



IN THE HIGH COURT OF ESWATINI

HELD AT
MBABANE

CASE NO. 1574/2016

In the matter between:

SWAZILAND PROCUREMENT AGENCY

Plaintiff

And

STEALTH SECURITY (PTY) LTD

Defendant

NEUTRAL CITATION:

SWAZILAND PROCUREMENT
AGENCY V STEALTH SECURITY
(PTY) LTD (1574/2016) SZHC (59)
04/04/2022

CORAM: B. W MAGAGULA J

HEARD: 07 MARCH 2022

DELIVERED: 04 APRIL 2022

SUMMARY

Civil procedure - At the close of the Plaintiff case, Defendant moved an application for absolution from the instance in terms of Rule 39 (b) of the High court rules- The law applicable on absolution from the instance restated- evidence adduced thus far prima facie sufficient that a reasonable judge that, he could, not should find for the Plaintiff. Application for absolution from the instance dismissed with costs.

JUDGEMENT ON ABSOLUTION FROM THE INSTANCE

BACKGROUND FACTS

1. The plaintiff alleged in its particulars of claim that, through its Director Bongani Mamba, it entered into an oral agreement with the Defendant who was represented by one Anita Hayes-Roets on or about April 2012. This was for procurement services in respect of a tender the Defendant was interested in.

2. That material terms of agreement were that:

2.1 Plaintiff will formulate, facilitate the proposal documents for the tender with MTN and the Defendant will only edit and/or make additions where necessary and make the tender presentation;

2.2 That upon successful bidding of the tender, the Plaintiff would be paid by the Defendant, a share of 7% of the total value of the services rendered;

2.3 That such payment will be on a month to month basis for the duration of the contract between the Defendant and MTN;

2.4 That indeed he proceeded to prepare the documents, forwarded them to the Defendant who went on to win the tender with MTN;

2.5 That the Defendant as of May 2012, commenced work with MTN and was paid monthly the sum of E117'180.00, but failed and or refused to pay Plaintiff the sum of E8'202.06 per month as per the 7% oral agreement;

2.6 That as a result of the failure to pay, as of May 2012 to 2016 the Defendant is owing the sum of E426'535.20, which is due owing and payable.

3. The Plaintiff on the basis of the above, seeks to be awarded the amount of E426'535.20, on the premise of the breach of the oral agreement by the Defendant.

4. The Plaintiff led only one witness, being the Plaintiffs director Mr. Bongani Mamba. It is at the conclusion of Mr. Mamba's evidence, that the Plaintiffs attorney Mr. **B.** Ngcamphalala closed the Plaintiffs case. This is what prompted the Defendant through it's attorney Mr. **H.** Magagula to move an application for absolution from the instance, on the basis that the Plaintiff has failed to establish a prima facie case.

THE LAW ON ABSOLUTION FROM INSTANCE

5. The Rules of the High Court in 39(b) states the following:

"(b) At the close of the case for the Plaintiff, the Defendant may apply for absolution from instance, in which event the Defendant or one advocate on his behalf may reply. The Defendant or his advocate may thereupon reply on any matter arising out of the address of the Plaintiff or his advocate."

6. The *locus classicus* in this area of the law, which I have referred to previously ¹ 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 courts 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** ² **Masuku 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:**

¹ Amelia Henued vs. Cordelier Henued

² Civil trial for 263/05 (unreported judgment delivered on the 10th of June 2009).

"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 one 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 man 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"

On this, Masuku J remarked that

"the Learned Judge of Appeal advocated for a test where the court trying the case (and not some other court or person), brings its own judgment to bear on the evidence adduced before it and decided whether the Plaintiff has, at the close of its case, made out a case such that the court could or might find for it, even in the absence of the Defendant's evidence at stage. If it could find for the Plaintiff on that evidence, then the defendant ought to be put to its defense. If not, then cadit quaestio that constituting a proper case for the grant of absolution from the instance it is, however, moot whether at the conceptual level there might actually be a marked difference in the Court's approach to the evidence if the latter test be applied as opposed to the former. "

8. If we are to use the guidance as stated in the **Marine Trade Insurance Company limited vs. Vandar Schyff (ZUPRA)**. There is an indication that for the court to be able to decide whether a case for absolution from the instance has been made, it is necessary that a consideration of the evidence thus far be made.

