

SOUTH AFRICA / JUDGMENT

Vyna Tarpaulins CC v Ziyaphenduka Promotions CC (30362/2014) [2016] ZAGPPHC 1212 (7 October 2016) [2016] ZAGPPHC 1212

COURT

North Gauteng High Court, Pretoria

BEFORE

M W Msimeki

CASE / FILE NUMBER

30362/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

NORTH

GAUTENG DIVISION, PRETORIA

CASE

NO: 30362/2014

DATE:

7/10/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

VYNA

TARPAULINS

CC Plaintiff

And

ZIYAPHENDUKA

PROMOTIONS

CC Defendant

JUDGMENT

MSIMEKI J,

INTRODUCTION

1. The plaintiff, in this action, sued the defendant for payment of R356 030 00 which represents the balance of R1 627 690 00 which is the full amount that the defendant had to pay to the plaintiff in terms of an agreement which the parties concluded on 18 January 2012.

BRIEF BACKGROUND FACTS

2. The genesis of the agreement referred to in my introduction is embodied in a quotation appearing on page 2 of Trial Bundle 1. The quotation is annexure A1 to the particulars of claim. The defendant, on the same date, namely, 18 January 2012, duly represented, accepted the quotation and the terms thereof. The plaintiff, in terms of the agreement, had to manufacture and supply 600 tarpaulins to the defendant at a cost of R1 627 690 00. Although paragraph 5.2 of the plaintiffs particulars of claim states that "payment of the purchase price will be made upon the delivery of the tarpaulins, the quotation states that the defendant was expected to pay the full purchase price prior to the commencement of the manufacturing of the 600 tarpaulins. The amount that the defendant paid, leaving the balance which it still had to pay, was not paid as stipulated in the quotation. The defendant, in the summary judgment application that the plaintiff brought against it admitted that it owed R56 030 00 and denied owing the R300 000 00. Judgment, in favour of the plaintiff, was granted for the admitted amount and leave to defend was granted in respect of the R300 000 00 which the defendant disputed. The defendant's case is that it paid the plaintiff in full while the plaintiff denies this. This culminated in this being the issue that the Court has to determine.
3. Advocate R. Raubenheimer and Advocate M. E. Manala represented the plaintiff and the defendant respectively when the matter was heard.
4. As already alluded to above, the issue is whether the defendant has paid the plaintiff in full.
5. It is noteworthy that the late Mr Kobus de Beer and his wife, S. M. M de Beer ("Ms de Beer") were equal members in the plaintiff each holding 50% of its membership. The deceased, during his lifetime, was responsible for the conducting of the day to day business of the plaintiff. He concluded the contracts with outsiders. Ms de Beer was responsible for the financial management which included invoicing and accounting.
6. To prove full payment of the contract price, the defendant discovered a document appearing on page 6 of the Trial Bundle. The document is headed: "Confirmation of payment". It bears the letterhead of the plaintiff and is dated 15 October 2012. In issue is the authenticity of this document.

7. The court, after the parties' cases have been closed, is charged with the duty to determine whether or not the defendant has discharged its onus of adducing adequate evidence to persuade the Court to find in its favour.
8. It is noteworthy that the defendant concluded an agreement with the Mpumalanga Department of Human Settlement. In terms of the agreement the defendant was to assist the communities which had been hard hit by floods necessitating relief from the department. The defendant then entered into the agreement in issue with the plaintiff.
9. The defendant, in its plea, set up a plea of payment of the R300 000 00 in issue. This, by law, meant that the onus rested on it to satisfy the Court "that there is sufficiently strong balance of probabilities" in its favour. The question, at the end of the day, is whether the defendant has discharged the onus. (See: Pillay v Krishna and Another 1946 AD 946).
10. The parties agreed that the defendant, as a result of its plea, had the duty to begin.
11. The defendant, to prove that it in fact paid the R300 000 00 in cash to the plaintiff, called Mr Bruce Kgapane, the Chief-Executive

Officer of the defendant, as its only witness. No expert witness was called by the defendant.

12. The plaintiff, to prove its claim, relied on the evidence of two witnesses, namely Ms de Beer and Mr Jannie Viljoen Bester ("Mr

Bester"), the forensic document examiner and handwriting expert. The expert's evidence was tendered and adduced by way of his report which was delivered in terms of rule 36(9)(b) of the Uniform Rules of Court. The report runs from page 7 to page 12 of trial Bundle 1 and page 67 to page 72 of the Notices Bundle (Index: Notices).

