

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A3104/10

DATE:23/09/2011

NOT REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

**SPECIALISED UTILITY AND MANAGEMENT
SERVICES (PTY) LTD**

Appellant

and

SIMON DIMANT

Respondent

J U D G M E N T

MBHA,J:

[1] This is an appeal against the whole of the judgment of Magistrate L L Singh which was handed down on 11 February 2009 in terms of which the appellant (defendant *a quo*) was ordered to pay the respondent (plaintiff *a quo*) the sum of R100 000,00 together with interest at the rate of 15,5% per annum from the date of service of the summons to date of final payment, and the costs of the action including counsel fees on tariff.

[2] At the commencement of the appeal, the appellant sought an order condoning the late filing of the appellant's application for the prosecution the appeal. The application was opposed and after hearing argument, the court decided to resolve this issue *in tandem* with the merits of the matter.

[3] The parties will, for the sake of convenience, be referred to as in the court below. The plaintiff caused summons to be issued against the defendant wherein he sought payment of R100 000,00 and averred that:

3.1 During 2005 the plaintiff acting personally, and the defendant represented by Blanche and Schultz, entered into an oral agreement in terms whereof the defendant would issue and sell to the plaintiff such number of shares in the defendant as would amount to 10% of its issued share capital for the sum of R100 000,00;

3.2 On 7 December 2005 the plaintiff paid a sum of R100 000,00 to the defendant;

3.3 In breach of the defendant's obligations, the defendant has failed to issue and sell to the plaintiff such number of shares in the defendant as would amount to 10% of its issued share capital;

3.4 As a consequence of the defendant's breach, the plaintiff has cancelled alternatively herewith cancels the agreement; and

3.5 The plaintiff is accordingly entitled to a refund in the amount of R100 000,00.

[4] The plaintiff also brought, in the same summons, an alternative enrichment claim against the defendant in the amount of R100 000,00 alleging *inter alia*:

4.1 That in breach of the oral agreement in terms of which the plaintiff would purchase a 10% shareholding from the defendant for the amount of R100 000,00 which the plaintiff duly paid to the defendant by way of cheque which was duly deposited by the defendant;

4.2 The defendant is unwilling to perform in terms of the agreement and refuses to transfer the shareholding to the plaintiff.

[5] The defendant's defense as pleaded was *inter alia*:

- 5.1 That a partly written and partly oral agreement was entered into with the defendant during 2005.
- 5.2 The R100 000,00 would be paid by the plaintiff to the defendant as working capital in developing and furthering First National Bank Ltd as a client ("*the FNB project*").
- 5.3 The plaintiff would work on and devote all his time and attention to the FNB project which would be funded from the plaintiff's contribution of R100 000,00 to the defendant.
- 5.4 When the FNB project made a profit, the plaintiff would share in such profits;
- 5.5 The plaintiff would receive repayment, alternatively a return on his contribution from the profits anticipated in the FNB project; and
- 5.6 The defendant denied that there was any oral agreement during 2005 for the sale of its shares to the plaintiff, and that the defendant had been unjustly enriched as claimed by the plaintiff.

[6] In its affidavit opposing summary judgment, the defendant also stated:

“The amount of R100 000,00 paid by the Plaintiff to the Defendant was spent by the Defendant in funding the expenditure incurred by the Plaintiff in running the FNB project.” (my emphasis)

[7] It being common cause that the plaintiff duly paid the sum of R100 000,00 to the defendant on 7 December 2005, the issue for determination before the court *a quo* was whether the R100 000,00 was paid by the plaintiff as a purchase of a 10% shareholding in the defendant, or whether the aforesaid sum was intended to be used, as the defendant averred, to fund the FNB project.

[8] The plaintiff testified on his behalf and his evidence can be summarised as follows:

8.1 He commenced employment with the defendant, a utility management company in January 2005 at a salary of R17 000,00 per month. It was agreed that as the business grew, other options would be explored.

8.2 In December 2005 a new agreement was entered into in terms of which:

8.2.1 the plaintiff would continue receiving the same salary of R17 000,00 per month and

8.2.2 the plaintiff would pay R100 000,00 to the defendant in return for which he would receive a 10% shareholding in the company and 20% profit sharing from all the projects undertaken by the company.

8.3 On 7 December 2005 the plaintiff duly paid the defendant R100 000,00. On that day he was given a draft letter of appointment setting out his salary and which also confirmed the shareholding and profit sharing agreement referred to above. As the said letter of appointment was merely a draft he never signed it but he requested that he be furnished with an official letter of appointment on the defendant's letterhead. His understanding was that the purpose of the document was to enable him to become a shareholder in the defendant.

8.4 He confirmed that on 13 December 2005 he received a letter from the defendant in which it was recorded that early in December 2005 he was furnished with a letter of appointment and a document entitled "*Purchase of shares*" which he had to sign. He however stated that save for the draft letter of appointment referred to above, no other document was ever furnished to him.

8.5 He denied that there was any agreement for his R100 000,00 to be utilised to defray the costs of the FNB project. Furthermore

at the staff Christmas party in December 2005, Mr Blanche a director of the defendant, announced to all staff that he had become a new shareholder in the company.

[9] Mr Blanche, the defendant's sole witness in the court *a quo* confirmed that a meeting was held during December 2005 at the defendant's offices where he, together with Mr Schultz, representing the company, presented the plaintiff with three documents, namely a letter acknowledging receipt of the R100 000,00 paid by the plaintiff, a letter of appointment and a shareholder's agreement. He testified that:

9.1 The R100 000,00 paid by the plaintiff was to be utilised as working capital on the FNB project; and

9.2 Due to the plaintiff's willingness to contribute to the FNB project, the defendant was prepared to give the plaintiff a 10% shareholding in the defendant and a 20% share of profits on all income derived from projects run by the defendant.