SURVEY OF THE PLAINTIFF'S SOLT WITNESS

9. As it has been indicated earlier, the Plaintiff led only one witness, Mr. Bongani Mamba. He is the director of the plaintiff. In summary, Mr. Mamba's evidence was as follows:

9.1 He is the director of the Plaintiff and he registered the Plaintiff in 2001. He continued to tell the court that he only got to know of the defendant pursuant to a call he received from Attorney Sikhumbuzo Simelane. He had known him as an attorney in his role as a Deputy Sheriff. He called him on his mobile phone and expressed willingness to meet him at the Plaintiffs offices. He allegedly said the agenda was urgent. Mr. Mamba's impression was that Mr. Simelane wanted to give him a court process to serve as a Deputy Sheriff, hence he agreed that they meet at the Plaintiffs offices in Matsapha. He told the court that the offices are situated at lot 325, 1st Avenue Matsapha Industrial Sites.

9.2 Mr. Mamba continued to tell the court that indeed Mr. Simelane came accompanied by a lady he didn't know at that time Anita Hayes. Introductions were made and Mr. Sikhumbuzo Simelane from the inception indicated that the meeting was not about court processes. He advised Mamba that he is a shareholder of the

Defendant and Miss Hayes was his partner, who also doubles up as the managing director of the company. Mr. Simelane proceeded to inform Mr. Mamba that the purpose of the meeting was that they required the services of the Plaintiff as a procurement service consultancy. They needed the Plaintiff to put together a tender for security services which had been advertised by MTN Eswatini, hence they needed Mr. Mamba to help them respond to the tender.

9.3 Mr. Mamba told the court that he welcomed them and confirmed that he was on that space of business. He also outlined his conditions for engagement, being that he charges commission at the rate of 7% of the value of the contract.

9.4 He proceeded to tell the court that he asked them in that meeting, if they were comfortable and the response he got was that they were. During the conversation, he then indicated that the tender was huge and they accepted his charge of 7% commission. That is how this witness said he got to be involved with the defendant.

10. It is again common cause, that in his examination in chief that Mr. Mamba further testified as follows:

10.1 That it was him who prepared the full tender document and submitted it to the Defendant's Director, Anita Hayes consideration for checking and presentation.

10.2 That during the whole process of preparing the tender document, he was copied in emails with the client. In support of that contention the Plaintiff referred the court to an email of the 29¹¹¹ May 2012;

10.3 Having honored his part of the oral agreement, he was never paid a cent, but only given cash for lunch in the sum of E2,500.00 and not the 7% as per the oral agreement;

10.4 He then enlisted survives of his lawyers to recover these amounts, which is why the matter is before court;

10.5 The Defendant through Attorney Mr. Sikhumbuzo Simelane, did engage him on an out of court settlement on the matter. That demonstrates that, indeed the Defendant acknowledges it's indebtedness to him. However, he could not include this aspect of evidence because it was objected to as being privileged communication.

10.6 The conduct of the Defendant amounts to an injustice and is abusive as he spent a lot of time in preparing the tender document and therefore the Plaintiff is entitled to the amounts claimed.

11. It is further common cause that on cross-examination of Mr. Mamba, the following unfolded:

11.1 For a person who claims to have prepared the tender document, he was unsure of the actual tender amount and duration of the tender the Defendant had with MTN. In fact, when it was put to the Plaintiff that how much was the tender worth and it's duration. He allegedly renegaded from his initial testimony that he had prepared the full tender document and Miss Hayes only did the presentation.

