



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 338 /2021

In the matter between:

BUSINESS ASSOCIATES (PTY) LTD

PLAINTIFF

And

DESTINY GROUP (PTY) LTD

DEFENDANT

Neutral citation : *Business Associates (Pty) Ltd v Destiny Group
(Pty) Ltd (338/2021) [2022] SZHC164
(05/08/2022)*

CORAM: B.S. DLAMINI J

DATE HEARD: 27 July 2022

DATE DELIVERED 05 August 2022

Summary: *Civil Procedure- Application for absolution from the instance. At the close of the Plaintiff's case, Defendant alleging that the Plaintiff has not made out a case which would require the Defendant to take the witness stand in opposition to Plaintiff's claim.*

Held; *The Plaintiff's testimony through its director is sufficient to require the Defendant to be put to its defence to Plaintiff's claim. The Application for absolution from the instance is dismissed with costs.*

JUDGMENT

INTRODUCTION

[1] The Plaintiff is Business Associates (Pty) Ltd, a company duly registered and incorporated as such in accordance with the company

laws of the Kingdom of Eswatini, having its principal place of business at Ezulwini, District of Hhohho.

[2] The Defendant is Destiny Group (Pty) Ltd, a company registered as such in accordance with the company laws of the Kingdom of Eswatini, having its principal place of business at No.16, Valley View Complex, Opposite Corner Plaza, Ezulwini, District of Hhohho

[3] On the 25th August 2021, the Plaintiff issued combined summons and sought relief as follows against the Defendant;

“(a) Payment of the sum of E 152,000.00 (One Hundred and Fifty Two Thousand Emalangeneni).

(b) Interest thereon at the rate of 9% per annum a temporae morae.

(c) Costs of suit.

(d). Further and/or alternative relief.”

[4] The Defendant filed all the necessary opposing papers to Plaintiff's claim and, at the close of pleadings, the parties applied for a trial date. The matter was accordingly allocated the 24th March 2022 as the first date of trial. On this date, the matter could not take off and was

subsequently allocated the 24th and 31st May 2022 as new dates for trial.

[5] The one and only witness to give testimony during trial on behalf of the Plaintiff was its director, Mr. Innocent Mxolisi Dlamini. The Plaintiff's director informed the Court that during the year 2017, his company partnered with the Defendant and was engaged as a Contracts Manager for certain projects awarded to the Defendant. On the 11th May 2017, the parties signed a written contract in which the Plaintiff was engaged as a Project or Contracts Manager. The contract was for a period of 6 months with the condition that it could be reviewed for a longer period as may be agreed between the parties.

[6] In terms of the agreement between the parties, the Plaintiff was to be remunerated at the rate of E 38,000.00 per month for the service rendered to the Defendant. The Plaintiff's testimony was that after the lapse of the initial 6 months, he continued to render service to the Defendant. The Plaintiff stated that the final invoice issued to the Defendant was in January 2020, which period according to the

Plaintiff was the period upon which the relationship between the parties formally came to an end.

- [7] The Plaintiff's claim against the Defendant is for payment for services rendered from the period of October 2019 to January 2020. This is a period of 4 months in which the Plaintiff alleges he rendered service to the Defendant but was not paid the agreed monthly sum of E 38,000.00. The period of four months in which the Plaintiff alleges he was not paid the monthly sum of E 38,000.00 adds up to the total sum claimed of E 152,000.00 as reflected in the combined summons.

- [8] The Defendant, through cross-examination, has disputed that Plaintiff rendered any service at all to the Defendant not just from October 2019 but actually from January 2019. For this reason, the Defendant filed a counter-claim against the Plaintiff and sought to be refunded the sum of money paid to the Plaintiff from January 2019 up to September 2019.

THE DISPUTE BETWEEN THE PARTIES

[9] At the close of the Plaintiff's case, the Defendant moved an application for absolution from the instance. In support of the application for absolution from the instance, the Defendant submits as follows in its written submissions;

“1.2 In this matter, during the leading of evidence by the plaintiff, it failed to produce any time sheets depicting the work and activities done and the time spent thereon. Even the invoices for which payment is claimed, do not show the number of hours worked. Plaintiff further conceded that between January 2019 until January 2020, there was no material as it had got finished. Accordingly, it is defendant's contention that the plaintiff did not do any work for it for the period it is claiming payment.”

[10] The Defendant relies on clauses 3.18; 5.1.1 and 5.1.2 of the contract between the Plaintiff and the Defendant to support its contention that the Plaintiff was no longer in service with it during the period in question. Clause 3.18 provides;

“[The Plaintiff shall] be required to complete time sheets which must be signed and accepted by the Client. The time sheets must accurately record work duration and activities.”

[11] Clause 5.1.1 on the other hand provides;

“The contract manager shall record all hours spent by him in rendering the prescribed services on a time sheet approved by the company.”

ANALYSIS AND CONCLUSION

[12] In order to make a proper determination on the contention being made on behalf of the Defendant, it is important to touch on certain key points from the testimony of the Plaintiff's director.

[13] It is not in dispute that after the lapse of the written 6 months' contract between the parties, the Plaintiff continued to render service to the Defendant way beyond the expiry of the fixed period of 6 months. The Plaintiff's director stated that in April 2019, he and the Defendant's director one Mr. Tom Lin flew to Taiwan in order to source some goods from different suppliers for the Defendant's ongoing projects in the country. According to the testimony by the

Plaintiff's director, by May and June 2019, the material which they had gone to source in Taiwan had still not arrived in the country.