[10] In a detailed analysis of the evidence, the learned magistrate found that there was indeed an oral agreement concluded between the parties during December 2005 in terms of which the plaintiff would acquire a 10% shareholding in the company in exchange for his contribution of R100 000,00.

[11] In my view the learned magistrate was correct in his finding. On the defendant's own version as reflected in Blanche's testimony, it is clear that during December 2005 it was specifically agreed that the plaintiff would acquire a 10% shareholding in the company.

[12] The letter of appointment referred to above which is B17 in the trial bundle, specifically states:

"As mutually agreed you will receive a 10% shareholding in SUMS."

"SUMS" is the acronym for the defendant.

[13] The defendant's intention to make the plaintiff a shareholder was put beyond any doubt when, during cross-examination counsel for the defendant made the following proposition to the plaintiff (at page 277):

"Mr Dimant the defendant will produce evidence to the effect that a shareholder's agreement was provided to you in December 2005, you were asked to sign the shareholder's agreement so that shares can be transferred into your name... what is your reaction to that?"

The plaintiff reacted to this proposition saying that he was only furnished with a draft and that he never received an official letterhead setting out the above position which he had to sign.

[14] In my view there are other indicators showing that the intention was to make the plaintiff a shareholder in the defendant and that his contribution was never intended to fund the FNB project. I will refer to just a few:

- 14.1 The letter of appointment referred to above which was written by Schultz, a director of the defendant expressly provides:

“As mutually agreed, you will receive 10% shareholding of Specialised Utility and Management Services, in return for a capital investment of R100 000,00.” (my emphasis)

- 14.2 Attached to the letter of appointment was a document which was produced by the defendant at the trial entitled *“Purchase of shares and shareholder’s agreement”* which the plaintiff had to sign. This document expressly records the defendant’s intention to make the plaintiff a shareholder in the defendant.

- 14.3 In his opening address at the trial *a quo*, defendant’s counsel made it clear that the R100 000,00 contribution by the plaintiff was *“an investment”* in the company.

- 14.4 Mr Blanche confirmed in his testimony that at the staff Christmas party in December 2005, it was announced that the plaintiff was now a shareholder in the company.

[15] It is also significant that the defendant’s case, as presented, differed materially from the one that was pleaded. For example, Blanche conceded that the defence, as pleaded, was incorrect and that the profit share due to the plaintiff had been agreed to at the time of conclusion of the oral

agreement in December 2005. The defendant's plea merely alleged that the profit share would have to be agreed to in due course.

[16] Whilst the defendant's plea alleged that the R100 000,00 paid by the plaintiff would be utilised to fund and develop the FNB project Blanche, in stark contrast not only to the plea but also to the averment in the affidavit opposing summary judgment that the money was utilized to fund this project, stated that the R100 000,00 was lying in a suspense account and had not been used. Significantly, the aforementioned money was, according to Blanche, reflected in the financial statements of the defendant as being in a loan account to which the plaintiff was the beneficiary. In my view this puts paid to the defendant's claim that:

16.1 The R100 000,00 was intended by the plaintiff to fund the FNB project; and

16.2 That this amount was utilized to fund the FNB project.

[17] Blanche's clear testimony that the defendant's intention was to make the plaintiff a shareholder is completely contradictory to the defendant's plea which makes no mention of any sale of shares to the plaintiff and, in fact, denied that such a sale was part of the oral agreement entered into between the parties.

[18] Finally, although the plea averred that the plaintiff only worked on the FNB project, Blanche stated in no uncertain terms that plaintiff had worked on a number of projects for the defendant. It accordingly defies logic and common sense that the plaintiff would only choose to fund one project amongst many others on which he worked.

[19] During argument Mr Booysens, appearing for the appellant, submitted that the cancellation by the respondent of the oral agreement and the claim for unjust enrichment were never proven.

[20] This argument cannot be sustained:

20.1 The cancellation of the oral agreement was never challenged by the appellant at the trial; and

20.2 The court *a quo* correctly found that the appellant was in breach of a contract and as such the appellant is liable to refund the respondent the amount paid. In any event, these are completely new issues and are not grounds of this appeal.

[21] It has not been shown that the learned magistrate misdirected herself in any way when she found that the plaintiff had on a balance of probabilities discharged the requisite *onus* of proving that the defendant was liable to pay him the amount of R100 000,00.

[22] Regarding the appellant's application for condonation for the late prosecution of the appeal, I have considered the appellant's explanation for the delay. The explanation furnished is that the appellant was encountering cashflow problems and was unable to raise R3 500,00 to pay for the transcript. However, if one considers the fact that the defendant had R100 000,00 in its suspense account which it claims rightfully belonged to the company, it defies logic and common sense why the defendant was not able to utilise R3 500,00 of this amount to obtain the record. Furthermore, the appellant delayed for a period of almost seven months before lodging the application for the assignment of a date for the hearing of the appeal.

[20] In my view the delay was quite extensive and no acceptable explanation for the delay has been proffered.

[21] In the absence of an acceptable reason for the delay, the application for condonation cannot be granted.

[22] Counsel for the parties also asked the court to pronounce on the issue of counsel's costs in the magistrate's court and that it was desirable that same be allowed based on the tariff by the Bar Council.

[23] I do not deem it expedient to deal with this aspect in this case, as amongst others, it was not an issue in the appeal.

[24] I accordingly make the following order:

1. The application for condonation for the late prosecution of the appeal is refused.
2. The appeal is dismissed with costs.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG