

SOUTH AFRICA / JUDGMENT

Maryn N.O. and Another v Anton N.O. and Others (19761/12) [2014] ZAGPPHC 5 (4 February 2014)

[2014] ZAGPPHC 5

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi V.V

CASE / FILE NUMBER

19761/12

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IN

THE NORTH GAUTENG HIGH, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NUMBER: 19761/12

DATE:

04 FEBRUARY 2014

In

the matter between:

VAN

STADEN, PETRUS JACOBUS MARYN

N.O.....FIRST

APPLICANT

KHAMISSA,

SUMAIYA ABDOOL GAFAAR

N.O.....SECOND

APPLICANT

And

STRYDOM,

ANTON

N.O.....FIRST

RESPONDENT

for

Gigworx (Pty) Ltd in Liquidation

STROH,

RINA ELAINE

N.O.....SECOND

RESPONDENT

For
Gigworx (Pty) Ltd in Liquidation
WERKSMANS
INC
ATTORNEYS.....THIRD
RESPONDENT

JUDGMENT

TLHAPI J

[1] In this application the applicants, being joint-liquidators of Freightsolve (Pty) Ltd seek a declaratory order in the following

terms against the joint-liquidators of Gigworx (Pty) Ltd:

Declaring that the sum of R2 364 978.29 plus interest thereon earned from 23 April 2010 to date of payment, currently held in a section 78(2) A trust account in terms of the Attorneys Act 1979 by the third respondent ("the funds") is payable to Freightsolve (Pty) Ltd (in Liquidation);

2. Directing the third respondent to pay the funds to the applicants, in their capacities as duly appointed liquidators of Freightsolve (Pty) Ltd, within 10 days from date of this order;

3. Ordering the costs of this application to be costs in the liquidation of Gigworx (Pty) Ltd Freightsolve (Pty) Ltd

('Freightsolve') under case number 2090/2010 and Gigworx (Pty) Ltd ('Gigworx') under case number 14456/2010 were finally liquidated on 4 March 2010 and 12 March 2010 respectively. The liquidators in both these companies claim ownership to the funds in dispute. The third respondent was cited only as an interested party because the funds in dispute were deposited into its trust account and no costs order is sought against it. The application was opposed by the first and second respondent.

[2] On 12 November 2012 the above matter was referred to oral evidence on the following issues:

1.....

1.1 What the exact nature of the contractual relationship between Freightsolve (Pty) Ltd and Gigworx (Pty) Ltds was prior to their

respective liquidations;

1.2 If the relationship between Gigworx and Freightsolve is found to be one of principal and agent; whether Mr Barend Petrus Barhuizen has waived any claim to the commission to which either he or Gigworx would have been entitled to in respect of the transaction with Grainco (Pty) Ltd trading as BKB;

1.3 If Mr Barkhuizen has waived the right to commission; whether he was lawfully entitled to do so.

1.4 Whether the Applicants in their capacities as such are entitled to the orders in terms of prayers 1;2;3 of the Notice of Motion;

1.5 If not whether the 1st and 2nd Respondents in their capacities as such are entitled to payment of the amount contained in prayer 1 of the Notice of Motion”.

BACKGROUND

[3] Mr Pieter Hendrik Vermeulen ('Vermeulen'), was prior to liquidation, the managing director of Freightsolve. He deposed to the founding affidavit on behalf of the Liquidators of Freightsolve. He averred that Freightsolve was a freight and transport broker which rendered brokerage services to several of its clients. He entered into an agency agreement with a Mr Barkhuizen ('Barkhuizen1),

who was the sole director and shareholder of Gigworx. The agreement was that Barkhuizen would invoice Freightslove clients directly

through Gigworx and that upon receiving payment from the said clients, Barhuizen would first deduct his commission agreed upon from time to time before forwarding payment to Frightsolve.

