



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5484/2016

In the matter between:

MPHATI BUSINESS ENTERPRISE (PTY) LTD

Plaintiff

and

**SIZAKELE CONSULTANTS CC t/a COLANDRA
CONSTRUCTION**

Defendant

HEARD ON: 30 & 31 OCTOBER 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 22 FEBRUARY 2019

Introduction

- [1] These proceedings concerned an action brought by the plaintiff based on a partly oral and partly written joint venture agreement alleged to have been concluded on/or about July 2015. The

plaintiff is a private company duly incorporated in terms of the law carrying on business in Bethlehem. The defendant is a close corporation with the registered office based in Bloemfontein. At all relevant times the plaintiff was represented by its sole director Maseru Johannes Mphati and the defendant by its member Siphonhlapo. None of the parties raised a special plea or point in limine to be considered prior to the merits. In this action, the crisp question to be decided is whether or not a joint venture agreement was entered into by and between the parties

- [2] In paragraph 3 of the particulars of claim, the plaintiff alleged that the parties have concluded a joint venture agreement. The paragraph read as follows:-

“On/or during July 2015 the Plaintiff and the Defendant entered into a partly written and partly oral Joint Venture Agreement (hereinafter referred to as the agreement”). The agreement was concluded in Bethlehem with the Plaintiff being represented by Mr. Maseru Mphati and the Defendant represented by Mr. Siphonhlapo. A copy of the partly written agreement is attached hereto marked Annexure “A”.”

- [3] Dealing with the issue of the unsigned document, the plaintiff pleaded in paragraph 4 as follows:

“The Plaintiff following negotiations provided the Defendant with a copy of the agreement which the defendant did not sign.”

- [4] The gist of the agreement and the background of the discussions between the parties is dealt with in paragraph 5 in the following manner:-

“The material terms of the agreement between the Plaintiff and the Defendant were *inter alia* as follows:

- 5.1 The joint venture was specifically formed for the Defendant attending to fulfilment of its obligation with the Department of Health under contract number: DOH(FS) 10/13/14; supply and delivery of infection control, cleaning equipment and supplies for health institutions in the Free State.**
- 5.2 The Plaintiff and the Defendant would form a joint venture in terms of which the Plaintiff and the Defendant would share all profits, losses and other allocations on a basis of 50% each;**
- 5.3 The Plaintiff would contribute finance towards the joint venture in the form of a loan, which the Plaintiff did for the period of 28 July 2015 to 6 August 2015 to the total value of R 239 563.00;**
- 5.4 The joint venture would repay the loan to the Plaintiff, which the joint venture has done;**
- 5.5 The joint venture will dissolve on the occurrence of the following events:**
 - a. the adjudication of bankruptcy, withdrawal, removal or insolvency of either of the parties.**
 - b. the sale or other disposition, not including an exchange of all, or substantially all, of the joint venture assets.**
 - c. mutual agreement of the parties.**
 - d. termination of the contract by the parties.**
 - e. lapsing of contract period with the Department of Health.**

5.6 The sharing of profits on the basis of 50% would be done on a six (6) month interval;

5.7 The plaintiff would contribute the providing of a motor vehicle for deliveries, telephone services, Internet services and other future administrative assistants.

[5] The allegations referred to above were dealt with in the plea filed by the defence as follows:-

“3.1 The Defendant pleads that:

3.1.1 During or about July 2015 the defendant, duly represented by Mr. Sipho Edmond Nhlapo requested Mr. Maseru Mphati, acting personally, to advance an amount of R 200,000.00 to the Defendant to enable the Defendant to make payment to a supplier of the Defendant;

3.1.2 Mr. Maseru Mphati acceded to the Defendant's request and duly made payments to the defendant supplier in the amount of R 200,000.00;

3.1.3 following payment of the amount of R 200,000.00 to the Defendant supplier, Mr. Maseru Mphati suggested that he and the Defendant should enter into a joint venture agreement;

3.1.4 Mr. Maseru Mphati indicated that he would prepare a draft written joint venture agreement for the Defendant to consider and if satisfied with the contents, the parties would sign the document

which would then constitute the joint venture agreement;

3.1.5 A written draft joint venture agreement was provided to the Defendant by Mr. Maseru Mphati;

3.1.6 The draft written joint agreement was not accepted and not signed by the Defendant;

3.1.7 Mr. Maseru Mphati during or about July and September 2015 requested repayment of the amount of R 200,000.00 advanced to the Defendant;

3.1.8 The amount of R 200,000.00 was dearly repaid by the defendant to Mr. Maseru Mphati.

3.2 The Defendant denies that an agreement was concluded between the plaintiff and the Defendant as alleged and the plaintiff is put to the proof thereof.