13. A number of the aspects are common cause and these are that:

1. The agreement between the parties for the manufacturing and supplying of the 600 tarpaulins at a cost of R1 627 690 00 was concluded;
2. The quotation forms the basis of the agreement;
3. The full purchase price was to be paid by the defendant to the plaintiff prior to the commencement of the manufacturing of the 600 tarpaulins;
4. Payment was not effected in accordance with the provisions of the quotation;
5. The plaintiff duly performed its obligation in terms of the agreement and delivered the tarpaulins to the defendant;
6. The Court, in the summary judgment application, granted judgment in favour of the plaintiff in respect of the R56 030 00 which the defendant has paid;
7. The deceased and Ms de Beer were members, in equal shares, of the plaintiff and Ms de beer, after the deceased passed on has remained the sole member;

8. The plaintiff's expert report has been admitted by the defendant which has no expert witness;
9. The expertise of the plaintiff's expert witness has not been challenged.
10. The result of the examination of the confirmation of payment of R300 000 00 document by the plaintiff's expert witness is that the document has been falsified. This, indeed, is not in dispute.
14. Mr Kgapane's evidence, in brief, is as follows:

He was the CEO of the defendant when the agreement between the parties was concluded. He confirmed that the plaintiff duly and fully performed. The defendant, according to him did not pay as the quotation required as the defendant ended up paying in instalments. He testified that he, representing the defendant, advised the deceased who represented the plaintiff, that "the defendant sourced the tarpaulins for the Mpumalanga Provincial Department of human Settlement, for the purpose of disaster relief for communities effected by massive flooding" and that "the Department would pay the defendant for its services after 30 or 60 or, even 90 days". The payment method, according to the defendant, was as a result, changed to payment in instalments and the money that the defendant paid amounted to R1 250 000 00. Mr Kgapane testified that the defendant began liquidating its indebtedness to the plaintiff even before the defendant was paid by the Department. This, according to him, resulted from the request of the deceased who had informed him that the plaintiff was having financial problems. Mr Kgapane testified that the defendant, at the time, experienced financial problems. His further testimony was that the deceased, because of the problem, he (the deceased) had with the South African Revenue Services (SARS), and his wife, requested Mr Kgapane to pay the plaintiff in cash. Mr Kgapane testified that he paid the deceased R300 000 00 during October 2012 at Savannah mall where the two had arranged to meet. He, (Mr Kgapane), was given confirmation of payment document which he signed. The deceased gave him a copy of the document while he kept the original. This is the document the authenticity of which is disputed by the plaintiff.

15. The plaintiff's first witness, Ms de Beer testified that she and the deceased purchased the business of the plaintiff. The deceased ran the business and contracted on its behalf while Ms de Beer took care of the financial management which included invoicing and accounting. They both knew the position of the business on a daily basis. They recorded and accounted for all cash payments which were made in a receipt book. She testified that they never used a document similar to the confirmation of cash payment appearing on page 6 of the Trial Bundle. She did not see this document before same was attached to Mr Kgapane's affidavit resisting summary judgment application. Every payment that they received whether received by her or those who would receive it in her absence was duly recorded in the books of the plaintiff. She denied that the deceased met or could have met Mr Kgapane at the Savannah mall. She attributed this to the fact that the deceased was extremely overweight-weighing approximately 300kg's which caused him to move with difficulty. The deceased, according to her, avoided physical activity as far as possible. She emphatically denied that

she had marital problems with the deceased and that the deceased had problems with SARS. In substantiation, she testified that she was involved in the business prior to the deceased's death and thereafter when she became the sole owner and member of the plaintiff. The agreement between the plaintiff and the defendant, according to her, represented one of the largest orders that the plaintiff had ever received. She and the deceased, because of the order, celebrated and thereafter discussed about the balance which the defendant still had to pay amounting to approximately R370 000

00. The discussion took place long after the alleged payment by the

defendant, but shortly before the deceased's death in December 2013. She testified about the text messages from Mr Kgapane to the deceased confirming the defendants indebtedness to the plaintiff and requesting favourable terms of payment as late as December 2013.

16. Mr Bester, the Forensic Document Examiner, was the plaintiff's second witness. He is also a handwriting expert. His evidence as already alluded to earlier, is not challenged. His qualifications are vast and very impressive. They too, are not challenged. He has professional recognition as a Forensic Document Examiner (Forensic Science, Society, UK) and is a Court qualified Handwriting

expert/document examiner in South Africa. He has been trained in various aspects of document examination which are, inter alia, individualisation of handwriting, signatures, printed matter which included documentation produced by computer printers, fax machines and photocopiers, stamped impressions, the identification of forgeries, erasures and additions, and the deciphering of obscured writing. (my emphasis).

17. Mr Bester was involved in many disputed document cases which were completed. He has given expert evidence in more than 70 Court cases in the magistrates Courts, Regional Courts, High Courts and Supreme Courts in South Africa, Namibia, Tanzania, and Swaziland. He gave expert evidence in more than 60 disciplinary and arbitration hearings and rendered document examination services in many countries. What he has done is fully disclosed under statement of qualifications and experience on pages 69 and 70 of the Index Bundle (Index: Notices).