[4] Brokerage services had been rendered through Barkhuizen to a client, Grainco (Pty) Ltd trading as BKB ('BKB'). BKB was invoiced as agreed to by Gigworx. Vermeulen averred that on 20 November 2009, Barkhuizen provided him with a letter, annexure 'F' which was intended for BKB and, in which he confirmed that Freighsolve was in fact the principal and not Gigworx or Bakhuizen and, furthermore Barkhuizen gave Freightsolve the right to invoice BKB directly. The letter reads:

7 Barkhuizen authorize you, the customer of Gigworx to payFrieightsolve ,, any amount due to me in the normal course of business.

I further acknowledge that i enter into this agreement out of my own free will in terms of an agreement with Freightsolve....

I also state that I am fully authorised to enter into this agreement on behalf of Gigworx. '

Vermeulen averred that Barkhuizen supported this application and annexed a confirmatory affidavit signed by Barkhuizen. According to Vermeulen, Barkhuizen had waived his right to a commission because he had been invoicing and arranging tariffs with Freightsolve clients, which were too low and which ultimately led to Freightsolve's insolvency and liquidation. BKB refused to make payment directly to Freightsolve and instead made payment into the trust account of the third respondent.

[5] Mr Strydom ('Strydon') was joint-Liquidator and he deposed to the answering Affidavit. He raised the following points in limine:

1. that the above court did not have jurisdiction to hear the matter since the third respondent into whose account the funds were

deposited was domiciled in Cape Town, and that the place of business of BKB was situated in the Western Cape Province; that the applicants had failed to make out a case why this court had jurisdiction to hear the matter;

2. that the applicant had failed to join BKB as a party to the proceedings and that there was a mis-joinder in as far as the third

respondent was concerned;

3. that the applicants had failed to obtain approval from the body of creditors to launch these proceedings on behalf of Freightsolve and therefore the applicants did not have the authority to bring this application;
4. that the application was defective in that no allegation was made in the founding affidavit that Vermeulen was authorized by the applicants to depose to the founding affidavit, and should such authorization have been granted there was no affidavit from the applicants confirming their approval for the launch of the application; in as far as the first and second respondents were

concerned they did not consent to Vermeulen deposing to the affidavit on their behalf;

5. that it was not possible that the deponents to the three confirmatory affidavits, relied upon by Vermeulen, had sight of the content of the founding affidavit which was signed on 5 April 2012 long after the confirmatory affidavits had been signed. Barkhuizen signed his confirmatory affidavit on 7 February 2012, and the first and second applicant signed theirs on 24 February 2012 and 13 March 2012 respectively.
 6. that disputes of fact arose regarding the relationship of principal and agent as claimed between Freightsolve, Gigworx and BKB; no invoices or documents in support this relationship were annexed.
- [6] Strydom averred that Gigworx transported certain products for BKB and other companies, HM Trust and HM Logistics Trust included. Gigworx did not have or provide the said transportation but had entered into contracts with other entities to provide such transportation on its behalf.

Freightsolve, Blue Disa and 4 Africa Infra Equipment were among the transportation entities Gigworx contracted with and none of these had a relationship with BKB or with each other. At a certain stage Gigworx ended up owing substantial amounts to some of these entities, e.g. Blue Disa issued summons against it in the above court for an amount of R 857

451. 40 under case number 7181/10. This was followed by an urgent application launched jointly by Blue Disa and 4Africa Infra Equipment for the liquidation of Gigworx on 10 March 2010 after it was discovered that Barkhuizen was voluntarily sequestrated on 4 December 2009

and after he had allegedly issued a letter on the 14 January 2010 giving authorization to HM Trust to take over the contracts which Gigworx concluded with HM Trust and to receive payment which was due to Gigworx. The letter was annexed as annexure 'F'. This letter was similar to one written on 20 November 2009 authorizing Freightsolve to receive all payments from BKB due in respect of contracts concluded with Gigworx. Strydom averred that in a meeting with Barkhuizen, Barkhuizen informed him that he signed the letters under duress. Attempts by Strydom to have Barkhuizen depose to an affidavit were not successful because Barkhuizen refused to answer calls from the liquidators attorneys, in fact he disappeared.