11.2 The witness said, the amounts claimed as being the agreement amount is not based on any actual figures on the tender prepared by himself. But on an estimation he made based on information he got

from "his sources". The sources were not called to buttress the accuracy of those amounts.

THE PLAINTIFF'S ARGUMENT

12. The Plaintiff is opposed to the granting of the application for absolution from the instance.

13. The basis of the opposition as appears in the heads of argument are as follows:

13.1 The court in deciding whether the plaintiff has adduced or has made out a *prima facie* case thus far, it should not apply the test that is usually used in the final determination of the matter; but the court should only consider whether the evidence adduced thus far might or could lead to the plaintiff succeeding.

13.2 The Plaintiff goes on to argue, basis of the Application by the Defendant is not clear in its written submissions and oral arguments. There was no formal application made by the Defendant as directed by the court when the matter last appeared.

14. The court must remark at this point that, the defendant's counsel actually made the oral application before court and then subsequently buttressed the basis through the written submissions. The application for absolution from the instance, was actually moved orally by the attorney before court.

Failure to Make a Demand

15. It is common cause that the Defendant in attacking the failure on the Plaintiffs side to make a prima facie case, argues that there was actually no final demand from the Plaintiff, before the current litigation. In response to this argument, the Defendant has quoted **Herbstein and Van Winsen**³ where it is stated as follows:

"The fact that 110 demand was made before the summons was issued does not, except where demand is a condition precedent to the issue of summons afford a defence to the action."

16. In a nutshell, the Plaintiff argues that a summons is a demand in itself, provided that it is within the common law prescription time frame which the Plaintiff understands to be a period of 15 years. This claim was made within 15 years so there is no merit in the Defendant's argument.

Conclusion of the Agreement

17. The Plaintiff argues that there appears to be a number of versions presented by the Defendant, in so far as the issue of the conclusion of the agreement is concerned. The Plaintiff insists that through the testimony of Mr. Mamba, it entered into an oral agreement with the Defendant. Mr. Mamba concluded the agreement on behalf of the Plaintiff and this evidence remains uncontroverted.

18. The Plaintiff continue to argue that, at that time, Mr. Mamba had a good relationship with Mr. Sikhumbuzo Simelane who is one of the directors of the Defendant. The relationship comes a long way back when Mr. Simelane

³ The Civil Practice of the High Courts of South Africa 5th Edition page 250

was still working at Robison Betram law firm.

19. The Plaintiff also argues that, in his assessment of the Defendant's arguments, as it came out through cross examination Defendant alleges that no work was done by the Plaintiff, as it had no mandate to do so. The Plaintiff argues *contra*, that if the Plaintiff had not been contracted to do the work, then how is the payment of the E2000.00 explained.
20. The Plaintiff also contends that if it was not engaged and was merely on a frolic of its own, why was the Defendant's director copied by MTN on the emails exchanged with the Defendant's director. Why also did the Defendant not report the Plaintiff's involvement in its affairs to MTN Eswatini or to the police?
21. The Plaintiff also contests why was the email of the 28th of May 2012, sent to the Defendant and also the presentation it prepared. The Defendant accepted the email and attachments without any protests or questions raised regarding the Plaintiff's involvement.
22. It is also the Plaintiff's contention that an oral agreement is acceptable and binding in law. To further demonstrate that, an oral agreement can be used as a mode of communication and this must be viewed in conjunction with the emails, letters exchanged and the general conduct of the directors of both parties.

Tender Amount in Issue

23. The Plaintiff also argues that its director testified in both examination in chief and during cross examination, that he was responsible for preparing the tender documents. What Miss Hayes did, was to incorporate the figures in her knowledge into the presentation prepared by the Plaintiff's director.

