

SOUTH AFRICA / JUDGMENT

Le Bac Estates (Pty) Ltd v Veripath (Pty) Ltd (241/2004) [2010] ZAGPPHC 596 (17 March 2010)

[2010] ZAGPPHC 596

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

241/2004

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE NO: 241/2004

DATE: 17 MARCH

2010

IN THE MATTER

BETWEEN:

LE BAC ESTATES

(PTY)

LTD.....PLAINITFF

(Previously

known as LISTER

LEAVES KWEKERY (PTY) LTD)

vs

VERIPATH (PTY)

LTD.....DEFENDANT

JUDGMENT

TOLMAY, J:

BACKGROUND:

The plaintiff instituted action against the defendant for outstanding remuneration in the amount of R573 500-00 arising from consulting services allegedly provided to the defendant during the period January 2002 to August 2003.

The defendant's primary business is the auditing of laboratory accounts and to this end it acts on behalf of various medical aid schemes in assessing and evaluating laboratory accounts submitted by various laboratories for payment. The defendant would review the accounts to check that the medical aid tariff has been applied correctly on such account and to verify that the services on such account have been coded correctly and that the codes indicated on such account do not provide for extraneous services not in fact rendered. The plaintiff alleged that it entered into an agreement with the defendant to render consultancy services to the plaintiff.

THE PLEADINGS:

On the pleadings the following disputes arose between the parties:

The defendant denied that it entered into a consultancy agreement of any kind with the plaintiff and avered that any such agreement was entered into between Dr du Toit, in his personal capacity, and a company called Veripath (2) (Pty) Limited. ("Veripath 2") which is a separate legal entity. Alternatively and in the event that the court should find that the plaintiff did enter into a consultancy agreement with the defendant, the defendant avered that such agreement terminated by reason of plaintiff's non-fulfillment of its obligations in terms thereof. The defendant brought two conditional counterclaims against the plaintiff in respect of payments allegedly made to the plaintiff in the bona fide but mistaken belief that they were due to it after the termination of the consultancy agreement.

The issues that were to be determined on the pleadings were as follows:

1. The identity of the true contracting parties to the consultancy agreement;
2. The terms of the consultancy agreement concluded between the parties;
3. Whether each of the parties performed their obligations in terms of the consultancy agreement.

On 5 February 2010 the defendant launched an application for separation of issues which plaintiff opposed. On 25 February 2010 the defendant withdrew the application.

THE EVIDENCE

The parties each led one witness at the trial. Dr du Toit testified on behalf of the plaintiff and Mr Christopher Adams testified on behalf of the defendant.

Dr du Toit was involved in the medical industry with the verification of accounts of medical aids. He was approached by Veripath 2 (Pty) Ltd. who was also active in this industry to join forces rather than be in competition with each other.

On 18 October 2000 Dr du Toit entered into an agreement ("the first agreement") with ms M M du Raan and messrs C Adams. R G McCulium. R M Trainer. P Horn and D de Necker. In terms of this agreement Dr du Toit rendered consultancy services to Veritpath 2 (Pty) Ltd ("Veripath") and was paid on an hourly basis. These services were rendered to Veripath 2 for the period 1 October 2000 to May 2001.

Certain internal problems arose in Veripath 2 which led to a meeting held on 17 May 2001, where certain proposals were made and which led to an agreement ("the second agreement") which was concluded during May

2001. In terms of this agreement Dr du Toit rendered consultancy services through Lister Leaves (Pty) t/a Lister Consultants ("Lister Leaves") to Veripath
2. Lister Leaves' name changed to be Le Bac Estates (Pty) Ltd before institution of action. The effective date of the second agreement was June 2001.

Dr du Toit testified to the reasons for the second agreement being entered into between Lister Leaves (and not himself in his personal capacity) and the defendant. Firstly he was concerned that he would be transgressing the professional rules applicable to his profession as an anatomical pathologist if he should share income with entities who are not registered pathologists. Secondly, channeling the income earned through Lister Leaves would be tax effective. The 40 hour minimum per week, which was a term of the first agreement, did not form part of the second agreement. He stated that his workweek in any event exceeded 40 hours.

During October 2001 the defendant purchased the business and assets of Veripath 2 for the amount of R940 000-00. The contracts between Veripath 2 and Medihelp and Spectramed formed part of the business of Veripath 2 which was sold to defendant. He also testified that a sale of shares from plaintiff to Dr du Toit took place on 2 October 2001. Negotiations took place between the plaintiff and defendant from September/October 2001 to January 2002.