- [7] Barkhuizen had also handed over a file containing invoices issued to the various entities Gigworx had contracted with and these were annexed. Those relating to BKB were annexed as annexure 'J1-J46' and amounted to R796 200.56 and load confirmation documents annexed as Ek1 - k193, a few of which related to the invoices supplied. According to Strydom there was no indication in the documents in his possession that Gigworx acted as agent for Freightsolve. A request was made to the third respondent for invoices from BKB and only a summary of transactions was availed without supporting invoices. A similar request was directed to the applicant to supply invoices which Freightsolve had sent to Gigworx and which related to the summary of transactions supplied by the third respondent on behalf of BKB. The invoices supplied by the applicants, annexures T1 - T279 did not support the information on the summary in particular with regard to the invoice numbers. A request for the relevant invoices was not heeded. Strydom contended that Freightsolve was a creditor of Gigworx like all the other entities with whom Gigworx had contracted and that they should lodge a claim. However if the court found that there was an agency agreement then the full proceeds still had to be paid to the respondents, that the commission be deducted and the balance be paid over to Freightsolve.

POINTS IN LIMINE

- [8] Even though the issues raised in the points in limine were not referred to oral evidence, there was an understanding by both counsel that only points relating to the misjoinder and the different dates on which the founding were signed would be argued. I shall not deal with these save to refer to them in as far as the issues raised were relevant to the determination of the relationship between Freightsolve and Barkhuizen (Gigworx).

THE CONTRACTUAL RELATIONSHIP BETWEEN FREIGHTSOLVE (PTY) LTD and GIGWORX (Pty) LTD

- [9] While there was a confirmatory affidavit from Barkhuizen, given the issues raised in limine around the different dates on which the founding and confirmatory affidavits were signed and, the explanation given by the attorney for the applicant, the issue around the above relationship should also be determined from the three affidavits to the application, the oral evidence and on what weight I place on the confirmatory affidavit of Barkhuizen. The Respondents did not call any witnesses. Furthermore, I shall not deal with all the queries raised by the respondents in the financial documents annexed to the papers.

[10] Vermeulen testified that the agency agreement was oral and that relationship with Barkhuizen turned sour after there was confirmation

from him that payment had been made to Freightsolve in the sum of R2million. The R2 million was not payment due in respect of BKB only, because Barkhuizen had to give a remittance to reflect in respect of which clients the monies were paid. Barkhuizen had confirmed on three occasions that the monies had been paid into Freightsolve's account, whereas this was not true. Barkhuizen never paid any monies over to Freightsolve. Vermeulen's later investigation into the transactions revealed a shortage of R 4 1/2 million.

[11] The agreement with Barkhuizen entailed him offering a rate from the customer to Freightsolve. The latter would take the offer to its subcontractor and if accepted the rate would be confirmed with Barkhuizen and confirmation of rates was done in writing.

Freightsolve would then invoice Gigworx and Gigworks would on- invoice the customer. He discovered that Barkhuizen would offer a higher rate to Freightsolve when in fact he gave a lower one to BKB. He gave an example of BKB's load confirmation of R550.00 on page 310 and the invoice on page 602. He then decided to disclose Freightsolve's existence as the principal to BKB. He denied that Freightsolve was a subcontractor of Gigworx.

[12] Vermeulen was asked to explain Gigworx tax invoices from the view point of an auditor. His response was that the document did not bear the registration number of Gigworx nor describe the document as an invoice or tax invoice. He did not have any knowledge of BKB's load confirmations annexures K1-K193 and had never seen these documents before the application was launched. Vermeulen further explained that annexure 'L', being the summary of transactions availed by BKB was compiled after Freightsolve had directly invoiced BKB. These summary showed that an amount of R 2 364 978.29 was owing and this was the amount in dispute.