18. Mr Bester, in the report, has disclosed the Forensic Document Examination standards as well as the Examination Methodology that he has applied.

19. His observation and results of the examination as well as his opinion are key in this matter. He found that "the first and probably most important characteristic of the questioned document (1 (one) copy of a VYNA TARP letterhead with the content topic, CONFIRMATION OF PAYMENT document dated 15 October 2012), is that, it is a photocopy document and not an original document. Irregular shaped dots; Random ink splatter and ink drag characteristic on the horizontal plane in both the left and right directions are displayed in the printed content of the letterhead details and the print details at the Kobus de Beer signature sections. The characteristics, according to him, are associated with an ink jet

printer process. The same characteristics, also associated with the ink jet process are again displayed in the lines of the Kobus De Beer signature. Smooth letter edge and absence of irregular ink splatter are displayed in the printed content of the information content of the document. According to Mr Bester, the signature was produced by a pen signed process, although it appears on the document in copy form. Striations associated with a penned signature process were identified. He observed that "the various print processes on the document are not in chronological sequence". He concluded that the two printing processes were applied to compile the document and that the Kobus De Beer signature was produced by a scanning process after the original signature.

20. Mr Baster's opinion is that two different printing processes, a copying process and a scanning process were used to compile the questioned document. This, because the sequence of compiling the document is irregular and associated with non-authenticity of a document. Mr Bester has also attached images of the letterhead section, Kobus de Beer signature section, content section and Mr Kgapane's signature section to explain the different print processes. The images are, indeed, instructive. In sum, the report discloses that the questioned document has been falsified.
21. It is noteworthy that the parties are in disagreement insofar as what transpired in this matter is concerned.
22. To be able to resolve the impasse I need to resort to previous matters in which principles were set out to enable a Court to

properly resolve the issues. One of the cases in point is Stellenbosch Farmers' Winery Group Ltd and Another v Martelle cie & Others 2003 (1) SA 11 (SCA). There, Nienaber JA, found that the parties' versions were irreconcilable. There were other peripheral areas of dispute which had a bearing on the probabilities. He then, at page 14 paragraph [5], summarised the technique which should generally be employed by the Courts in resolving factual disputes of this nature.

23. The Court, according to Nienaber JA, to come to a conclusion on the disputed issues must make findings on:

".. (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and

- (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. 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. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will

doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

24. Mr Raubenheimer submitted that there were discrepancies in Mr Kgapane's evidence in chief, his evidence under cross-examination and in the affidavit that he deposed to when summary judgment was resisted.
25. Mr Raubenheimer pointed out that Mr Kgapane, in his affidavit, stated that the defendant was not paid by the Mpumalanga Provincial

Government which had problems with its internal procurement processes. This features nowhere in his evidence. Mr Manala, for the

defendant, submitted that the defendant had been paid after 30 days, prior to 90 days of delivery of the tarpaulins.

26. Mr Kgapane's affidavit discloses that he negotiated with the deceased regarding an offer to pay the outstanding amount in instalments. This appears nowhere in his evidence in Court. Mr Raubenheimer submitted that this was also not in line with the argument that the defendant received a once-off payment.
27. Mr Kgapane, in his affidavit, says nothing about the difficulties which the deceased had with his wife, Ms de Beer.
28. Mr Kgapane's affidavit is silent on the deceased's request not to receive the cash amount immediately.
29. That Mr Kgapane paid the deceased R300 000 00 at Savannah mall appears nowhere in his affidavit.
30. Mr Kgapane, in his affidavit, does not mention that he does not have the original of the alleged confirmation of payment document.

