
SOUTH AFRICA / JUDGMENT

Lotter and Others v Sekekete and Others (125/2017) [2020] ZAFSHC 32 (26 February 2020) [2020] ZAFSHC 32

COURT

Free State High Court, Bloemfontein

BEFORE

N. M. Mbhele

CASE / FILE NUMBER

125/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 125/2017

In the matter between:-

WILLEM JACOBUS LOTTER AND 3 OTHERS

Plaintiff

and

SAMUEL SEKEKETE AND 2 OTHERS

Defendant

CORAM:

N. M. MBHELE, J

HEARD ON:

10,11,13 SEPTEMBER 2019 &

19 & 20 NOVEMBER 2019

DELIVERED ON: 26 FEBRUARY 2020

- [1] This is a claim for payment of monies that are alleged to be due and payable by the defendants to the plaintiffs. The claim emanates from contracts entered into by individual plaintiffs for the delivery of water during the period of drought in Steynsrus town and the surrounding areas.

It is common cause that the plaintiffs did deliver water during February to May 2016. The plaintiffs allege that they were each

approached by the first defendant who offered them contracts to assist him to deliver water from their respective farms to Steynsrus

town and the township while the defendants deny that the first defendant entered into any contract with the plaintiffs. The defendants' version is that the contracts were entered into with the fourth defendant represented by the 3rd defendant.

- [2] The parties agreed that the issues be narrowed down to determine who the contracting parties were. This leads to one question alive for the court's determination, namely, whether the first defendant or the fourth defendant represented by the third defendant was the contracting party with plaintiffs in this matter.

Each plaintiff testified in support of their respective cases.

CHRISTIAN JACOBUS SAAIMAN, 3rd plaintiff.

- [3] He testified to the effect that he is a farmer at Steynsrus. He knows the three defendants, they are farmers in the same district as him. The fourth plaintiff is his son. The first defendant is the father to the second and third defendant. In January 2016 he entered into a verbal contract to deliver water for the town of Steynsrus. During the first week of February 2016 he stumbled over the first plaintiff at the VB K Corporation. At that time the first defendant informed him that he was busy transporting water for the town of Steynsrus and the township. He told him that he was awarded a contract by Moqhaka municipality to deliver water to Steynsrus town and the township. He enquired from him if he would be willing to assist him to meet the obligations of the contract by delivering water as a subcontractor. The first defendant knew that the fourth plaintiff's farm is just 6 km from the town and that there are boreholes on the farm

with plenty of water. He agreed to help the first plaintiff to deliver water. He has known the first defendant for over 35 years. The first defendant was born at Steynsrus and he was a farm worker when he first knew him. The terms of the contract were that he would deliver water at a cost of R1900.00 per 10,000 Litres of water. He thereafter bought tanks and started delivering water just a few days later. He was paid during the months of March and April by means of cheques that were delivered by the first defendant. During the subsistence of the contract there were regular meetings held to monitor performance and ensure smooth running of the project. The first second and third defendant were always in attendance of these meetings. The third defendant would give feedback on the number of loads delivered for preparation of invoices that would in turn be delivered to the municipality.

- [4] During a meeting that was held in the beginning of April they were informed that the municipality wants to enter into a contract with a company as it is irregular for the Municipality to enter into a contract with an individual. They were informed that the terms of the contract would remain the same and that they must continue delivering water as before. Around 12 May 2016 they were informed by the first defendant that they should stop delivering water. There were no further payments received. This was how their engagement with the first defendant ended.

Johan De Vos Lotter

- [5] He and his brother, the first plaintiff, met the first defendant at the garage owned by the Lotter family and the first defendant informed them that he got a contract from Moqhaka Municipality to deliver water to the town of Steynsrus and the township. The meeting was requested by the first defendant telephonically. He asked them to help him deliver water in fulfilment of his contract with the municipality. They delivered water and were paid for some deliveries until payments ran out. Upon enquiry they were informed that the Municipality had not paid the invoices. They made investigations with the municipality and were informed that the payments were long done to the Sekeketes. He only learned about the company called Mavellisto Mavela at a meeting held in the first week of April where they were informed that the municipality requires that a contract be entered into with a company and not an individual to comply with the law. Him and the 4th plaintiff were supposed to become signatories in the bank account of the company that was yet to be formed. He received payments

from the 3rd defendant. Payments were done at the ATM straight into their mother's account. He denied that they were contracted by the third defendant on behalf of 4th defendant.

- [6] Willem Jacobus Lotter, the first plaintiff confirmed the evidence of his brother, 2nd plaintiff.
- [7] Gerhardus Bartolomias Saaiman, the 4th plaintiff, essentially confirmed the evidence of his father, 3rd plaintiff and the 2nd plaintiff. He reiterated that he was approached by the first defendant and asked to use his trailer to deliver water on his

behalf. He denied when it was put to him that he approached the first defendant on his farm and made an enquiry about the delivery of water when he referred him to the 3rd defendant.

