

SOUTH AFRICA / JUDGMENT

Sebokuboku Constructions and Water Supply CC v PJMJ Engineering and Plant Hire CC (36/2015) [2019] ZALMPPHC 34 (18 July 2019) [2019] ZALMPPHC 34

COURT

Limpopo High Court, Polokwane

BEFORE

Makgoba JP

CASE / FILE NUMBER

36/2015

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE NO: 36/2015

18/7/2019

In

the matter between:

SEBOKUBOKU

CONSTRUCTIONS AND WATER SUPPLY CC

PLAINTIFF

and

PJMJ

ENGINEERING & PLANT HIRE CC

DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff instituted an action against the Defendant for payment of a total amount of R 938 271.00 being in respect of the reimbursement of expenses for fuel, ground engagement tools, the hiring of graders, transportation of graders, accommodation of grader operators and project management fees. Furthermore the Plaintiff claims a statement and debatement of a full account of the business of a partnership between the Plaintiff and the Defendant.
- [2] The Defendant in its plea denied that a partnership agreement was concluded between the Plaintiff and the Defendant. It was specifically pleaded that Mr Marcus Malebatja, the managing member of Plaintiff, was employed by the Defendant as a project manager for which he was paid an amount of R 100 000.00 for 38 days. It was further pleaded that the Defendant deposited money into Mr Malebatja's nominated bank account to enable him to manage and make the necessary payments of expenses on behalf of the Defendant, when executing his duties. Accordingly the Defendant denied that any amount is owed to the Plaintiff in respect of the reimbursement of the expenses.

Common Cause Facts

- [3] It is common cause that

3.1. The Plaintiff prepared a quotation for submission to the Road Agency Limpopo ("RAL") using the Defendant's letterhead. The quotation was accepted by RAL.

3.2. The Defendant was at that time under financial constraints. The Plaintiff started managing the project and used its money, for which it was to be reimbursed.

3.3. The Defendant was provided with two banking accounts of Sebokuboku Construction & Water Supply CC and the bank account of Marcus

Ruby Investment CC for the Defendant to make payments into these two accounts.

3.4. The Defendant made its bank card available for use by Plaintiff for the purpose of fuel purchases and other necessities needed for the management of the project. The Plaintiff also used its own bank card for the same purpose for which it was to be reimbursed.

3.5. The project which commenced on 14 April 2014 and which was supposed to last for 38 days was eventually extended with another 28 days and was concluded on 29 August 2014 .

3.6. The following number of graders were provided by the Plaintiff, the Defendant and one Mr Kwinana.

14 April 2014 to 16 May 2014

The Plaintiff 5 graders

The Defendant 2 graders

Mr Kwinana 2 graders

19 May 2014 to 19 June 2014

4 August 2014 to 29 August 2019

4 from Barlow paid by the funds received from RAL

The Plaintiff 1 grader

The Defendant 1 grader

3.7. The first payment was made by RAL on 6 June 2014 in an amount of R 807 623.00. The second payment of R 1 308 193.00 was made on 18 July

2014. The third payment of R 672 722.00 was made on 4 September 2014. The fourth payment of R 589 764.00 was made on 11 September 2014. The final two payments of R 166 270.00 and R 259 958.00 were made in March 2015. The total amount received from RAL in respect of the project is therefore R 3 804 530.00.