[14] It was the Plaintiff's evidence, through its director, that despite the unavailability of building or other material, work on the ground was ongoing in that there were other site works proceeding; there were technical issues that needed his attention; there were meetings and feedback with the main client (International Convention Centre) and also the management and supervision of the Defendant's staff at the building site. It was the director's evidence that the Defendant had a specific contract with the client which required the former to always be on site, as long as the main contract with the client was still in force. It is against this background that the Plaintiff's director advised the Defendant's director against retrenching staff upon either non-payment or non-availability of material from the client.

[15] The Plaintiff's director further relies on an extract of communication between himself and the Defendant's director from a 'WhatsApp' platform in which the parties communicated as follows'

"2/3/20, 08:54 – IMD: Hi Tom. I have received your letter but I am not sure I understand what you are communicating through it.

2/3/20, 11:55- IMD: And I would like to know when I can expect payment.

2/3/20, 13:08-Tom Lin: Hi Innocent. I am forced to halt operations until the site is up and running again. Unfortunately I have run out of resources to continue paying salaries. It was a general feeling from staff that we would rather officially played off (laid off) and they be recalled if the situation onsite changes. They also requested this in writing. I'm aware of the risk of losing them but I have no alternative at the moment. Keeping the team would mean that the bill continues to accumulate with no progress onsite. I have also seek [sic] an opinion from cmac about the issue and they advised same. You will get your payment by this Friday."

[16] The Defendant's director in the last line of his communication to the Plaintiff's director on the 3rd February 2020 expressly and unequivocally admitted being liable to the Plaintiff. The Plaintiff, in his communication to the Defendant's director was seeking payment for the four invoices submitted from October 2019 up until January 2020. It is against this background that the Court must make a determination on the application to dismiss the Plaintiff's claim without the need to call the Defendant to take the witness stand.

[17] In the case of **Swaziland Procurement Agency v Stealth Security (Pty) Ltd (1574/2016) SZHC (59) (04/04/2022)** it was held by the High Court of Eswatini that;

“[6] The *locus classicus* in this area of the law, which I have referred to previously as the ancestor of the authorities is none other than the leading case of *Gascoyne vs Paul and Hunter* 1917 TPD 170 , which espoused the law in this area as follows,

“At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the court is; is there evidence upon which a reasonable man might but not should give judgment against

Hunter (Defendant)? It follows from this that the court is enjoined to bring to bear on the question the judgment of a reasonable man and is bound to speculate on the condition of which the reasonable man, of the court's conception not should, but might or could arrive. This is the process of reasoning which however difficult its exercise, the law enjoins upon the judicial officer."

[7] In the matter of TWK Agricultural Limited vs SMI Ltd and Another, Mamba J, quoted with approval the following excerpt by Harms JA in Gordon Lloyd Page and Associates vs Revera and another, 2001 (1) SA 88 (SCA) at 93:

"This implies that a plaintiff has to make out *a prima facie* case in the sense that, there is evidence relating to all the elements of the claim to survive absolution. Without such evidence, no court could find for the plaintiff (MARINE AND TRADE INSURANCE CO. LTD v VAN DER SCHYFF 1972 (1) SA 26 (A) at 37G-38A; As far as inferences from the evidence are not the only reasonable ones the test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable might find for the plaintiff a test which had its origin in jury (RUTO FLOUR MILLS). Such a formulation tends to cloud the issue. The court ought not to be concerned with what

someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court."

[18] In the present matter, the Defendant relies on the contention that the Plaintiff has failed to submit time sheets and further failed to present a record of all the hours worked by him from January 2019. This, according to the Defendant implies that the contract between the parties according to it terminated in December 2018. It is on this ground that in the counter-claim, the Defendant is claiming a refund of the invoices paid by it to the Defendant from January 2019 up until October 2019. This means the position taken by the Defendant is that it paid a sum of E 342,000.00 to the Plaintiff over a period of 9 months by mistake. The Court does not wish to make any comment at this stage regarding these assertions by the Defendant as it may affect the main matter. In the Court's view, the Defendant is required to take the witness stand and offer its explanation regarding all the issues it has raised against the Plaintiff's claim.

[19] In his testimony, the Plaintiff's director submitted that all time sheets were submitted to the client as stipulated in the contract between the parties. The reference to 'client' in the agreement endorsed by the parties hereto means the entity that engaged the Defendant to do works on its behalf. In other words, the reference to client means the International Convention Centre. It was to this entity that time sheets were to be prepared and furnished by the Plaintiff. As regards, the record of hours, it is stated by the Plaintiff that he used one system of filing a claim which has always been accepted by the Defendant.

[20] It is the Court's conclusion that the application for absolution filed on behalf of the Defendant is misdirected and should, in the circumstances, fail.

[21] The Court accordingly makes the following orders;

(a) The application for absolution from the instance filed on behalf of the Defendant is hereby dismissed.

(b) The Defendant is ordered to pay costs of the application for
absolution.



B.S. DLAMINI

THE HIGH COURT OF ESWATINI

For Defendant: *Mr. S. Madzinane (Madzinane Attorneys)*

For Plaintiff: *Mr. W. Maseko (Maseko Tsambokhulu Attorneys)*