- [8] At the end of the plaintiff's case the 2nd defendant successfully applied for an absolution from the instance.
- [9] Willem Sekekete, the 3rd defendant testified that he is the sole director of Movelisto Mavela, a company that was in existence in 2015 and secured a tender with Moqhaka Municipality to deliver water at Steynsrus town and her township. He personally approached the 4 plaintiffs and proposed that they subcontract under his company to help him deliver water in terms of his contract with Municipality. He denies that the first plaintiff was the one who approached the plaintiffs. The first plaintiff himself was a subcontractor in the project. The price agreed

upon with the first and second plaintiffs was R1700 .00 per 10 000 litres of water and R1515 was the price agreed upon with the 3rd and 4th plaintiffs. He was the one who delivered cheques to the plaintiffs and personally made electronic transfers from Movelisto

Mavela's FNB account. They have known each other with the plaintiffs for a very long time. The 3rd plaintiff installed the pump that extracts water on their farm and he used to fix a lot of broken things on their farm. He used to work for the 1st and 2nd plaintiff's father. Their relationship come a long way.

[10] He denies that there were regular meetings held to discuss water delivery schedules. His testimony is that there was only one meeting held and it was on the 05th April 2016. The purpose of the meeting, according to him, was to discuss the places where water was sourced by the subcontractors.

He received the delivery schedules form the municipality and they did not have to meet with the contractors to discuss each subcontractor's

number of loads delivered. The quotation that led to him securing the verbal contract to deliver water is undated and not signed. It was prepared by him and a certain Mrs. Botha , manager technical at Moqhaka municipality. He was adamant that all 4 plaintiffs knew that they were contracting with Movelisto Mavela, the 4th defendant.

[11] Bae Bae Samuel Sekekete, the first plaintiff denies ever entering into a contract with the plaintiffs. He was himself a subcontractor under Movelisto Mavela. He knows the plaintiffs. He worked with 1st and 2nd plaintiffs' father. He became a tenant on his farm until he got a farm that he is currently occupying. It is the 1st and 2nd plaintiffs' father who helped him apply for a loan to to start his farming career. The 3rd plaintiff was his mentor when he started farming on his own after receiving 3 million rands grant from the government. He is not happy with how he was treated by the 3rd plaintiff when he acted as his mentor. He would make him sign cheques without explaining what they were for. He, further, gave himself a tender to build kraals and garages on his farm . he believes that he was hard done by the 3rd plaintiff and his brother. He denies that there were any meetings held to discuss delivery of water. The only meeting he attended was when the ANC was distributing T- shirts to the attendants and he left soon after the meeting. The meeting must have been on the 5th April 2016.

[12] The plaintiffs bear the onus to prove that there were contracts concluded between them and the first plaintiff. I must determine whether or not the party bearing the primary burden of proof has succeeded in discharging it against the required standard, namely, on a balance of probabilities.

[13] It is common cause that there are two different and mutually destructive versions before the court. In such instances, the plaintiffs can only succeed if they can satisfy the court, that their version is probable, accurate and acceptable, and that the defendants' version is therefore false and falls to be rejected. I then turn to deal with the issue of credibility and probabilities.

[14] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* 1984

(4) SA 437 (E) at 440E-G, where Eksteen AJP said:

"... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[15] The above was emphasized in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003

(1) SA 11 (SCA) at 14I-15E, where the court held as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the court must make findings on

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and (c) the probabilities. ... As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues ..."

[16] The following are common cause:

- The plaintiffs were contracted to deliver water as subcontractors;
- The contracts were verbal;
- They delivered water for the duration of the contract, being February to May 2016;
- The parties have known each other for more than 30 years, their relationship was based on trust.

[17] The plaintiffs' testimony was clear and straight forward. They admitted where they made mistakes and where they forgot finer details. They were frank and open . The fact that they incurred expenses to ensure smooth delivery of water without any written confirmation of the contracts is an indication that they trusted the defendants and did not anticipate any problems in their relationship. The third plaintiff credited the monies he received for water delivery in the names of the first defendant. This was done with the very first cheques he received when there was no indication that there would be a dispute between the parties. He genuinely believed that the monies were from the first defendant as the contracting party. All plaintiffs do not deny that somewhere during the subsistence of the contract they were informed of the company called Movelisto Mavela. It would have been easier for them to deny any knowledge of the name but they did not. They mentioned that there were meetings held to discuss performance and invoices . The second plaintiff kept record of the said meetings. This was not denied by the defendants during the plaintiffs' testimonies.

[18] The first and third defendant were not impressive witnesses. The third defendant has no understanding of how a company operates. Throughout his testimony he never stated in one occasion that he in clear and unambiguous terms informed the plaintiffs that they were sub contracting with the 4th defendant. He firstly mentioned that there was a written resolution authorizing him to contract with the plaintiffs on behalf

of the company but failed to sustain this version throughout his testimony. The first and third defendant deny that there were any meetings held to discuss delivery schedules. Their denial shows that they were not open and candid with the court.

[19] It was clear from the first defendant' s testimony that he abhors third plaintiff. He blames him for losing money that he received from government as a grant. He was evasive in his responses during cross examination. It is clear that he has an axe to grind with him. how else would they have reconciled their records with those of the plaintiffs. How then were invoices prepared if there were no meetings held throughout the subsistence of the contract.

[20] In the light of what I have stated, I find that the plaintiffs' version is, on the probabilities, true and that the version of the defendants falls to be rejected. The court accepts the plaintiffs' version that they were approached by the first defendant who invited them to help him deliver water as sub contractors. Nothing suggests that the plaintiffs' version is untrue.

[21] In the circumstances the following order is made:

ORDER

1. The first defendant is found to have entered into contracts with 1st to 4th plaintiff
2. 1st , 3rd and 4th defendant shall pay the costs ,the one paying to absolve others.

NM MBHELE, J

On behalf of the plaintiff: Adv J Lubbe SC

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant: Adv D R Thompson

Instructed by:

Moroka Attorneys

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