Factual Matrix

- [4] Mr Seja Marcus Malebatja and his son Mphaki Lefa Malebatja gave evidence on behalf of the Plaintiff. Various documents were also handed in by Mr Marcus Malebatja during the trial as evidence. Mr Johannes Modiba and one Mr Sylvester Khwinana gave evidence on behalf of the Defendant.
- [5] Mr Marcus Malebatja testified that he was the managing member of the Plaintiff. He further testified that the Plaintiff had since 2005 been involved in inter alia the upgrading of roads in the Limpopo Province. He knows Mr Modiba, the sole member of the -Defend ant, very well as he is the nephew of a close friend of his.
- [6] During March 2014 Mr Malebatja became aware of a memorandum by Road Agency Limpopo (RAL) in terms of which it requested quotations for the supply of graders. He obtained a copy of the memorandum from the procurement manager of RAL. It entailed the supply of graders for the blading of various provincial gravel roads as well as the transportation of the graders, the supply of diesel and ground engagement tools (GET), maintenance of the graders, the provision of grader operators and accommodation for grader operators. Because of his experience in the field he knew where to hire graders. The Plaintiff was however unable to submit the necessary quotation as its letter of good standing had 'expired'. He then approached Mr Modiba in this regard and enquired from him whether the Defendant complied with all the necessary requirements including a letter of good standing which Mr Modiba confirmed. Mr Malebatja then asked Mr Modiba whether they could "make a partnership" in terms whereof they would submit the quotation in the name of the Defendant. He would do everything from the quotation to running the project as he had the required knowledge and experience to which Mr Modiba agreed.

- [7] On 27 March 2014 Mr Malebatja submitted the quotation to RAL on the Defendant's letterhead as agreed. On 7 April 2014 Mr Malebatja was informed by Mr Modiba that he had received an appointment letter from RAL in respect of the Capricorn District. Thereafter they met at Mr Modiba's Office. He then proposed to Mr Modiba that he would act as the project manager and that a fair compensation as such would be R 100 000.00 for the 38 days of the project to which Mr Modiba agreed.
- [8] Mr Malebatja further proposed that they should invite a certain Mr Khwinana (who was known to him and a friend to Mr Modiba) to source graders and that he would also bring his son, that is Malebatja's son. Before the project started on the 14th of April 2014 the four of them met at Mr Modiba's Office. During the said meeting Mr Khwinana was invited to also source graders for the project and that for each grader sourced payment would be made at the rate of R 450.00 per hour. All disbursement incurred would be reimbursed from the first payment received from RAL.
- [9] Mr Malebatja further testified that the first invoice submitted by the Plaintiff in respect of expenses incurred by it was for an amount of R 228 726.00 which was in fact paid from the first funds received from RAL. However when the second payment was made by RAL he suggested to Mr Modiba that rather than to pay the Plaintiff's invoice in respect of the reimbursement of expenses incurred by the Plaintiff, they should pay a deposit of R 450 000.00 to Barlow for the hiring of new graders reason being that they had experienced numerous breakdowns of graders, which could jeopardise the successful completion of the project. The suggestion was accepted.
- [10] Mr Malebatja testified that he had utilised funds which the Plaintiff had received for another 'job' as well as some of his wife's pension benefit to fund this project. The Plaintiff had incurred expenses in respect of GET and fuel as set out in claims 3, 4 and 8 of the Particulars of Claim in the total amount of R 562 222.00. He testified that claim 7 was in respect of the hiring of a cat grader by the Plaintiff which was used at Skeiding. Claim 5 was in respect of the project manager as well as assistant fees. Claims 1, 2 and 6 were in respect of short payments made by the Defendant of invoices submitted by the Plaintiff for the reimbursement of expenses.
- [11] Mr Malebatja testified that save as aforesaid the profit and loss still had to be calculated. In cross-examination he testified that the Plaintiff and the Defendant were in partnership and as such liable for any loss which resulted from the project.
- [12] Mr Malebatja referred to the bank statement of the Plaintiff for the period May 2014 which showed that the Plaintiff had made payment during May in excess of R 200 000.00 for the hiring of graders from BJP and Mantel as well as for diesel. He further testified that the Plaintiff funded the project because it was a partner. He reiterated that they had received their first payment in the amount of R 807 623.00 from RAL on 6 June 2014 from which an amount of R 228 726.00 was paid to the Plaintiff as reimbursement of expenses incurred by the Plaintiff as per invoice submitted in this regard.

