

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 4171/2007

DATE: 24 MARCH 2010

In the matter between

UPAL CHANDRA DEBANATH

Plaintiff

and

SAMUEL DEMOCRACY ZWANE

Defendant

JUDGMENT

Ismail AJ;

[1] The plaintiff instituted proceedings against the defendant wherein he sought an order that the Defendant pays the sum of R300 000-00 together with interest thereon at a rate of 15,5% per annum from 1 March 2006 to date of payment. The plaintiff also sought an order for the costs of suit.

[2] The Plaintiffs action is based on an oral agreement which was reached between himself and the defendant during December 2005. In terms of which the defendant sold to the plaintiff who purchased the goodwill in the business known as 'Moonlight' [hereinafter referred to as the business] .The purchase price of R300 000-00 for the business was paid in installments by the plaintiff to the defendant. The final payment was due by no later than the end of February 2006.

Upon payment of the purchase price the defendant undertook to conclude a lease agreement with the plaintiff in respect of the business situated at 2 Laingnek Street Volksrust, Mpumalanga.

The trial

[3] It is common cause that the amount of R300 000,00 was paid by the plaintiff to the defendant during the period December 2005 and February 2006, however, the defendant alleges that the amount was paid in

respect of equipment which the defendant purchased on behalf of the plaintiff.

[4] Plaintiff called Mr Kekana as a witness. Mr Kekana corroborated the plaintiff's version that he accompanied the plaintiff to the defendant's house and that the plaintiff handed over the sum of R40 000-00 to the defendant. The payment related to the purchase of the business Moonlight. Mr Kekana also testified that he accompanied the plaintiff to the business Moonlight.

[5] The defendant relied upon a Cash Sale document which is contained at page 12 of the bundle A. It would be prudent for me to incorporate this document in the judgment. The document appears hereunder:

HARRIS RICHARD JACOBUS VAN DER MERWE ERMELO

(hereinafter called the SELLER)

CASH SALE

Invoice No. 01

Customer

Name Upal Chandra Debenath

Date 20- Jan -2006

Address Warm Bath

Rep Harris

I D No 6[...]

Acc no

Phone

Tel No.

Description	Quantity	Unit	Total Amount
		Price	

Set of super Market

shelves	01	16 000-00	16 000-00
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2.4 X 2.4 Cold room

deep freezer	01	40 000-00	40 000-00
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Microwave stove	01	4 000-00	4 000-00
Wall display fridge	02	2 500-00	5 000-00
Fish Freyer	01	5 000-00	5 000-00
Stove Meat freyer	01	5 000-00	5 000-00
Computer Counter	02	5 000-00	5 000-00
Fish Freyer canope	01	6 000-00	6 000-00
Counter Fridge	01	7 500-00	7 500-00
TOTAL			287 500-00
VAT 14%			40 250-00
GRAND TOTAL			327 750-00

Name of equipment receiver: Asad

Date: 20-01-06

Signature:

[6] The plaintiff denied that he purchased the items appearing on the invoice reflected above. Mr Zwane, the defendant, on the other hand testified that the amount of R300 000-00 which he received from the plaintiff was used in order to purchase the equipment from Mr van der Merwe. This equipment was received by Asad who he alleged was the plaintiff's partner. The plaintiff denied knowing Asad and he also denied that Asad was his partner.

[7] The defendant called a witness, Mr Greyling, the plaintiff's erstwhile attorney to testify. Mr Greyling in response to a question from the court stated that he did not have the permission from his former client to testify. This aspect will be dealt with later in this judgment under the heading of privilege.

[8] Mr Greyling testified that he wrote a letter to the defendant which appears at page 9 of the bundle. The gist of the letter being that the plaintiff paid in total the sum of R300 000 for movable property as set out in

an annexure which was attached. The annexure being the invoice referred to in paragraph 5 *supra*. Mr Greyling denied that the plaintiff instructed him that the amount was for the purchase of the business. Mr Omar during cross- examination of Mr Greyling requested to see the latter's consultation notes. Mr Sullivan objected to Mr Omar viewing the notes. Mr Greyling was subpoenaed by virtue of a subpoena *decus tecum*. I permitted Mr Omar to view the notes as Mr Greyling had no objection to him perusing his notes. The Court adjourned in order to allow Mr Omar an opportunity to peruse the notes.

[9] When the matter resumed defendant's counsel sought an indulgence order to take instructions from the defendant. At that stage Mr Greyling was still being cross -examined by Mr Omar.

[9] Mr Omar was of the view that the court should permit him to complete his cross-examination of Mr Greyling where after the matter could stand down for Mr Sullivan to take instructions. Mr Sullivan informed the court that if the matter stood down it could curtail proceedings.

