

SOUTH AFRICA / JUDGMENT

Pholile Business Solutions CC v Sidas Security Guards (Pty) Ltd (09103/12) [2017] ZAGPJHC 206 (5 July 2017)

[2017] ZAGPJHC 206

COURT

South Gauteng High Court, Johannesburg

BEFORE

M M Mabesele

CASE / FILE NUMBER

09103/12

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 09103/12

Not reportable

Not of interest to other

judges

Revised

5/7/2017

In

the matter between:

PHOLILE
BUSINESS SOLUTIONS CC
Plaintiff
and
SIDAS
SECURITY GUARDS (PTY)
LTD Defendant

JUDGMENT

MABESELE J:

- [1] The plaintiff has instituted an action against the defendant, arising from a written partnership agreement that was concluded by them on 9 August 2009, claiming the following:

That the defendant renders a full account to the plaintiff within 15 days from the date of the order, supported by vouchers, of the business of the defendant pertaining to the agreement, from 19 August 2009 until date of rendering of such an account; That the defendant is to debate the said account with the plaintiff within one(1) month from the date it was rendered in terms of the preceding prayer; That the defendant pays the plaintiff whatever amount appears to be due to the plaintiff upon debate of the account.

- [2] The plaintiff is Pholile Business Solutions CC, a close corporation, duly incorporated and registered in terms of the Close

Corporations Act¹.

- [3] The defendant is Sidas Security Guards (Pty) Ltd, a private company with limited liability, duly incorporated and registered in terms of the Company laws of the Republic of South Africa.

- [4] It is common cause that on 9 August 2009 and at Denver, the parties, both duly represented, entered into a written agreement, a copy of which is annexed to the particulars of claim.

- [5] It was a common understanding between the parties that although each party conducts its own business, independently, both parties may join hands and become partners for the purpose of contesting certain tenders. Such tenders would be contested under the name of the defendant. In those circumstances, the parties would be bound by the terms of the aforementioned written agreement.

- [6] In 2010, the defendant bid for a tender for physical security services in the Department of Home Affairs, in Mpumalanga. On 21 September 2010, the chief director in the said department addressed a letter to Dan N Sidambe, director of the defendant, informing him that the defendant's bid offer had been accepted. It is this tender that forms the subject of the dispute between the plaintiff and the defendant.

- [7] I was called upon to determine whether the plaintiff and the defendant had formed a partnership for the purpose of bidding for

that tender.

- [8] The plaintiff's case is that it had formed a partnership with the defendant. In substantiating its case, the plaintiff presented evidence of its director, Mr Jabu Dladla. He was a single witness.
- [9] He testified that he and his partner, Mr Victor Sidambe, who is a managing director of the defendant, identified a tender from the Department of Home Affairs, in Mpumalanga. After they had identified same they both were of the view that it was not going to be easy for them to secure it, due to the fact that some of the information in the tender document was technical.
- [10] Relying on his experience, he thoroughly read through the document and finally understood what was required. He identified in the document, items such as pricing, compliance and functionality and subsequently advised the employees of the defendant, responsible for the compilation of the document, to make sure that SARS was paid so that it could issue a tax clearance certificate to be annexed to the tender document when same was submitted to the Department of Home Affairs. He advised them, also, to pay the Company's annual registration fee to the relevant body in order to secure its existence.
- [11] After he had given an advice to the employees of the defendant certificate he was never involved in a further processing of the document until it was submitted to the Department of Home Affairs and a tender awarded to the defendant, after both the officials of the department and the representative of the defendant had signed an agreement.
- [12] He said subsequent to the signing of the agreement and the defendant taking over the security services project, the defendant paid him a total amount of R150 000,00 for the role he played, as a partner, in securing the tender. The money was paid in instalments. He disputed the version of the defendant that money was given to him to enhance his business which was still at its infant stage.
- [13] Mr Dan Sidambe is the director of the defendant. His duties include marketing and sourcing business for the defendant. He attends to every tender document, compiled by his staff members, to make sure that it complies with the requirements before it is submitted to the relevant institutions, for assessment.
- [14] He said the defendant has employed 2800,00 employees and has been offering security services in many towns and cities in South Africa. Their clients include hotels, government departments, shops and private houses.
- [15] He testified that in 2010, a tender was advertised by the Department of Home Affairs, Mpumalanga, in the Sowetan newspaper. The advert indicated, inter alia, the dates for the briefing sessions in the Department of Home Affairs. Subsequently, the Board of Directors of the defendant

appointed him to attend the briefing session and take care of the compilation of the tender document. One of the staff members

accompanied him to the briefing session. At the meeting or session, the key requirements for the said tender were explained to the bidders. The purpose was to enable the bidders to clearly understand the requirements for the project they were tendering for.

- [16] He said during the years 2004 to 2005, Mr Dladla was in the employ of the defendant as its consultant. He was deployed in Kwazulu-Natal to do work for the defendant. According to his knowledge, the money that the defendant paid into the account of Dladla was for the services that Dladla had rendered for the defendant in Kwazulu-Natal. He denied that Dladla took part in compiling the tender document for the security services in the Department of Home Affairs. He did not give satisfactory explanation as to why money was paid to Dladla six years after he had rendered service and just a year after a tender was awarded to the defendant.
- [17] Mr Victor Sidambe is the managing director of the defendant. He said Dladla marketed the defendant in Kwazulu-Natal. The profile of the defendant was prepared specifically for Dladla to attract work for the defendant, from the Department Transport, in Kwazulu-Natal but not to form part of the tender document that was submitted to the Department of Home Affairs. He said he later on mentored Dladla to establish his business. He denied that Dladla was involved in the compilation for the tender document that was submitted to the Department Home of Affairs. He testified that the Board of Directors of the defendant appointed Mr Dan Sidambe, alone, to take care of the compilation of the tender document.
- [18] He said the defendant paid money to Dladla as part of the defendant's enterprise development. The defendant wanted to develop Dladla's company. He did not know why Dan testified that Dladla was employed by the defendant. He said according to his knowledge, Dladla was not employed by the defendant as a consultant.
- [19] It is trite that the party bearing the onus at a civil trial must discharge that onus on the balance of probabilities. In this regard, in the matter of City of Johannesburg Metropolitan Council v Ngobeni² the following was said:

