

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

(3) REVISED. ☒ YES

24/1/11 DATE *[Signature]* SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case No: 38952/09

24/1/2011

In the matter between:

BLUE TURTLE TECHNOLOGIES (PTY) LTD

PLAINTIFF

and

VALOR IT (PTY) LTD

DEFENDANT

JUDGMENT

Delivered... 24/1/11

R D CLAASSEN J:

1.

Plaintiff claimed \$200 000 in damages, and costs, from defendant for an alleged repudiation by defendant of a contract. It is the Plaintiff's case that the following oral agreement was concluded (par 4 of the Particulars of Claim):

1.1 The Plaintiff would assist the Defendant in its CIPRO-tender by compiling all the technical data of the allocated portions of the Vignette portion of the tender. (The Vignette portion being the software portion of the tender.)

1.2 The Plaintiff and the Defendant would share the gross proceeds in respect of all the Vignette software sold and implementation services rendered in terms of the tender on a 50/50 basis.

1.3 The terms in 1.2 and 1.3 above, would be subject to defendant obtaining the tender.

1.4 Plaintiff as the sole agent for Vignette would purchase the software from Vignette at a price of \$1 000 000. The price to the client (CIPRO), would be \$1 400 000. The parties would then split the profit.

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In its plea, defendant admits that *an* agreement was reached.

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It is common cause that a meeting took place at a Mugg and Bean restaurant in Lonehill, during September 2008, at which Mr Devlin Janssens of Vignette and Mr Justin Arnoldi of the plaintiff, and Mr Moosa Seedat, Mr Josias Molele and Mr Jabu Majiza, from the defendant, were present. The discussions that took place at that meeting, form the subject matter of the dispute between the parties.

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It is common cause that defendant was awarded the tender, and that defendant did not buy the necessary software from Vignette via plaintiff, but bought it directly from Vignette, for \$100 000 less than it would have obtained it through plaintiff. It is also not disputed that plaintiff, at that time, had a contract with Vignette, to be its distributor for their software in South Africa (and further abroad in Africa).

Three people testified on behalf of plaintiff:

Mr G van den Bosch, the managing director of plaintiff;

Mr J Arnoldi, responsible for the *enterprise content management* (ECM) at plaintiff;

Mr M Ladbroke, also at plaintiff, being a Vignette software expert.

Defendant also called three witnesses:

Mr Moosa Seedat, its chief executive officer;

Mr P Hanson, defendant's head of solutions architecture, responsible for completing the CIPRO bid;

Mr Jabu Majiza, plaintiff's business development director.

The relevant portions of defendant's plea (in answer to par 4 of the particulars of claim set out above) read as follows:

"3.2.3 *Vignette indicated its willingness to be the Defendant's software provider through the Plaintiff as its local agent; and*

3.2.4 *The Plaintiff indicated that it had the necessary skills and capacity to provide Vignette's software solutions in relation to the CIPRO tender;*

3.3 *...*

3.4 *In terms of the presentation made by the defendant the plaintiff was requested to look at the electronic(sic) content management aspect of the tender, being the technical aspect thereof.*

- 3.5 *The Plaintiff indicated its willingness and capability to complete and provide the electronic content management portion of the tender.*
- 3.6 *The Plaintiff was given the technical specifications of the tender and was requested to provide answers thereto within a period of a week by 26 September 2008.*
- 3.7 *...*
- 3.8 *During or about 26 September 2008 the Plaintiff provided an incomplete and substandard response in relation to the electronic content management aspect of the tender. The Plaintiff's respond(sic) did not meet the specific requirements of what was required in terms of the tender.*
- 3.9 *The response provided by the Plaintiff did not meet specific requirements relating to record management and document management which are substantial parts of the electronic content management.*
- 3.10 *The Plaintiff's response also did not address the issue of how there was going to be integration between what they had provided and other applications that were relevant to the tender. The Defendant, on various occasions, indicated its dissatisfaction to the quantity and quality of the response provided by the Plaintiff and the Plaintiff indicated that it was waiting for a response to some of the answers to the tender from Vignette Solutions (Pty) Ltd.*

- 3.11 *On or about 3 October 2008 the Plaintiff indicated to the Defendant that it was unable to provide all of the technical specifications required by the Defendant in relation to the CIPRO tender.*
- 3.12 *During or about 3 October 2008 the Defendant indicated to Vignette Solutions (Pty) Ltd and the Plaintiff that it was unhappy about the non-performance by the Plaintiff and indicated that the Defendant will address the electronic (sic) content management aspect of the tender, on its own.*
- 3.13 *The Defendant completed the electronic(sic) content management portion of the tender on its own and duly submitted a tender on 8 October 2008.*
- 3.15 *At the time that the Defendant notified Vignette Solutions (Pty) Ltd and the Plaintiff that the Defendant was going to conclude the electronic(sic) content management aspect of the tender on its own, no agreement had been reached between and among the parties about the amount or the percentage that the plaintiff would be entitled to in case it complied fully with the request from the Defendant.*

(For electronic read enterprise)

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Plaintiff's witnesses basically testified according to the particulars of claim. They denied that their work was sub-standard and that it was not used at all by defendant in the tender documents. The also testified that the defendant "moved the goalposts" by requiring plaintiff to do more than originally agreed upon.

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The defendant's version, in court, consisted of various versions:

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- 8.1 In the plea (paragraph 3), it was agreed that a *contract* was concluded, albeit on somewhat different terms. This was also clearly stated by plaintiff's counsel in the opening address, while defendant's three witnesses were sitting in court. Defendant's counsel agreed with the statement. Defendant further pleaded that plaintiff did not perform adequately in terms of its responses to the tender, and defendant decided to go it alone, with the assistance of Vignette. Defendant further denied that there was any agreement about the 50/50 split on the gross profit.
- 8.2 Defendant's first witness, Mr Seedat, testified that there was no agreement at all, as defendant had already "registered the CIPRO opportunity" with Vignette. He did however concede that a 50/50 split on gross profit was discussed. His evidence was that as far as defendant was concerned, plaintiff and vignette had their own agreement and that plaintiff was only an agent for Vignette.
- 8.3 Mr Majiza testified that the "agreement" was only a "test phase" to see whether plaintiff could do the job for defendant, with a view to further co-operation in the future. There was however no agreement reached at all. Furthermore, defendant did not need the assistance of plaintiff at all for purposes of the CIPRO tender.
- 8.4 Mr Hanson was the person who finalised the tender for defendant. He stated that the first response from plaintiff, dated 26/9/08, was a preliminary response. They were waiting for more. By the time plaintiff's further response arrived on 7/10/08, it was too late. Defendant had already decided to go it alone. He stated that none of the responses of the 7th were used. He later had to concede that some of it was used. He also denied that he said that plaintiff's work was *sloppy* or *sub-standard*. He could not explain where or from whom that description came from, but he was the only one from defendant's side who would have known that it was sloppy or sub-standard.
- 8.5 During the trial defendant's counsel also specifically put on record that the only two issues remaining were:

8.5.1 Whether it was a condition of the agreement that the Plaintiff had an exclusive distributor agreement with Vignette;

8.5.2 Whether the Plaintiff's technical response amounted to sub-standard or "sloppy" work (as described by the Defendant's counsel).

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It is an interesting fact that much of these different versions were NOT put to plaintiff's witnesses during cross examination. Defendant's witnesses also contradicted one another on various other aspects. On the other hand plaintiff's witnesses were clear in their testimony, and did not contradict one another.

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It is also an interesting fact that defendant's counsel, in his Heads of Argument, makes no attempt to weigh up the versions of the different witnesses against either the pleadings or the other witnesses. He simply accepts as a given that the evidence of the defendant is the only acceptable evidence. Apart from the fact that it is not very helpful to the court, it shows a blatant disregard for the basic rules evidence and how it is to be evaluated.

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A whole stack of e-mail correspondence between the three parties, (as part of Exhibit A), were put before court. None of it was disputed. Several things emanate from these writings. It is obvious that the various parties were all in contact with one another on more than just a daily basis. At times it was almost hourly, or even less. All correspondence was also copied to all concerned. However one crucial bit of information was not given to plaintiff. That was the fact that defendant was going "to go it alone". Plaintiff was only informed of this fact on 16 February 2009, i.e. after the tender was awarded to defendant, and plaintiff was asking about the way forward with the supply and installation of the software. It was also only then that plaintiff became aware of the fact that

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defendant bought the software directly from Vignette. The actual price paid by defendant to Vignette only became known to plaintiff during the evidence, being \$100 000 less that via plaintiff. (On account of this information, plaintiff applied, at the end of the evidence, to have the amount of the claim amended to \$250 000.)

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Another issue that arose, related to the specific parts that plaintiff had to complete in the bid. It is common cause that a second meeting was held on 22/9/08 at the offices of "Tibco", another company that was to help with certain aspects of the bid. A dispute arose thereafter as to what parts of the bid plaintiff had to complete. It is clearly illustrated in some of the correspondence that passed between the parties:

12.1 On 3 October 2008 an e-mail was addressed by Moosa Seedat, to, *inter alia*, Marc Ladbrook. This e-mail reads as follows:

"Hi Justin,

Subsequent to our initial meeting in Lonehill, I met with Harry and Marc at the TIBCO offices where we cleared out what Blue Turtle needed to do and provide. One area was to answer all questions relevant to ECM/Vignette in annex "B". You are welcome to confirm this with Harry/Marc.

I trust that this will sort out this to and fro of emails. Please assist in completing the annexure "B" so that we can finish up the tender response over this weekend.

Thanks and Kind Regards

*Moosa
Valor IT."*

12.2 On the same day, approximately two hours later, Marc Ladbrook responded to this e-mail. The response of Ladbrook reads as follows:

"Hi Moosa,

Just a correction here. I do recall the following that was agreed upon at the meeting at TIBCO's offices.

- 1. Harry on at least three accounts confirmed and specifically stated ECM, Collaboration and Portal with regards to annexure "B". All the responses were yes.*
- 2. I specifically asked if we were supposed to answer the Records and Document management and the response was no as it was going to be handled by someone else.*
- 3. Security, it was mentioned, it was going to be handled by Novelle.*
- 4. Integration it was indicated that we should not worry about it. (if you recall I did bring this up saying that we could possibly integrate Tibco BPM using a portlet).*

Kind regards."

12.3 Seedat did not dispute the contents of the last-mentioned e-mail in his response. On the same day he responded to this e-mail as follows:

"Thanks Marc,

Are you guys going to respond to the sections highlighted in annex "B" as sent to you by Jabu yesterday? Please confirm.

*Thks
Moosa."*

- 12.4 These e-mails were in response to an e-mail sent by Ladbrook of plaintiff to Justin Arnoldi, Devlin Janssens and Harry Nicholson, the previous day, and not to any representative of defendant. It *i.a.* contained the following statements:

I would like to escalate this problem with the response to the CIPRO-tender. Valor IT have come back to us with more than what was stipulated in our meeting with them on the 22nd of September. Although this was a confusing meeting to begin with as TIBCO and ourselves were not sure what part of the tender to respond to (TIBCO had already been in meeting with Valor IT prior to this). Eventually we came to agreement in which Harry on at least three accounts confirmed with Moosa that we were only going to respond to annexure "B" with BMC, Portal and Collaboration in which all responses were yes.

I know I specifically asked Moosa if we were supposed to respond to the Records and Document management systems (as I come from this space) and the response was no. Moosa also indicated not to worry about Security as this would be handled by some other party....

I really do feel that if there was any misunderstandings with regards to who should do what this could have been raised by Valor IT by the latest Monday (29 September) and we could have managed to get

more questions/reviews in as Vignette have not come back to us at that stage.

Please let us know would you like proceed with this.

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It is noteworthy that on the very same day that defendant allegedly decided "to go it alone", they also attempted to "shift the goalposts", by requesting additional input from plaintiff. It is also to be noted that this was but a few days before the bid had to be put in. And one of the complaints of defendant was that it did not get the necessary responses timeously. From a perusal of these facts, it is clear that the evidence of defendant's witnesses is not only confusing, but also unreliable.