[10] The court granted Mr Sullivan an indulgence in order to discuss the matter with his client. When the matter resumed Mr Sullivan informed the court that he was instructed to apply for a postponement. Mr Omar strenuously objected to the request and I thought that it would be appropriate for Mr Omar to complete his cross-examination of Mr Greyling before an application for a postponement should be entertained.

[11] The cross-examination of Mr Greyling revealed that the plaintiff instructed him that he had paid the sum of R300 000-00 for the purchase of a business from Mr Zwane. Mr Greyling could not explain on what basis he wrote the letter contained at page 9 of the bundle, to the effect that the monies were paid to purchase equipment.

[12] Mr Sullivan thereafter informed me that he could not proceed with the matter as his instructing attorney's mandate was terminated.

[13] I enquired from the defendant whether it was correct that he had terminated the mandate of his legal team and Mr Zwane confirmed that he had done so. Mr Zwane thereafter requested that I postpone the matter. I gave him an indulgence till the next day to get his witness(es) to court with a new legal team if he intended to use lawyers failing which the matter would proceed without lawyers representing him.

[14] The court was informed by Mr Sullivan that the defendant was only intent to lead two witnesses during the presentation of its case, namely the defendant and Mr Greyling.

[15] The following day Mr Koos Pretorius from the Pretoria bar came to see me in chambers accompanied by Mr Omar. He informed me that he was instructed to apply for a postponement in the matter and that he required an indulgence until 10:45 as the affidavit pertaining to the postponement was being typed. I granted

him the indulgence until 10:45 a.m.

[16] At 10:45 a.m I went up to the court and waited until 11:10 for Mr Pretorius who only arrived at 11:35 a.m. Mr Pretorius did not have the courtesy of informing the court nor Mr Omar that he was experiencing problems and that he would be delayed. When the matter resumed Mr Omar immediately addressed the court regarding the discourtesy shown by Mr Pretorius and he stated that he phoned Mr Pretorius in order to find out why he was not at court. His mobile phone was apparently on voice mail.

[17] Mr Pretorius proceeded to address me on the issue of obtaining a postponement. I gave a judgment whereby the application for a postponement was dismissed.

[18] Mr Pretorius thereafter sought permission to withdraw from the matter as his instructions were to merely seek a postponement.

[19] I then explained to Mr Zwane what his rights were and the latter closed the defendant's case.

Evaluation of the Evidence

[20] I am confronted with two mutually destructive versions in this matter. It is trite that in such a situation the court should follow the approach laid down by Wessels JA in *National Employers Mutual General Insurance Association v Gany* 19931 AD 187 at 199 where the learned judge stated:

“ *where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is the true version and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. ”*

Coetzee J in *African Eagle Life assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237 H-238 B referring to the *Gany* matter stated:

It is frequently said that the dictum in the *Gany* case does not apply to civil cases because of the omission of the learned Judge to have regard to the measure of proof in civil cases being on a balance of probabilities. But the criticism is invalid because, unless suitably qualified, it confuses proof with the measure of proof. Where there is no probability there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person and disbelieve the other. Until then the chances of it being black or white remain exactly evenly balanced”

[21] The plaintiff and his witness corroborated each other. Mr Greyling the defendant's witness proverbially shot the defendant's case in the the foot. He confirmed that the plaintiff came to see him and advised him that

he purchased a business from the defendant. See his notes exhibits C1 and C2. This prompted Mr Sullivan to seek an indulgence and he stated to the court that the indulgence would curtail proceedings. One need not be a rocket scientist to conclude that Mr Sullivan realized that Mr Greyling's concession during cross-examination sounded the death knell to the defendant's case. The interlude during the cross-examination of Mr Greyling set in motion a train of events, namely:

1. Mr Sullivan unexpectedly seeking a postponement;
2. the termination of Mr Sullivan's mandate;
3. the appointment of Mr Pretorius to seek a postponement

[21] Mr Zwane did not impress me as a good witness. He deliberately avoided simple and straightforward questions which were put to him. Many questions had to be repeated several times before he would answer questions. This was in spite of him understanding English and having had the benefit of the question being interpreted to him in Zulu. When he addressed the court I was not at all surprised at his fluency in the English language. He is a successful businessman who is not a stranger to using lawyers to conclude business deals on his behalf. However, when the amount of R300 000,00 was given to him this was not recorded into writing nor was the purchase for which this amount was intended for.

[22] Had the monies been for equipment as he alleges one wonders why he did not hand over equipment to the value of R300 000-00 to the plaintiff and retain equipment for the balance of R27 000,00 in his possession until the plaintiff paid him that amount. He could have kept the meat freyer; fish freyer, computer counter and the counter fridge amounting to R27 500-00 as security for the balance due to him.