24. The Plaintiff further argues that, in the Defendant's plea, there is nothing to suggest that the amount is in dispute. The defendant makes a bare denial. There is nothing that suggests that the amount of E117 180.00 (one hundred and seventeen thousand, one hundred and eighty emalangen) is in dispute. The Defendant made a bare denial. There is a plethora of authorities that suggest a bare denial does not carry any evidential weight. In fact, the Plaintiff contends that in a plea, a Defendant is required to clearly and concisely state all material facts that are relied on as a defence. The Plaintiff argues that, if the issue of the amount of the tender was in contention, it should have been clearly stated in the Defendant's plea, the Plaintiff to know what the Defendant's defence is especially that also it comprises the contestation of the amount or tender price

25. The Plaintiff therefore argues that it was ambushed by the Defendant by raising the issue of the tender amount through cross examination. The Plaintiff cited the case of **Lungile Mngometulu and another vs. Attorney General**⁴ where it was held as follows:

"The Defendant merely raised a bare denial, on both Plaintiff's particulars of claim. It denied assaulting both plaintiffs. It is, with clear why the Defendant decided to plead in this fashion in light of the amble

⁴ High court case no 335/2013 and 904/2013[29] Sz HC 149

*authorities in this jurisdiction to the effect that a bad denial is as good as
110 plea at all.*

*Where litigant simplify denies allegation without advancing its side of the
story, the other party is entitled in our law to consider that no issues
raised and that the fore version is not denied."*

ADJUDICATION

26. I will now discern to consider whether on the evidence adduced thus far, there is evidence upon which a reasonable man might, not should, give judgment against the Plaintiff. According to the *dicta* in the Gascoyne case,⁵ at this stage, the court is enjoined to bring to bear on the question of a reasonable man and is bound to speculate on the condition of which a reasonable man, of the court's conception, but might or could arrive. I agree that this process of reasoning is a difficult exercise. I can further not agree more with the observations made by his Lordship Mamba J, in the matter of **Cathula Dvokolwako Farmers association vs. A. J. Nyman Swaziland (Pty) Ltd**⁶ where he remarked as follows:

"It is generally accepted that when a court refers to a judicial officer acting reasonably or judiciously where it refers to a mere reasonable person, its view of that person is that which in the opinion of the preceding officer is reasonable in the circumstances. It's a value led and judgment. The presiding officer, in fact substitutes his own reasonableness for that of the notional reasonable man or judicial officer. The opinion of the presiding officer becomes the opinion of the reasonable man. "

⁵ Gasoyne vs. Paul and Hunter 1917 TPD 170

⁶ High court case no. 55/2005

Has the Plaintiff led sufficient evidence on the existence of an oral agreement with the Defendant?

27. It is apposite for this court to look at the evidence adduced by Mr. Bongani Mamba, to establish if he has led sufficient evidence on the existence of an oral agreement with the Defendant. This is more so because it is the Plaintiff's case that on or about the month of April 2012, at Matsapha, the parties entered into an oral agreement, where the Defendant sought the Plaintiff's procurement services for a tender that they were interested in.⁷

28. The Plaintiff further avers that, when the oral agreement was entered into, the Plaintiff was represented by Mr. Bongani Mamba as its managing director and the Defendant was duly represented by one of its directors Miss Anita Hayes-Roets. This court has already alluded earlier on in this judgment, that Mr. Bongani Mamba when giving his testimony did tell the court that after receiving a telephone call from Mr. Sikhumbuzo Simelane they did meet at his offices where Mr. Simelane attended with his co-director, Ms. Hayes. Mr. Mamba even gave details of where they met he told the court that they met at the Plaintiff's offices at Matsapha at Lot 325, first avenue, Matsapha Industrial Sites. He continued to tell the court that after Mr. Sikhumbuzo Simelane had explained the purpose of their mission, he duly informed him that they wanted to engage the Plaintiff on its expertise as a procurement and service consultancy. They required the Plaintiff's services to put together a tender for security services tenable at MTN Eswatini. Mr. Mamba continued to tell the court that he confirmed that indeed the Plaintiff does render those services on a commission of 7%

⁷ See paragraph 4 of the Plaintiff's particulars of claim at page 6 of the book of pleadings.

of the value of the contract. He also probed the Defendant's directors on whether they were comfortable with the charge. They are alleged to have said they were comfortable as the tender was huge.