3.3 The remainder of the contents of these paragraphs are denied.”

[6] During the pre-trial conference held in terms of Uniform Rule 37 on 27 September 2017, the parties agreed as recorded in the minutes that the issue to be adjudicated upon is whether or not there was a joint venture agreement. The remainder of the issues to stand over for later determination. Therefore that is the only issue before me relating to the merits.

Factual Background

- [7] On/or about May 2015 the sole director of the plaintiff (Maseru Johannes Mphati hereinafter referred to as “Mphati”) was approached by the member of the defendant (Sipho Nhlapo hereinafter referred to as “Nhlapo”) who informed him that he had been awarded a lucrative tender to supply hygiene and cleaning material to the Department of Health - Free State Province. The latter conveyed to him that he was having financial constraints to perform as per agreement and as a result was on the verge of losing the tender. The key performance areas that were lacking on his part were logistics, administration and finance. To expand on this, he did not have transport to deliver the required orders to various parts of the Province, the financial muscle to procure the necessary goods and the capacity to administer the contract.
- [8] At this point Nhlapo suggested to Mphati they must join hands. The duration of the contract was for three (3) years which sounded economically worth the trouble. Nhlapo provided Mphati with all the documents that he had signed with the relevant government department. Astute businessman that he is, Mphati prepared a joint venture agreement and scheduled a follow-up meeting in Bloemfontein to formalize their business relationship. They duly met at Kentucky Fried Chicken outlet near the Grey Sports Centre in Bloemfontein.
- [9] Their discussion centred around the implementation of the project. Shareholding and sharing of the dividends was also dealt with. They concluded that they will split the ratio profits equally ie. 50/50. The salaries of R 16 000,00 and R15 000.00 respectively for William Mphati and Nhlapo was agreed upon. He was

appointed to be the representative of the plaintiff in the new entity and use his expertise for the benefit of the joint venture.

- [10] The agreement was reached and what was left was for it to be reduced in writing. Mphati drafted the document and remitted it to Nhlapo who took it to his accountant. It is common cause that eventually he did not sign the document.
- [11] Although the parties were still negotiating, some clauses of the agreement were already implemented by them. Mphati through his business entity had already paid a supplier namely Servest to procure some material. He had supplied some goods in the Qwa-Qwa/Bethlehem area. A bakkie was also rented from Avis Car Hire for the delivery of the goods. The sum of approximately R 200 000.00 had been paid to the defendant for operational costs. This amount was repaid to the plaintiff. The business relationship soured around December 2015 when the issue of profit-sharing was due for discussion.
- [12] Sehloho Mphati left his job as a Media Liason Manager with a government department to be a representative of his brother in the joint venture between the plaintiff and the defendant. He was introduced to Nhlapo who at the time did not even have money to put petrol in his motor vehicle. They discussed the logistics around the project. Together with Nhlapo they travelled to various health facilities to publicize the tender. The purpose of this exercise was to inform various shareholders that orders had to be placed through the defendant. The spin off was to maximize profits and ensure that the client department is complying with it.

He was also requested by Nhlapo to attend the meeting where the price adjustment was the main item under discussion. Their cordial relationship became strained around November 2015. Nhlapo became evasive and started not taking calls and/or honouring appointments. He also stopped reporting for duty. Despite all this his salary was paid until February 2016 and thereafter it was stopped.

- [13] According to Nhlapo he approached Mphati in July 2015 at his offices in Bethlehem. He requested a loan of R200 000.00 and this amount was paid directly to his suppliers. The issue of joint venture was proposed by Mphati but they did not discuss the terms of it. Mphati was assigned the responsibility to draft the joint venture agreement and remit it to him. He received it but did not sign because he was dissatisfied with some clauses.
- [14] The delivery that Mphati did on his behalf was not in terms of the agreement but a favour he had requested from him. He conceded that he had shortcomings as discussed in the preceding paragraphs and was not opposed in principle to the idea of entering into a joint venture agreement with the defendant. He did not enter into it on the strength of an advice from his accountant because it was not in his interest to do so. The loan agreement did not have any terms neither did they discuss any terms relating to William Mphati. This matter was discussed over a telephone call and the payment of R15 000.00 made to him was based on the financial strength of the business. In employing William, he was only returning a favour to Mphati.