“The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP, in the National Employers' General V Jagers³, as follows:

‘It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rest. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rest on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied 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's, 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"

- [20] It is true, also, as argued by Counsel for the plaintiff, in his heads of argument, that in resolving the factual disputes, the findings should be made on the credibility and reliability of the witnesses and the probabilities.
- [21] Mr Dladla's evidence is that after he and Victor Sidambe had expressed views with regard to the technicality of the tender, he identified in the tender document, items such as pricing, compliance and functionality and subsequently advised the employees of the defendant, responsible for the compilation of the document, to make sure that SARS was paid so to that it may issue tax clearance certificate to be annexed to the tender document when same was submitted to the Department of Home Affairs. He advised them, also, to pay the company's annual registration fee, to secure its existence.
- [22] This evidence of communication between him and the employees of the defendant was not challenged by presenting contrary evidence from the employees responsible for the compilation of the document before it was submitted to Dan Sidambe for finalisation. The evidence of Mr Dan Sidambe is that the document was brought to him by the employees for scrutiny and finalisation. Therefore, he would not deny that items such as pricing, were addressed by Dladla before the document was given to him for finalisation.
- [23] Mr Dladla's evidence that he participated in compiling the document is supported by an amount of money paid into his bank account by the defendant.
- [24] The evidence of Mr Dan Sidambe that the money was paid for services rendered by Dladla as the consultant of the defendant between 2004 and 2005 is contradicted by Mr Victor Sidambe who testified that the money was paid into the account of Dladla to boost the financial capacity of the plaintiff.
- [25] Victor Sidambe disputed, also, evidence of Dan Sidambe that Dladla was employed by the defendant as a consultant.
- [26] These material contradictions in the evidence of the directors of the defendant with regard to the purpose for which money was paid into the account of Dladla leave me with no other option than accepting the version of Dladla that money was paid into his bank account by the defendant for the role he played, as a partner, in securing the tender.

[27] In closing arguments, Counsel for the defendant argued that Mr Dladla, when invited in the pleadings to state the obligations which he alleged he fulfilled, in terms of the agreement, failed to do so. Therefore his version, in evidence-in-chief, that he attended to the items such as pricing and compliance in the tender document, should be rejected.

[28] In contrast, Counsel for the plaintiff argued that the Court must decide the true issues between that parties. In this regard, he relied on *Sentrachem Bpk v Wenhold*⁴ wherein the following was said:

‘Where the Appeal Court had all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the course of the trial in the Court a quo’

[29] In *Van der Westhuizen V Arnold*⁵ the following was said:

‘I accept that it is trite law that ‘in proceedings in the magistrates’ courts, the duty of the Court is not to pay too meticulous regard to the ipsissima verba of the pleadings but to get to the bottom of the real issues, to try and determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on those real issues. The Court is not confined within the technical limits of the pleadings’

[30] For these reasons the argument raised by counsel for the defendant falls to be rejected.

[31] Mr Dladla was credible and reliable. His evidence that he played a role in securing a tender for the defendant is supported by a substantial amount of money paid into his bank account by the defendant. He was consistent in his evidence that money was paid to him in instalments at the request of the defendant, as opposed to the contrary versions of the directors of the defendant with regard to the reason for payment of the money into his account, in instalments. His evidence that he gave advice to employees of the defendant about the payments to be made by the defendant to the relevant bodies the tender document was submitted to the Department of Home affairs was not contradicted.

[32] Therefore his evidence that the plaintiff and the defendant had formed a partnership for the purpose of securing a tender for

security services in the Department of Home Affairs is probable and accepted.

[33] Therefore the plaintiff has discharged the onus of proving its case on a balance of probabilities and is entitled to the relief claimed in the particulars of claim.

[34] I am grateful of the plaintiff’s counsel for his well-prepared heads of argument which assisted me greatly when writing this

judgement.

[35] In the result, the following order is made:

35.1 The defendant should render a full account to the plaintiff within Fifteen days from the date of this order, supported by vouchers, of the business of the defendant pertaining to the agreement, from 19 August 2009 until date of rendering such an account;

35.2 The defendant should debate the said account with the plaintiff within one month from the date it was rendered in terms of the preceding prayer;

35.3 The defendant should pay the plaintiff whatever amount appears to be due to the plaintiff upon debate of the account.

35.4 The defendant should pay costs.

M. M. MABESELE

(Judge of the Gauteng Local Division)

Hearing date : 31 May 2017

Judgment

delivered : 7 July 2017

Appearances

Plaintiff's Counsel : Adv. H.P van Nieuwenhuizen

Instructed by : Ndhlovu A.J Inc.

Defendant's Counsel : Adv. A.P Bruwer

Instructed by : Kitching Attorneys

1 69 of 1984

2 314/11[2002] ZA SCA SS

3 1984(4) SA 437(E) at 440 D See, also, Dreyer V AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) at 558 E-G

4 1995(5) SA 312(A) 314J-315

5 2006(6) SA 453(SCA) 17

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