29. It is also part of the record that Mr. Mamba told the court that subsequent thereto, they exchanged emails and there was a response from Miss Anita Hayes- Roets, who appreciated the work that Mr. Mamba had done.

30. In my observation of the narration as set out above, it appears *prima facie* on the version given by Mr. Mamba thus far, that an oral agreement with the Defendant appears to have been made. Obviously, that is subject to these facts being controverted in one way or the other by the Defendant through evidence, during the Defendant's case.

31. In its broadest definition a contract is an agreement between two or more parties entered into with a serious intention of creating a legal obligation⁸. It is common cause and widely accepted that oral agreements are also valid agreements in law.

Breach of the Agreement at the Instance of the Defendant.

32. It is also will be of consideration whether the evidence adduced by the Plaintiff thus far, indicate *prima facie*, a breach of the agreement at the instance of the Defendant.

⁸ South African Contract law- Wikipedia

33. Again for this question to be answered effectively, recourse must be made to the evidence of Mr. Bongani Mamba, who is the sole witness of the Defendant. It is the evidence of Mr. Mamba that after the meeting in his offices, where the fee had been agreed to, he was then requested to start the work. He said there was communication from MTN written by the purchasing manager a certain Wanen Dlamini, directed to Stealth. The latter had requested MTN to send a correspondence to him. From that point, Plaintiff prepared the content of the presentation in respect of the tender. Mr. Mamba was then advised that the Defendant had been shortlisted by MTN and he must proceed to prepare for the presentation. He continued that he prepared content for the said presentation which the Defendant used for the actual presentation and eventually the Defendant was successful and was awarded the tender. After a period of 4 months, he enquired as to when were they going to hold a meeting to finalize the agreement. He subsequently met with Miss Hayes firstly he was given E500.00 for lunch and he was also given another E600.00. The court was not told what this E600.00 was for.

34. Mr. Mamba continued to state that, despite that the Defendant secured the tender, and was paid by MTN. Plaintiff was not paid the agreed fee. He also stated that, he called the Defendant's directors numerous times and at some point, he met Mr. Sikhumbuzo Simelane at his offices in an effort to settle the matter amicably. He told the court explicitly that Plaintiff never received the payment as per the oral agreement.

. **35.** In my view, the evidence adduced thus far Mr. Mamba has imputed an allegation of breach against the Defendant, as he has expressly stated that despite that he performed his part of the oral agreement by preparing

content for the presentation and there was an acknowledgement through email, but there was never a corresponding payment of the amount of 7%. Again, it is my considered view that this question was traversed through the evidence of Mr. Mamba. He has adequately outlined why he thinks the Defendant has breached the oral agreement. It is now open to the Defendant to refute his testimony if it so wishes

ENTITLEMENT TO THE AMOUNT CLAIMED AND HOW THIS AMOUNT WAS ARRIVED AT.

36. Following the excerpt by **Harmes J.A** in **Gordon Lloyd Page and Associates vs. Revera and Another 2001 (1) 88 SCA.**

"This implies that a Plaintiff has to make out a prima facie case in the sense that there is evidence related to all the elements of the claim to survive absolute, because without such evidence the court could find for the Plaintiff. "

37. I now discern to consider whether the Plaintiff has been able thus far, to demonstrate on a *prima facie* basis, as it were, its entitlement to the amount claimed and how this amount was arrived at. It was argued strenuously by the Defendant, that the Plaintiff was not able to meet this element of its case.

38. It came out through the cross examination of Mr. Mamba, that for a person who had prepared the tender document, he appeared to be unsure of the amount and duration of the tender that the Defendant had been awarded by

MTN. This was imputed to be the basis for the Defendant to argue that the Plaintiff never prepared the tender document on behalf of the Defendant.