[13] The amounts claimed by the Plaintiff in respect of the disbursements and expenses incurred can be summarised as follows and as per the particulars of claim:

Claim 1: R 27 157.50 (being short payment)

Claim 2: R 733.00 (being short payment)

Claim 3: R 78 473.06 (for GET)

Claim 4: R 397 862.31 (for diesel)

Claim 5: R 193 684.21 (for management fees)

Claim 6: R 19 497.00 (being short payment)

Claim 7: R 134 976.00 (for grader hiring)

Claim 8: R 85 887.89 (for diesel)

Total: R 938 271.08

In his evidence Mr Malebatja was able to testify on all the amounts claimed by producing supporting documentation in the form of invoices, receipts and bank statements. The relevant invoices have been attached as annexures to the particulars of claim in this matter. He testified that the Plaintiff had never claimed more than what was due to it as all the invoices were supported by documentary proof thereof.

[14] Mr Malebatja made a good impression as a witness. His evidence was straightforward both during evidence in chief and cross-examination. He answered questions satisfactorily and without any contradictions. The evidence of Lefa Malabatja corroborates that of Mr Malebatja with regard to the existence of a partnership between the Plaintiff and the Defendant. Lefa Malebatja testified that he was employed by the partnership at a remuneration of R 20 000.00 for 38 days. He was present at a meeting with Messrs Malebatja, Modiba and Khwinana when the four of them discussed the sourcing of graders. The said meeting was held at Mr Modiba's office.

[15] Mr Johannes Modiba testified that he was approached by Mr Malebatja who asked him whether he was able to go to RAL to make a quotation. Mr Malebatja said to him that he knew about the 'job' and that it was an opportunity for him (referring to Mr Modiba) to quote. He declined it whereafter Mr Malebatja went to his mother during the night for her to ask him to avail his company with regard to the opportunity. After a meeting at his mother's place he gave the Defendant's letterhead to Mr Malebatja to work for him in

the event of the quotation being accepted by RAL.

[16] After the quotation had been accepted by RAL he appointed Mr Malebatja as the project manager for an agreed remuneration of R 100 000.00 for a period of 38 days. Mr Malebatja thereupon asked him whether he could also involve his son in the running of the project. They then agreed to it and that R 20 000.00 would be a fair remuneration for his services. Mr

Malebatja also suggested to him that they should invite people that they trusted to source graders for which graders they would be paid R 450.00 per hour. They would also be reimbursed for the expenses incurred by them in the process to which he had agreed to.

- [17] He testified that his cash flow at the time was tied and for them not to lose the opportunity Mr Malebatja offered to use his funds in the meantime which he could pay back to him out of the money received for the project to which he agreed. When asked whether he had paid Mr Malebatja the R 100 000.00 as agreed he initially said yes, according to his records. When asked in which account he had paid the R 100 000.00 he said he had to first check his bank statement. When this question was once again put to him in cross-examination he said that Mr Malebatja's salary formed part of the first payment of R 228 726.00 made to the Plaintiff.
- [18] In cross-examination Mr Modiba said that due to his cash flow problems at the time it was agreed that Mr Malebatja would bring in whatever he could to help in running the project so that they did not lose the project, for which he would be reimbursed.
- [19] When it was put to Mr Modiba that this version was contradictory to what was pleaded by him in paragraphs 4.2.4 and 10.3 of his plea to wit that he paid all operational costs of the project and that the Plaintiff was misleading the Court by generating invoices for disbursements as if the Plaintiff had paid for amounts appearing on those invoices from its own funds, he could not give any explanation thereof. It was further put to him that the aforesaid conduct of the parties were not that of an employer employee relationship but of partners to which he could not give a satisfactory answer or explanation.
- [20] When asked by the Court how it came about that an employee had to source and pay for graders for an employer, he said that they had a short period of time to source the graders. This answer is still not being understood by this Court.
- [21] There is a vast discrepancy between the Defendant's plea and Mr Modiba's testimony before Court. In the Defendant's plea the following was stated as a defence to show that the Defendant does not owe any amount to the Plaintiff in respect of disbursements or expenses:

"1) 4.2.4. In terms of the said appointment the Defendant would pay for all operational costs of the project into the nominated account of Mr Malebatja who would then be able to make any necessary payment for the project on behalf of the Defendant.