Application for amendment

- [15] At the conclusion of the plaintiff's case counsel for the plaintiff applied for the amendment of paragraph 3 of the particulars of claim by substituting the name "Bethlehem" with the name "Bloemfontein". This proposed amendment was objected to on behalf of the defendant on the basis that the plaintiff has failed to make out a case for such an amendment. In addition no evidence was led why the particulars of claim should be amended nor explained why it was not done much earlier before the trial commenced.
- [16] Uniform Rule 28 (10) provides that the court may grant a party leave to amend a pleading at any stage before judgement. In deciding whether to grant or refuse such an amendment, a court must exercise a discretion. The primary principle is that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties.¹ In exercising the discretion the court must be concerned with the attainment of justice between the parties and not be bogged down by too rigid adherence to the pleadings.²
- [17] The case of the plaintiff is that the parties entered into a joint venture agreement. There is only one joint agreement that is referred to. It is uncontested evidence that the parties held meetings where some kind of a business venture was discussed. That took place in Bethlehem and Bloemfontein. According to the

¹ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 637 A

² *Four Tower Investments (PTY) Ltd v Andries Motors* 2005 (3) SA 38 (N)

plaintiff the agreement was entered into in Bloemfontein at their meeting held at Kentucky Fried Chicken outlet. The defendant's case is that no joint venture agreement was entered into although the joint venture agreement was handed over to him. In this regard I can find no prejudice that will be suffered by the plaintiff if the amendment is allowed. This is not a case of allegation of many joint venture agreements but one. The amendment even if it is effected does not mean that a finding has been made that the parties did enter into such an agreement. In tandem with the indulgent approach, the application for amendment is granted.

Legal principles

- [18] In the heads of argument, counsel for the plaintiff submitted that the burden of proof lies on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed. He quoted and relied on the judgment of **Goldblatt v Freemantle** where the following was said:-

“Subject to certain expectations, mostly statutory, any contract may be verbally entered into, writing is not essential to contractual validity. If during negotiations mention is made of a written document, the court would assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract and (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that the contract shall be a written one (see Voet 5.1.73; V Leeuwen 4,2 sec 2 Decker's note); and in that case there will be no binding obligation until the terms have

been reduced to writing and signed. The question is in each case one of construction”³

- [19] This principle was emphasized and the passage referred to in Goldblatt supra was quoted with approval in **Woods v Walters**. Innes CJ wrote the following:

“It follows of course that where the parties are shown to have been ad idem as to the material conditions of a contract, the onus of proving an agreement that is legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.”⁴

- [20] The essence of the submissions is that whether the agreement (joint venture agreement) requires contractual force or not depends upon the intention of the parties, their contract, the terms of the agreement and the surrounding circumstances.⁵ In this matter an offer was made by the defendant and dully accepted by the plaintiff. The document was drafted and handed over to Nhlapo who did not communicate his disagreement at all to Mphati. They simply continued working in the unison.

- [21] Counsel for the defendant in a two (2) pronged attack refutes the existence of the agreement and in the event that it is found that it does, then such an agreement is invalid. In his written submissions he argued that the joint venture agreement was to be signed by Nhlapo only if he was satisfied with the terms and conditions therein. He was not content with its terms particular the

³ 1920 AD 123 at 128-129

⁴ 1921 AD 303 at 305

⁵ Cgee Alsthom Equipment v GKN Sankey PTY Limited 1987(1) SA 81 (A) at 92 E

one dealing with the equal sharing of the profit and sought professional advice. That led to him not signing the document. The parties were simply engaged in negotiations and discussions about a possible joint venture which did not materialize.

- [22] The second leg of the argument is that the tender was awarded to the successful bidder namely the defendant. In turn, a service level agreement was signed between the Department of Health and the defendant. In terms of the Government General Conditions of Contract dated July 2018, paragraph 18.1 prohibits any variation or modification of the contract except with the written amendment signed by the parties concerned. He relied on the case of *Municipal Manager: Qaukeni Local Municipality and another v FV General Trading*.⁶ In that matter the court held that in considering the validity or otherwise of the second contract, section 217 (1) of the Constitution 108 of 1996 was pertinent. The provisions which is couched in peremptory terms demands that an organ of State in procuring goods and services must do so in accordance with the system that is fair, equitable, competitive and cost effective. The cornerstone of his submission is that even if the joint venture agreement is deemed to have existed, such an agreement is invalid and unenforceable because it will be in contravention of the aforementioned provisions because the Department of Health did not grant the necessary consents.