Attorney Client Privilege

[23] The writers Zeffert and Paizes in their book *The South African Law Evidence* 2nd edition at pages 647 et seq deal with the issue of privilege.

In *S v Nkata and Others* 1990 (4) SA 250 (A) at 255 I-J

“ The rule is based on public policy and regarded as fundamental to the proper functioning of our legal system. (Cf *S v Safatsa and Others* 1988 (1) SA 868 at 885D-886G.) Wigmore (*supra* at para 2291) points out that:

'In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed, hence the law must prohibit such

disclosure except on the clients' consent'

[24] In *Marais v Smith* 2000 (2) SA 924 (W) the court held that a witness brought to court by a subpoena *duces tecum* in order to produce documents cannot refuse to testify. He or she must claim the privilege and set out the grounds supporting it.

[25] In this matter Mr Greyling came to court with his file and did not raise the issue of privilege. The court asked him whether he discussed this with his client, the plaintiff, and he responded negatively. "As regards a legal adviser, it is his or her duty to claim the privilege; but when the legal adviser does so (or when he or she waives the privilege) he or she is acting for the client and not in his or her own right." *The Law of South Africa, Joubert* 2nd edition vol 9 [Lawsa].

See: *Bank of Lisbon & S Ltd v Tandrien Beleggings (Pty)Ltd* (2) 1983 (2) SA 626 (W)

Mr Omar at that stage indicated that he was waiving privilege. Up to that point in time Mr Greyling did not raise the issue of privilege notwithstanding his understanding and doctrine.

[26] Mr Omar submitted that I should refer this matter to the Law Society of the Northern Provinces [LSNP] in order for them to investigate the conduct of Mr Greyling on two grounds:

(i) that he did not canvass the aspect of privilege with his erstwhile client;

(ii) that Mr Greyling did not carry out the mandate of his client and that he wrote the letter (contained at page 9 of the bundle) without reference to his hand written notes and instructions.

Mr Greyling responded to the defendant's attorneys letter without referring to his instructions, which the plaintiff gave him.

In the light of Mr Greyling's evidence before me I am duty bound to report Mr Greyling to LSNP in order for the Society to determine whether Mr Greyling's conduct was appropriate or not.

[27] This judgment is not intended to be one relating to the conduct of legal practitioners, unfortunately these problems manifested during the trial and they need to be ventilated. I was once again during arguments before me requested to report the conduct of adv Pretorius to the bar council. The reason for doing so appears in paragraph 16 *supra*.

[28] I might add that where a practitioner receives instructions belatedly as in this case he or she should ensure that they are prepared to launch whatsoever application they intend to timeously and not utilize court time in order to prepare their applications. In this matter as a consequence of the conduct of Mr Pretorius the

court started 1 hour and 45 minutes beyond the appointed court time.

[29] Mr Omar is a feisty and persistent practitioner, however, in this matter I believe that he was perfectly entitled to criticize his opponent for the delay and indifference shown towards him and the court.

Costs

[30] Mr Omar in his address submitted that the court should it find for the plaintiff should award attorney and client costs against the defendant. He premised his argument upon the basis that Mr Greyling's evidence damaged the defendant's case materially and that the defendant wasted the court's time thereafter by seeking a postponement. I do not agree with plaintiff's representative that I should award costs as on the scale suggested.

The defendant was entitled to defend the action and there was nothing which dictates awarding costs on a punitive scale.

I am however, of the view that the defendant should be ordered to pay the costs relating to the application to have a document which was not discovered admitted.

[31] I am satisfied that the plaintiff discharged the *onus* which he had to meet on a balance of probabilities. Booth the plaintiff and Mr Kekana impressed me as good and honest witnesses.

[32] In the circumstances I make the following order:

- (1) the defendant is ordered to pay to the plaintiff the sum of R300 000-00;
- (2) the defendant is ordered to pay interest on the amount of R300 000-00 at a rate of 15,5% per annum
- (3) the defendant is ordered to pay the cost of the application for admissibility of the document not discovered;
- (4) defendant is ordered to pay the plaintiff's taxed party and party cost of the trial;
- (5) the LSNP is ordered to look into the conduct of Mr Greyling regarding the question of attorney client privilege and his failure to carryout his clients mandate;
- (6) Mr Pretorius failure to attend court at the appointed time is reported to the Bar Council of Pretoria.

Appearances:

For the plaintiff: Mr Z Omar Attorneys, Springs

For the Defendant: Adv M Sullivan instructed by De Beer and Van

Heerden attorneys - Pretoria.

- thereafter: Defendant in person

Judgment delivered on the: 24th March 2010.