39. In his response, the witness told the court that, he obtained the information regarding the tender amount from his own sources, which he did not disclose. It was put to him that he reneged from his initial testimony in chief, that he prepared the full tender document himself and the Defendant's directors only went to do a presentation.

40. The Defendant therefore argues that the shift in testimony of the witness signifies that he did not prepare the tender document, which is contrary to the thrust of the Plaintiff's claim. It is argued that the Plaintiff was basing its claim not on actual figures of the tender prepared by himself, but based on an estimation which was done by himself based on information that he had sourced outside the tender he alleges to have prepared.

41. In response to this argument, the Plaintiff argues in the Defendant's plea, there is nothing that suggests the amount claimed is in dispute. If the Defendant was contesting the amount claimed should have explicitly stated so in their plea. The Plaintiff demonstrates this by highlighting what the Defendant had pleaded in its plea. The Plaintiff argues that the defendant made a bare denial when responding to the Plaintiff's claim of E17 180.00.

42. The plaintiff further contends that there is a plethora of authorities stating that a bare denial does not carry any evidential weight. In fact, it is

considered to be an admission of the Plaintiff's averments. A Defendant in its plea is required to clearly and concisely state all material facts upon which he relies on.

43. The Plaintiff argues that it finds this to be a matter that the Defendant should have clearly articulated its plea if it was an issue. Not to surprise the Plaintiff during cross examination. The Plaintiff relied on Rule 22(2) of the High court Rules and also cited the case of **Wilson vs. South African Railways and Harbors 1981 (3) SA 106.**

44. The imp01i of the Plaintiff's argument is that it was incumbent on the Defendant to deny the amount alleged in its pleadings and also state the material facts upon which it relies on for the denial. The Plaintiff therefore argues that it has been ambushed by the Defendant on cross-examination as the bare denial was not sufficient for purposes of pleading and for purposes of preparation for trial.

45. In the matter of **Lungile Mngometulu and another vs. The Attorney General**⁹ her Ladyship Dlamini J. stated the following:

"The defendant merely raised a bare denial on both Plaintiff's particulars of claim. It denied assaulting both plaintiffs. It is not clear why the Defendant decided to plead in this fashion in light of the ample authorities in this jurisdiction, to the effect that a bare denial is as good as no plea at all. Where a litigant simplify denies an allegation without advancing its side of the story, the other party is entitled in our law, to

⁹ High court case no. 335/2013 and 904/13 2019 SZ HSC145

consider that 110 issues were raised and that therefore its version is not denied."

46. I am inclined to agree with the Defendant on this issue. The test at this stage is for the Plaintiff to demonstrate a *prima facie* case. The Plaintiff's director in his evidence, told the court a specific amount that he is claiming. This amount is in line with what is stated in the particulars of claim. The issue of the amount cannot be an issue for the first time at this stage of the proceedings. The amount was stated in the particulars of claim in its plea the Defendant did not dispute the basis on which the defendant arrived at the amount.

47. In my view, the Defendant still has a chance to demonstrate that there is no basis for the Plaintiff to claim the amount in the summons or that the contract does not exist. But the test at this stage, is not that high. In my considered view the elements of the amount claimed has been sufficiently traversed at this stage of the proceedings.

CONCLUSION

48. Due to the afore going reasons, it is my considered view that on the totality of the evidence led thus far, enough and relevant evidence has been adduced based on which the court could find for the Plaintiff.

ORDER

48.1 The Defendant's application for absolution from the instance is hereby dismissed.

48.2 Costs to follow the event.

A handwritten signature in black ink, consisting of a series of loops and a vertical line on the right side, positioned above a horizontal dotted line.

B. W. MAGAGULA J

HIGH COURT OF ESWATINI

FOR THE PLAINTIFF:

FOR THE DEFENDANT:

B. NGCAMPHALALA

H.MAGAGULA