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I do not intend to deal with all the arguments on behalf defendant. As stated earlier, no attempt was made to analyse and compare the evidence of the various witnesses. The evidence contradicted the pleadings as well as the statements of defendant's counsel. Counsel for defendant makes short shrift of the fact that the evidence contradicted the pleadings. It is stated as follows in the Heads of Argument:

The defendant presented evidence that supported what was stated in its plea. Any suggestion that the defendant's witnesses contradicted what is contained in its plea is not only less than frank; it is based on the selective reading of the plea explanation contained therein.

It only needs to be read and compared with what has been set out earlier, to see that it is a fallacious attitude. The case needs to be adjudicated on the basis of plaintiff's evidence.

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In dealing with the issues not put to plaintiff's witnesses in cross examination, he makes the following allegation:

During cross-examination of Mr Hansom and Mr Majiza, the plaintiffs' counsel raised an issue that the witnesses' versions were not put to the plaintiff witnesses. Such a statement is devoid of any truth. To even to begin to make an issue therefrom is like the plaintiff is clutching on straws.

From a reading of the evidence it is quite clear that the issues raised earlier were definitely not put to the witnesses. Some of them were quite crucial, and gave plaintiff no chance to reply thereto. One is thinking particularly of the evidence of Mr Hanson, regarding what portions were used and what not. The fact is however that he eventually had to admit that plaintiff's material was used.

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The first question that arises is whether there was indeed a contract as alleged and testified to by plaintiff's witnesses. There can be no doubt that plaintiff's witnesses were honest and reliable. There were no contradictions of any material nature. The only issue that they did differ on, is as to what material is normally contained in the *enterprise content management* software. The point is however that whatever may *normally* be contained therein, the dispute related to what was *agreed* that plaintiff had to provide. This is where defendant's witnesses' reliability comes into play, read with the various e-mails referred to above.

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One must also consider the probabilities. It is inconceivable that the plaintiff would have gone to all the trouble it did, if there was no binding agreement, at least in its mind. The absence of the testimony of Mr Janssens must be evaluated in this respect. He was sub-poenaed by plaintiff to give evidence, *duces tecum*, but also to give evidence on the facts. He did not appear. It is probably understandable, because it seems quite clear that he played a double role in this whole affair. His evidence alone could have given the answer to the dispute between the parties. However it is clear that a deal was made between

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defendant and Vignette, to go behind plaintiff's back. That is to my mind the only reasonable inference to be drawn from the facts as gleaned from the evidence of both parties. To my mind no negative inference can be drawn from plaintiff's failure to have Janssens arrested and brought before court to testify. If anything, a negative inference can be drawn against defendant, because it allegedly had an agreement with Vignette. However that was not pleaded at all.

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Having said all that, it is clear to me that plaintiff's version, on the evidence, the probabilities and credibility, is the preferred version, and plaintiff has succeeded in discharging the onus resting on it.

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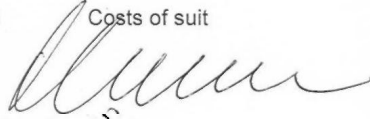
A further issue needs to be addressed. Defendant raised the issue of not joining Vignette as a party to the proceedings. As indicated already, Mr Seedat tried to convey that plaintiff's contract was in actual fact with Vignette to provide defendant with the necessary responses on Vignette's behalf. Because of that, it was argued that Vignette ought to have been joined. There is no merit in this argument. Plaintiff's case is simply that it had a contract with defendant, and no one else. If anything, defendant would have had reason to join Vignette.

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Lastly there is the issue of plaintiff's application to amend the amount of its claim, from \$200 000 to \$250 000. There was no objection raised to the application. The evidence regarding the amount is not in dispute. Plaintiff's case has all along been that the gross profits would be shared on a 50/50 basis. There can thus be no problem with granting the amendment. It must be added that plaintiff also claimed damages for the implementation portion of the contract. This part of the claim was withdrawn *in initio*.

I therefore grant judgment in favour of plaintiff as follows:

- 1 Payment of the amount of \$250 000,00
- 2 Interest on the said amount at 15.5% per annum *a tempore*
- 3 Costs of suit



R D CLAASSEN

Judge of The High Court Of South Africa.