2)10.2..... Defendant pleads that funds were put into the Plaintiff's account by Defendant

to enable Mr Malebatja to manage and make the necessary payments on behalf of the Defendant when executing his duties.

3)10.4. The Defendant further pleads that all payments to the supplier, Barlow and other suppliers were made by the Defendant, some by paying the disbursements amounts into the nominated account of Mr Malebatja including that of the Plaintiff, and others were paid directly to suppliers."

- [22] In his testimony in Court Mr Modiba stated that Mr Malabatja would time and again present invoices to him which he settled. Mr Modiba was unable to explain the material contradiction between the plea and his testimony. In general he was not a good witness. His evidence was shaken on several occasions under cross-examination. On the other hand the evidence of Mr Marcus Malebatja was, as against that of Mr Modiba, detailed, consistent and probable. The evidence of Mr Khwinana, who testified for the Defendant, does not take this case any further.
- [23] The evidence of Mr Modiba and the submission by the Defendant's Counsel that the Defendant has overpaid the Plaintiff to the tune of R 443 493.23 in respect of the disbursements or expenses incurred is improbable. One would have expected the Defendant to have lodged a counter claim for repayment of such a significant and large sum of money.

Issues

for Determination

- [24] The following issues are for

determination:

- 24.1. Whether there was a partnership agreement entered into by and between the Plaintiff and the Defendant.
- 24.2. Whether there is any outstanding amount due to the Plaintiff by the Defendant relating to the services rendered by the Plaintiff, including disbursements incurred by the Plaintiff in connection with the management of the project.

The Law with regard to Partnership

- [25] There are no formalities prescribed for the conclusion of a partnership agreement. The agreement may thus be concluded in writing, orally or even tacitly, that is implied by conduct. The presence of the essentialia of a partnership in an agreement is prima facie proof of an intention to create a partnership.
- [26] In casu the evidence establishes the following as the essentialia of a partnership:
- 26.1. The Plaintiff and the Defendant would jointly submit a tender/quotation, in the name of the Defendant, to provide graders for the blading of provincial gravel roads for the Road Agency Limpopo.
- 26.2. The Plaintiff would, in the name of the Defendant, prepare certain quotations to be submitted by the parties in the partnership to RAL.
- 26.3. Any expenses incurred by a party in execution of the project, would be reimbursed to such party out of the first available funds received from RAL and such reimbursement would take place into a bank account as nominated by a party, from time to time.

26.4. The graders sourced by any of the parties would be reimbursed as expenses and at the rate of R 450.00 per hour excluding VAT, on a 9 hours a day rate.

26.5. The net profit earned by the partnership would be shared equally between the Plaintiff and Defendant.

[27] In the case of *Pezzutto v Dreyer and Others* 1992 (2) SA 379 (A) at page 3891- 390E it was held that:

'For a partnership to come about there must be an agreement to that effect between the contracting parties. In determining whether or not an agreement creates a partnership a Court will have regard, inter alia, to substance of the agreement, the circumstances in which it was made and the subsequent conduct of the parties....What is necessary to create a partnership agreement is that the essentialia of a partnership should be present. Our Courts have accepted Pothier's formulation of such essentialia as a correct statement of the law. The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit .. Where Pothier's four requirements are found to be present the Court will find a partnership established 'unless such a conclusion is negative by contrary intention discloses on a correct construction of the agreement between the parties' ... a joint venture in respect of a single undertaking can amount to a partnership provide the essentialia of a partnership are present...'