31. Mr Raubenheimer submitted that the fact that Mr Kgapane alleged that he utilised virtually all the cash he withdrew from his personal account and the defendant's account during a period of time which stretches several months to pay the deceased is farfetched and offensive and wondered how and why Mr Kgapane could utter such a statement. Mr Kgapane, in Mr Raubenheimer's view, is the only person who stands to benefit from the utterance of such a statement. There appears to be merit in the submission.
32. Mr Raubenheimer submitted that Mr Kgapane's evidence was replete with improbabilities and he cited the following as examples:
 1. Mr Bester demonstrated that the document which is said to have been brought by the deceased could not have been an original document.
 2. There would have been no reason for the deceased to forge the document and that any suggestion to say that the deceased forged the document is farfetched and offensive.
 3. That the deceased initially wanted cash but later requested Mr Kgapane to wait before making such payment.
 4. That the deceased asked the defendant to wait before making payment of the approximately R70 000 00.
 5. The fact that Ms de Beer and the deceased discussed the defendant's debt and that the deceased showed her the text messages from Kgapane confirming the existence of the debt as late as December 2013, is relevant to the probabilities and clearly, according to Mr Raubenheimer, demonstrates and confirm the plaintiff's claim.
33. The fact that the deceased had problems with SARS and his wife; that the deceased requested that payment be made in cash; that the deceased changed the arrangement and required Mr Kgapane to wait before effecting payment; that the deceased collected the R300 000 00 just when the money that was withdrawn from his account and that of the defendant constituted the required amount that the plaintiff had needed and that the deceased asked Mr Kgapane to wait before paying the approximately R70 000 00, according to Mr Raubenheimer, demonstrated only the improbability of the defendant's version. This appears to be a plausible submission.
34. Mr Raubenheimer further submitted that even if the court found that the improbabilities do not favour the plaintiff, it cannot be said that the defendant sufficiently discharged its onus. On a balance of probabilities, the defendant, according to Mr Raubenheimer, has failed to discharge the onus which rested on it. I agree.
35. It is noteworthy that Mr Kgapane, according to his version, signed a document which already had been signed by the deceased. Mr Kgapane was informed that the confirmation of payment document was falsified and his response thereto was: "Did the expert elaborate?" Meaning if the expert provided a reason for so stating. He was informed that the document was produced as a result of two processes that were applied. He firstly denied that but

quickly changed and said that he could not deny that and added that he merely signed the document.

36. Asked, under cross-examination, why the defendant could not pay the plaintiff the approximately R70 000 00 immediately, Mr Kgapane

testified that they had cash flow problems. He changed the version and stated that they did not have cash flow problems as they only paid according to instructions. His other version was that the defendant could not pay the full R370 000 00 because he had not received such an instruction.

37. Mr Kgapane was asked to explain why the deceased would not accept the entire amount if he had desperately needed money because of the problems that he had, he responded by saying that the question should be directed to the deceased. It was ultimately suggested to him that he had no answer to the question. Asked why he could not withdraw the R300 000 00 and pay the plaintiff, his answer was that it was risky to withdraw an amount of R300 000 00 yet he, according to his evidence, paid the deceased R300 000 00 at Savannah mall on 15 October 2012.

38. Mr Kgapane was asked if he had informed his attorneys that the deceased had refused to accept payment of R70 000 00 and he answered

that the deceased had not refused to accept the R70 000 00. The deceased, according to him, would advise him when the money would be needed.

39. Mr Kgapane was a number of times told by Mr Raubenheimer that his version was farfetched, had material differences and that the probabilities favoured a finding that he had not paid the R300 000

00. Mr Kgapane's version, indeed, supports this view.

40. Unlike Mr Kgapane's evidence which is replete with improbabilities and contradictions, Ms de Beer's evidence is largely undisputed. She was never shaken under cross-examination. She was honest reliable, credible and trustworthy. It is impossible not to accept her version which is bolstered by Mr Bester's evidence.

41. The defendant's version is improbable, unreliable and contradictory as demonstrated above. The version can safely be rejected and it is so rejected.

42. I safely find that:

42.1. The defendant did not pay the R300 000 00 to the deceased at Savanah mall on 15 October 2012. The defendant, through Mr Kgapane, fabricated and forged the confirmation of payment document.

42.2. The defendant, on its own version, paid R21 660 00 on 4 May 2013 but that the payment related to toilets. This simply means that the R21 660 00 had nothing to do with the agreement that the parties concluded in respect of the tarpaulins. Effectively, the defendant still has to pay the R21 660 00 which the plaintiff thought had been part payment of the debt of R1 627 690. The amount, therefore, remains due, owing and payable by the defendant to the plaintiff.

42.3. The amount of R321 660 00 remains unpaid. The amount is due, owing and payable.

42.4. The amount ought to have been paid on 31 January 2012 when the goods were delivered.

42.5. The plaintiff is entitled to payment of interest at the rate of 15.5% calculated from 31 January 2012 to date of payment.

42.6. The conduct of the defendant and as correctly submitted by Mr Raubenheimer, should not be countenanced. The defendant's conduct was calculated to deny the plaintiff's claim. The costs on the scale as between attorney and client, again, as correctly submitted by Mr Raubenheimer are warranted.

43. The plaintiff's claim in the amount of R321 660 00 consisting of the R300 000 00 and the R21 660 00 against the defendant should succeed.

ORDER

44. In the result, I make the following order:

1. Judgment in favour of the plaintiff for payment of the amount of R321 660 00 against the defendant is granted.
2. The defendant is ordered to pay interest on the aforesaid amount a tempora mora at the rate of 15.5% calculated from 31 January 2012 to date of payment.
3. The defendant is ordered to pay the costs of suit on the scale as between attorney and client.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA

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