He testified to the conclusion of an oral agreement ("the third agreement") between Lister Leaves and defendant with him as its designee, against the payment of R57 000-00 per month (VAT included). He rendered consultancy services to plaintiff via Lister Leaves from January 2002 to August 2003. Invoices were rendered by Lister Leaves to plaintiff and payments were received by Lister Leaves from plaintiff as was indicated in amended schedule A annexed to plaintiff particulars of claim.

All the payments, but one was made by defendant to plaintiff According to his testimony the outstanding invoices are due. owing and payable.

The third agreement (between Lister Leaves and defendant) was terminated on 14 August 2003 per letter by Dr du Toit.

He testified that the payment which was made during March 2002 by Veripath 2. was indeed payment for outstanding invoices owing by Veripath 2 to the plaintiff.

Mr Christopher Adams then testified on behalf of the defendant. He conceded during his testimony that the consultancy agreement would not automatically terminate, if the minimum hours worked by Dr du Toit fell below 40 hours per week. He also conceded that, other than showing that Dr du Toit had other business interests at the same time as his involvement with the defendant, it could not be shown that Dr du Toit in fact worked less than 40 hours per week.

This evidence disposed of the conditional counterclaim brought by defendant, the defendant's alternative defence based on the breach by Dr du Toit of his obligations to the defendant to work a minimum of 40 hours per week, as well as the alleged consequent termination of the consultancy agreement.

Mr Adams also conceded to the fact that there had been a consultancy agreement with the plaintiff. That disposed of the defence that the consultancy agreement was with Veripath 2 and not defendant.

Mr Adams agreed that Lister Leaves delivered invoices for consulting services rendered during the period from January 2002 to August 2003. He also testified to the fact that the other directors also invoiced the defendant through companies, because that was more tax effective Mr Adams testified that although Veripath 2 made the payment to plaintiff in March 2002 such payment was intended to discharge defendant's indebtedness to plaintiff. Aside from the payment of March 2002. which payment was made by Veripath 2 and not the defendant (and which was therefore excluded from the payments acknowledged by the plaintiff by way of amendment brought during the trial), the parties are ad idem as to which months during the period claimed for were paid and which months were not paid.

As a result of the aforesaid it became unnecessary for me to determine:

1. The terms of the third agreement concluded between the parties:
2. Whether each of the parties performed their respective obligations in terms of the third agreement: and

3 The quantum of the plaintiff's claim, baring the issue of the March 2002 payment.

ISSUES IN DISPUTE

The only issues remaining in dispute between the parties are:

1. Whether the contracting party to the third agreement with the defendant was the plaintiff or Dr du Toit in his personal capacity: and

2. Whether the March 2002 payment, albeit made by Veripath 2, was intended to discharge the defendant's indebtedness in respect of the consultation services rendered for the month of March 2002.

APPLICABLE LEGAL PRINCIPLES

The plaintiff bears the onus to prove on a balance of probabilities that it and not Dr du Toit was the contracting party to the third agreement.

Defendant in argument raised the defence that any purported agreement between the plaintiff and the defendant was a simulated agreement and alleged that the real agreement was one concluded between the defendant and Dr du Toit in person.

It must be noted right from the outset that the defence alleging a simulated contract was not raised in the pleadings. Defendant argued that it was not necessary to raise it in the pleadings. It was argued on behalf of the defendant that, as it was denied on the pleadings that plaintiff and defendant entered into an agreement, that allegation sufficed to allow the defendant to raise the defence of a simulated agreement.

On my understanding of the law it would seem that it is necessary to plead a simulated agreement, but in the light of my conclusion it is not necessary for me to deal with this aspect.

It is trite law that substance rather than form determines the nature of a transaction (*plus valet quod agitur quam quod simulate concipitur*). A simulated transaction is essentially a dishonest transaction, in that the parties to the transaction do not intend it to have among them the legal effects it purports to convey. See in this regard *S v de Jager* 1965 (2) SA 616 (A) on 627 - 628, *Skjelbreds Rederi A/S and Others v Jartless (Pty) Ltd* 1982 (2) SA 710 on 732 G - 733 G.