The transport invoices in the summary were made up of Freightsolve invoices although he was not in a position to explain in respect of which transactions they were, He was certain that where BKB was involved they could only have related to Barkhuizen's

involvement and that the invoices were in respect of grain or manganese.

[13] It was put to Vermeulen that since other entities were involved with Gigworx the statements from Freightsolve to Gigworx did not describe in respect of which entities they were issued. The invoice numbers described therein did not correspond with those in annexure V which Vermeulen testified were Freightsolve's invoices.

His response was that as an accounting person he knew how to do a reconciliation afterwards and, to determine how to split the cash.

Although he had testified that no payments whatsoever had been received from Barkhuizen, he was not aware that Freightsolve's

statements did reflect some payments.

[14] It was argued for the applicants that the issues raised in cross examination with Vermeulen were not relevant to the determination of this relationship and, that what was important was Vermeulen and Barkhuizen's confirmation of the factual basis of the

relationship of agency. It was contended that the respondents were not involved in the business of Gigworx, that they had failed to call witnesses and that the denial of the existence of an agency agreement was based on hearsay, speculation and conjecture. In my view there is no merit in this argument because it disregards and over simplifies the purpose for which liquidators are appointed to administer an insolvent estate. It was argued for the respondent that absent confirmation from financial records it was not possible to properly characterize the relationship as one of agency

[15] Whether they be for Freightsolve or Gigworks liquidators have an obligation to execute their statutory duties in the interests of the creditors and the company. It is

the creditors of the respective companies and the companies which stand to be prejudiced if the money deposited in trust is incorrectly

allocated. After taking possession of all the assets including books of account and supporting documents they have an obligation to examine the activities of the company before liquidation. Claims against a company in liquidation have to be proved by way of

affidavit and supporting documents. In order to execute their duties properly liquidators require some knowledge and skill in accounting

and auditing.

[16] Annexed to the papers were financial records made available to the respondents, being those referred to herein. The respondent therefore had to satisfy themselves from what was available before them. The same exercise that they would be expected to engage in is in my view the same exercise this court is expected to engage in its determination. There is no explanation from the applicants about what their findings were in the examination of the books of Freightsolve regarding the agency agreement or on the investigation conducted by Vermeulen before liquidation, except that they relied on Vermeulen to explain such relationship and to explain the content of the financial records annexed to the papers. There has been a reluctance to release relevant invoices by both Freightsolve and BKB. The latter was not joined as a party. Vermeulen is therefore obliged to satisfy the court with concrete evidence gathered mainly from the books of account of the agency relationship. Barkhuizen's letter and confirmatory affidavit do not refer to an agency relationship and these documents alone are not helpful in explaining what exactly the relationship Freightsolve and Gigworx or Barkhuizen was.

[17] The question to be asked is whether from the financial records annexed to the papers the court can find what was testified to by Vermeulen as confirmation that an

an agency relationship existed:

1. the written confirmation of the acceptance of the rate offered by BKB and communicated by Barkhuizen to Freightsolve; (the emails referred to by Vermeulen were not made available, for example there is no confirmation regarding the accepted rate with regard to the figures on pages 310 and 602);
2. information from Freightsolve which was used to compile the invoices sent to BKB after the Barkhuizen letter; (the supporting and source documents were not made available);
3. is there a connection between invoices issued by Freightsolve to Gigworx, the on-invoice by Gigworx to BKB (invoices not presented)

and the transport invoices in summary annexure 'L' issued by BKB; (the invoices from which the summary was compiled were not made available);

4. the connection between the invoices annexures 'J' and load confirmations annexures 'K' and the rest of the records;

[18] Vermeulen could not explain in cross examination why the invoice numbers supplied by Freightsolve to BKB differed from those provided by BKB in annexure 'L'. He could not explain whether the detail in annexure 'L' related to business which BKB had with Gigworks as reflected in documents handed over by Barkhuizen to the respondents, except to say that the invoice numbers fell within the same series of numbers emanating from Freightsolve's records. No documentation to support this explanation was availed by him.

