casu it was common cause that Mr Rayman and Mr Chetty had a long-standing relationship and that the Mr Rayman's firm, Reitz McKenzie had an ongoing business relationship with the plaintiff. It is also to be borne in mind that Mr Rayman had not been candid in representing to Mr Singh that the product was his own. His explanation under oath (viz. that he had he had somehow taken the product onboard and thus taken "ownership" of it) was also not convincing. A candid answer would have been that he represented that the product was his own so as to negate the risk of the defendant approaching the plaintiff directly – which would have been to Reitz McKenzie's and Mr Rayman's financial detriment.
28. It was not in dispute that the plaintiff bore the onus. Thus, the plaintiff was required to prove its case on a balance of probabilities in order to succeed. If the magistrate was of the view that the probabilities were against the plaintiff, then an order dismissing the claim would have been appropriate. If he considered the probabilities to be evenly balanced, then the appropriate order would have been one of absolution from the instance.

29. Turning to the inherent probabilities, the version proffered by the plaintiff seems unbusinesslike and hence inherently implausible. Ordinary men of business do not simply pay advances running to tens of thousands of rands for services to be delivered at some time in the future – the more so when the precise nature and extent of the services is not specified. Likewise, ordinary men of business do not wait for months or years to seek an accounting in respect of services actually rendered or how the funds were expended.
30. The suggestion that the plaintiff would simply have paid such a large amount without so much as an invoice (or indeed, any form of paper), is inconsistent with normal business practices and hence improbable. This is even more the case on the plaintiff's version – i.e. that it made a payment to a third party with whom it had no prior relationship for services to be rendered in the future. The probabilities in this regard are overwhelmingly in favour of the defendant.
31. The suggestion that an accounting query was raised for the first time many months later is also inconstant with ordinary business practice and utterly implausible. The overwhelming probability is that the plaintiff was in possession of the defendant's invoice and that it was reflected as the basis for the payment in the plaintiff's books of account. It must therefore be accepted that the invoice was sent on or about 5 November 2014 at the request of Mr Chetty.
32. Another consideration which affects the assessment of the inherent probabilities is that it is common cause that Mr Chetty approached Mr Singh to assist him with his personal financial affairs during or about March 2014. How Mr Chetty came to know Mr Singh or to make the enquiry of him is completely unexplained on the plaintiff's version. Indeed, Mr Chetty tendered no explanation other than to say that Mr Singh/the defendant was doing quotes for him in respect of insurance policies and the like. This makes no sense as contact had to have been established somehow – whether by way of a referral, a chance meeting or perhaps a telephone call. On the other hand, if one accepts that the two were already involved in a working relationship (as Mr Singh testified)

then everything makes perfect sense.

33. In the result we make the following order:

ORDER

1. The appeal is upheld.
2. The order of the court below is amended to read "The plaintiff's claim is dismissed with costs".
3. The respondent is ordered to pay the appellants costs.

G MYBURGH

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

M P KUMALO

JUDGE OF THE HIGH COURT

(I agree and it is so ordered)

Appearance:

For the appellant: Adv F van Wyk Instructed by: Wolhuter Attorneys For the respondent: Adv C
Zietsman Instructed by: Mothle Jooma Sabdia Inc

[1] It was common cause that Mr Rayman was employed by a company referred to as “Reitz
McKenzie”, which appears to have been an intermediary and an advisor to the plaintiff.

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