Application of the law to facts

⁶ 2009 4 All SA 231 (SCA)

- [23] Applying these legal principles to the facts before me, I have no hesitation that the parties entered into a joint venture agreement. It is common cause that Nhlapo went to Mphati to request financial assistance which was given. In their discussion he made available all the documents pertaining to the award of the tender. The defendant was assisted with logical support to transport the ordered goods. He employed William who assisted with marketing and administration of the project. William even represented the defendant at a meeting where price adjustment or increase was discussed. This is undisputed. Although the relationship soured around November/December 2015 and he stopped reporting for duty, the defendant continued to pay his salary until February 2016. The reasons advanced for doing so defies logic and conduct of an astute “businessman” Nhlapo projects himself to be. It can also not be a coincidence that his monthly salary is the same amount mentioned in the unsigned joint venture agreement.
- [24] No agreement can come into existence without prior discussions and negotiations. This occurred between the parties over a period of time commencing in Bethlehem and concluding in Bloemfontein. The document was sent to him. Assuming Nhlapo did not agree with it, he did not communicate his disapproval to Mphati. The contents of the professional advice were also not divulged to Mphati so that it can be amended or the relationship be terminated. I would expect a businessman in his position to voice out his opinion(s) about the document in no uncertain terms to its author. It was not challenged that he simply became un-cooperative as stated above thus bringing the agreement to an abrupt end.

- [25] The basis of the defence as encapsulated in the plea and evidence led has always been that the amount of R200 000.00 paid by Mphati on behalf of the defendant was a loan and that no joint venture agreement was concluded between the parties. This is the case that was defined in the pleadings and the plaintiff was prepared to meet against its claim.
- [26] The argument based on section 217 of the Constitution and reliance on Municipal Manager: Qaukeni Local Municipality supra is misplaced. In any event the facts of the quoted case are distinguishable from the facts of this matter. In that matter the oral agreement concerned an organ of States and a private entity. It is not the position in the matter before me. I find no application of section 217 of the Constitution between two (2) private entities which does not deal with the awarding of a tender but the conclusion of the joint venture agreement. In any event it was never the case of the defendant that the agreement was invalid for this or the other reason. It has always been the contention that the parties did not conclude the joint venture agreement.
- [27] The reliance on the General Conditions of Contract does not come to the assistance of the defendant. The parties must enter into an agreement and therefore present it to the client department for the necessary amendment. The defendant, after concluding the agreement, obstructed this process from being brought to finality.
- [28] The lengthy cross-examination directed at discrediting the probative value of the evidence of the existence of the joint

venture agreement did not disturb the prima facie case. I could not find any fault in the evidence of the Mphati brothers about the chronology of events, the conduct of the parties and the surrounding circumstances in their dealing with the defendant.

[29] Nhlapo did not create a good impression of himself as a witness under cross-examination. He contradicted himself in a number of aspects and left a trail of unsatisfactory aspects in his evidence. At best he was evasive to give straight answers to simple questions directed to him. He testified that the defendant was in principle not opposed to the joint venture agreement. He did not discuss the terms of the alleged loan with Mphati. Not a single term was discussed. Equally they did not discuss the terms and conditions of the alleged employment of William Mphati. This matter was briefly dealt with over a telephone conversation. Amazingly, his salary was perched on the strength of the joint venture agreement. He was advised by his accountant not to enter into the joint venture agreement because it was not good or in the defendant's best interests. He could not reveal what it is that was against the defendant to an extent that it will not be prudent to proceed to sign the document. I am convinced that he did not make an honest and credible witness. I have no qualms about rejecting his evidence as unreliable.

[30] In conclusion I am satisfied that the plaintiff has proved its case on a balance of probabilities. I do not have any reason to deviate from the principle that the defendant as the unsuccessful party must also pay the costs.

[31] According I make the following order:-

31.1 The parties are deemed to have entered into a joint venture agreement.

31.2 The defendant is ordered to pay the costs.

M. A. MATHEBULA, J

On behalf of the Plaintiff:

Instructed by:

Adv. W. van Aswegen

Phatshoane Henney Inc

BLOEMFONTEIN

On behalf of the Defendant :

Instructed by:

Adv. W. Groenewald

Symington & De Kok

BLOEMFONTEIN