[19] His evidence on how Freightsolve was prejudiced by the lower rates offered to BKB and the higher rate as accepted by BKB as reflected on pages 310 and 602 is but one example not supported by any information from BKB, understandably so because BKB was only invoiced after the Barkhuizen's letter and there were no source documents annexed.

[20] He had difficulty explaining how commission to Barkhuizen was paid out or calculated. It could have ranged between 5% and 10%.

Barkhuizen would first deduct his commission and then pay what was due from BKB, on the other hand Barkhuizen had to make payment first and his interest would be calculated on a determination whether the transaction was profitable and lastly Barkhuizen did not qualify for commission because he had breached the agreement. Annexure L' refers to a determination fee and it is not clear for what reason it was charged and whether it related to commission or to any information obtained from Freightsolve.

[21] When Vermeulen was asked to clarify annexures 'J' he responded that they could not be described as proper Tax Invoices

because they lacked certain features as required by legislation (Section 20 (4) Act 89 of 1991 as amended) that is Gigworx registration number and the description of the documents as a tax invoice. My understanding of a tax invoice is that it is issued by a vendor to a customer and that

the lack of the required features would prejudice the customer when claiming a VAT refund, where the Receiver declined to accept it as a full Tax Invoice. There are also exceptions available where the invoice would be accepted. The document bears the tax details of the vendor and the customer and details though incomplete of where the businesses are situated, it also describes the transactions involved. In Barkhuizen's letter he refers to BKB as a customer and that payment due to him from BKB be paid to Freightsolve. For the purposes of this enquiry it could have been important to show that annexure 'J' was in fact an on-invoice originating from Gigworx which had connection to an invoice issued by Freightsolve to Gigworx thereby confirming Vermeulen's testimony.

[22] It was argued for the applicants that questions posed in cross-examination regarding records that reflected that some payments were made to Freightsolve during the period of their relationship were not relevant to the determination of the above issue, I disagree. Freightsolve generated an annual turnover of between R 80 - R 100 million rand. One would expect Vermeulen, a non-practising auditor to have kept proper books of account, including bank statements in which could have been reflected that no payments were made by Gigworx to Freightsolve and alternatively, if payment was made in respect of which entities and transactions it was made and how the amounts were to be allocated to the respective entities. This information was available to Vermeulen before the matter was referred to oral evidence.

Having conducted an extensive investigation before liquidation into his business with Gigworx another opportunity was given to examine the books. It is not acceptable that he refers it back to the applicants when they relied on him to give an explanation. He was the only person in charge of financial matters of Freightsolve who could give a better explanation to the court of what exactly the business with Gigworx entailed.

Furthermore, the content of the letter from the third respondent which recorded the reasons why the monies in dispute were deposited into their trust account, does not suggest that BKB was in agreement that there was an agency agreement and that the monies were due to Freightsolve. The only conclusion I can arrive at is that the financial statements and Barkhuizen's letter do not reflect any agency relationship. I am of the view that the application must fail because I am not satisfied that Vermeulen has shown that an agency agreement between Freightsolve and Gigworx (Barkhuizen) was in existence.

[23] In the result the following order is made:

1. The application is dismissed,
2. The third respondent is ordered to pay all monies paid to it by BKB and held in Trust to be paid over to the respondents being duly appointed liquidators of Gigworx (Pty) Ltd in liquidation within 10 days of this order;
3. Freightsolve (Pty) Ltd In Liquidation to bear the costs of this application

Tlhapi V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON 20 MAY 2013

JUDGMENT

RESERVED ON 22 MAY 2013

ATTORNEYS FOR THE APPLICANT BEUKES & SONJA NEL PROK

c/o MACINTOSH CROSS &

FARQUHARSON

ATTORNEYS FOR THE RESPONDENT : ARTHUR CHANNON PROK.

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