[28] In brief, the essentialia necessary for the creation of a partnership are

- (1) that each of the partners bring something into the partnership, whether it be money, labour or skill;
- (2) that the business should be carried on for the joint benefit of the parties;
- (3) that the object should be to make a profit; and
- (4) that the contract be a legitimate one.

See also: *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H-784A and *Purdon v Muller* 1961 (2) SA 211 (A) at 218B-D.

[29] In the present matter the Plaintiff's case is based on an oral partnership agreement concluded during March/April 2014 between the Plaintiff, represented by its managing member, Mr Malebatja and the Defendant represented by its managing member, Mr Modiba in respect of a single project, to wit the hiring of graders to RAL for blading of the provincial gravel roads in the Capricorn District during the period 14 April 2014 until 29 August 2014.

Circumstances pointing out to the existence of a partnership between the parties

[30] The undisputed evidence of Mr Malebatja is that he had the knowledge, experience as well as the funds to do the project. However the Plaintiff could not submit a quotation to RAL as its letter of good standing had expired. The Plaintiff therefore had to form a partnership with another company which complied with all the requirements including a letter of good standing. Consequently and

because he knew Mr Modiba very well he approached him to form a partnership in respect of the project to which the latter had agreed.

[31] It is the Defendant's case that Mr Malebatja was a mere employee of the Defendant. It is against the nature of an employment contract for an employee to fund his employer's project to the tune of hundreds of thousands of Rand. Such conduct to the effect that each of the partners bring something into the partnership is clearly indicative of a partnership agreement. In the present case Mr Malebatja brought in money, graders, skill and labour into the business project of the partnership.

[32] Mr Modiba's testimony to the effect that the Defendant was at the time cash strapped is an indication that Mr Malebatja was to contribute to the capital to start the project. This is a clear indication that a partnership between the Plaintiff and the Defendant was intended. Mr Malebatja testified that his understanding of a partnership was that they could share equally in the profit and loss from the project.

[33] Mr Malebatja testified that when the second payment of R 1 308 193.00 was made by RAL to the Defendant on 18 July 2014 he informed Mr Modiba to rather pay an amount of R 450 000.00 to Barlow for hiring of new graders as they had experienced numerous breakdowns of the graders hired from other service providers, instead of reimbursing the Plaintiff for expenses incurred at that stage. This means that Mr Malebatja was prepared to forego any payment due to him for the sake of a successful completion of the project. In my view Mr Malebatja's aforesaid conduct is a further indication of his intention to make profit for the joint benefit of the Plaintiff and the Defendant.

[34] From the totality of the evidence adduced at the trial the Plaintiff presented a plausible version of events. The Defendant's version that Mr Malebatja was a mere employee of the Defendant is highly improbable. The conduct of the Plaintiff at all material times

manifestly surpassed that of an employee. Such conduct is in my view indicative of a partner. .

Conclusion

[35] Having regard to the totality of the evidence and the probabilities in this matter I reach a conclusion that it is more probable than not that a partnership agreement was entered into by and between the Plaintiff and the Defendant. Furthermore the Plaintiff has proved on a balance of probabilities that a total amount of R 938 271.08 is still outstanding in respect of the disbursements incurred in the running of the business of the partnership.

[36] Accordingly, judgment is granted in favour of the Plaintiff against the Defendant for:

- (a) Payment of the sum of R 938 271.00;
- (b) Interest on the aforesaid amount at 9% per annum a tempore morae;
- (c) That the Defendant renders a full account of the business of the partnership.
- (d) Debatement of the aforesaid account;
- (e) Payment to Plaintiff of whatever amount that appear to be due to the Plaintiff upon debatement of the account.
- (f) Costs of the action.

EM MAKGOBA

JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on

: 10, 11, 12 & 18 June 2019

Judgment

delivered on : 18 July 2019

For the Plaintiff

: Ms M C De Klerk

: DDKK Attorneys Inc

For the Defendant : Adv S M Malatji

Instructed by

: Langa Attorneys

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