In order to determine whether an agreement is indeed a simulated agreement one needs to look at the true nature of the agreement and the facts of the case. See *Zandberg v Van Zyl* 1910 AD 302 at 309 where the following was stated:

“Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports, and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavor to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature And when a Court is asked to decide any rights under such agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies plus valet quod agitur quam quod simulate concipitur. But the word of the rule indicates its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable,

which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement

other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius.Ad Cod 4.22.2 remarks that these simulations, may be detected by considering the fact leading up to the contract, and by taking account of any unusual provision embodied in it."

It must be taken into account that parties are free to arrange their affairs as they deem it fit and the mere fact that an agreement is structured in a way that benefits the parties does not in my view make an agreement a simulated agreement. See Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue [1996] ZASCA 35; 1996 (3) SA 942 (SCA)

In the light of what was already stated a factual analysis is necessary to determine whether one is in specific circumstance dealing with a simulated transaction. The factual analysis is thus to ascertain the actual intention of the contracting parties See Commissioner of Customs and Excise v Randles, Brother & Hudson Ltd 1941 AD 369, where the following was stated at 395 - 5

"(a) transaction is not necessarily a disguised one because it is devised for the purpose of evaluating the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Court according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.

A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction:

dishonest, inasmuch as the parties to it do not really intend it to have, inter partes. the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be in fraudem legis. and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.

Of course, before the Court can find that a transaction is in fraudem legis in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties."

See also Long Oak Limited v Edwards (Pty) Ltd 1994 (3) SA 370 (SE)

If the aforesaid principles are applied to the facts in this case, the following becomes clear. The defendant wanted Dr du Toit's services and would only enter into an agreement if it could secure his service. There was no one else at Lister Leaves who could perform the services rendered to the defendant. Dr du Toit used the vehicle of Lister Leaves for two reasons. The one was that he was concerned that he could transgress the professional rules of his profession by sharing income with non registered pathologists and secondly it would be more tax effective if Lister Leaves entered into the agreement. The other directors and shareholder also made use of

companies who invoiced the defendant. It is common cause that Lister Leaves invoiced the defendant, that Lister Leaves was paid by defendant and that Lister leaves paid VAT on the payments of the defendant. It is also common cause that Dr du Toit was rendering the services.

On a factual analysis of the facts in this case it is clear that the parties structured the agreement between them to make it tax

effective. The way in which it was structured also addressed Dr du Toit's concerns regarding his professional rules. There was nothing untoward or fraudulent about this transaction.

Consequently the facts can be distinguished from the matter of Long Oak Ltd, supra. In this instance, there was nothing dishonest about the transaction and it cannot be said that the purpose of the structuring of the agreement was to disguise or deceive by concealing what the real agreement between the parties was. The shareholders entered into an agreement which was structured to accommodate their specific interests. The parties acted within their rights to structure the agreement in a way that was tax effective. The agreement can consequently not be regarded as fraudulent or dishonest.

In the premises I cannot find that the agreement between the parties was a simulated agreement which is invalid. Consequently the defence must fail.

The only outstanding issue is the March 2002 payment made by Veripath 2, and which defendant alleges was done on behalf of defendant by Veripath 2. The plaintiff alleged that this payment was made by Veripath 2 for outstanding payments of Veripath 2. Both versions are probable and as the plaintiff carries the onus, I must decide in this regard for the defendant.

The costs should follow the outcome of the case and defendant should also be liable for the costs of the separation application.

Consequently I make the following order:

1. Defendant is ordered to pay to the plaintiff the amount of R459 000-00.
2. Interest at a rate of 15,5% per annum from date of service of summons to date of payment.
3. Defendant is ordered to pay the costs which will include the costs of the separation application.

R G TOLMAY

JUDGE OF THE HIGH COURT

LE BAC ESTATES (PTY) LTD (previously known as LISTER LEAVES)

Vs

VERIPATH (PTY) LTD

JUDGE: TOLMAY

ATTORNEYS FOR PLAINTIFF:

LE GRANGE ATTORNEYS

555 WALKER STREET

MUCKLENEUK PRETORIA

REF: MNR LE GRANGE 145/03L

TEL: 012 - 344 2611

ADV : P M VAN RYNEVELD

ATTORNEYS FOR DEFENDANT:

MORRIS LAZER INC

C/O FRIEDLAND HART & PARTNERS

SUITE 103, BLOCK 4

MONUMENT OFFICE PARK

79 STEENBOK AVENUE

MONUMENT PARK

REF: T VAN STRAATEN

TEL: 012 -424 0200

ADV: A L ROELOFFZE

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