



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 16841/ 2015

Date of Hearing: 14 March 2018

Date of Judgment: 19 October 2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
19-10-2018	

In the matter between:

BILLY SELEKANE

First Plaintiff

ABE THEBYANE

Second Plaintiff

And

LEGACY VENTURES (PTY) LTD

First Defendant

ALBERT NORMAN WESSON

Second Defendant

ALISTER CLIVE GORDON

Third Defendant

JOHN GRAIG GLANVILLE

Fourth Defendant

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The First Defendant is a company in which the Second to the Fourth Defendants hold equal shareholding. I shall henceforth refer to the First Defendant as Legacy Ventures and the Second to the Fourth Defendants as the Defendants. To conduct business, Legacy Ventures needed to raise finance and to have sway in the right places in the business community in the country. The Defendants acknowledged that the objective of Legacy Ventures would not be easily accomplished without the recruitment of suitable black members to act as a black equity empowerment group ('BEE') to acquire shares in Legacy Ventures. The Plaintiffs were then identified for that purpose.

[2] On 12 October 2013 at Boksburg, the parties concluded a memorandum of understanding (hereinafter referred to as 'the MOU'), In terms of the MOU the Plaintiffs agreed to pay into the account of Legacy Ventures an amount of R406 000 and to assist to influence business in favour of Legacy Ventures. In exchange, the Defendants agreed that they would dispose of 70% of their shareholding in Legacy Ventures to the Plaintiffs. In consequence of the relationship between the parties, the shareholding of the Defendants in the issued share capital of Legacy Ventures would decrease to 10% each while the Plaintiffs would share the remaining 70% equally.

[3] Initially, the Plaintiffs deposited an amount of R306 000 into the bank account of Legacy Ventures. At the request of the Defendants, the Plaintiffs later added an amount of R200 000 to the amount of R306 000 for the partial acquisition of the 70% shareholding. The cash component of the 70% was thus increased to R506 000.

The payment of the amount of R506 000 is, as I understand it, a matter of common cause. However, whether or not the Plaintiffs performed in terms of what is stipulated in the agreement is central to the parties' dispute.

[4] The Plaintiffs allege that they have complied with all the terms of the agreement. Conversely, the Defendants have failed to observe the terms of the agreement in that they have failed to effect registration of transfer of their shares in the issued share capital of Legacy Ventures amounting in all to 70% into the names of the Plaintiffs. For that reason, the Plaintiffs at first sought to claim specific performance but later amended their particulars of claim to seek restitution. Their entitlement to both remedies having stemmed from the Defendants' breach of the MOU.

[5] The Defendants deny that they are in breach of the MOU. They contend that on a proper construction of the MOU, payment of the amount of R506 000 was made in respect of working capital and is not refundable. In any event, maintain the Defendants, performance by the Plaintiffs did not consist in payment of the cash amount of R506 000 only but the obligations stated under Clauses 4.1 to 4.3 had to be discharged. The Plaintiffs have failed to execute on their obligations arising from the MOU. The Plaintiffs are as such, conclude the Defendants, not entitled to claim payment of the amount of R506 000. Besides, the Defendants point to the defective manner in which restitution has been pleaded in the particulars of claim.

[6] The Respondents have counterclaimed in the amount of R5 000 000. However, it appeared that there was no fervour to follow through the counterclaim.

As a matter of fact, Counsel for the Respondents did not mention the counterclaim during his argument, not even in his heads of argument. Counsel for the plaintiffs, however, referred to the fact that the plaintiffs did not proceed with the counterclaim and I did not hear any objection. Accordingly, I regard the counterclaim as withdrawn. As such, it does not form part of this judgment.

EVIDENCE ON BEHALF OF THE PLAINTIFFS

[7] In support of their claim, the Plaintiffs rely on the testimony of the First Plaintiff. He testified as follows:

7.1 During 2012, he and the Second Plaintiff were invited by the Defendants to become BEE equity partners in a project called the Legacy Project. Legacy Ventures had already been identified as a vehicle that would be suitable to run the project. The project had prototype patented products which would be exposed to Legacy Ventures once properly structured as a BEE entity with the Plaintiffs as shareholders. The products would be set-up for industrial and commercial use. The products are listed in the MOU as aqua sola car wash system, sky cleaner, trolley wash, takkie cleaner, escalator cleaner and blind cleaner.

7.2 He and the Second Plaintiff were specifically targeted because they were perceived as above reproach candidates for BEE as they were socially networked persons and had business experience in their individual rights. They were offered opportunity to act as endorsing parties for the Legacy Project. He testified that he is a motivational speaker and held shares in other businesses. He said that the MOU

was the foundation of the agreement between the parties whose purpose was to develop and produce products on an incubator model and the business model.

7.3 He and the Second Plaintiff had anticipated the 70% stake to be transferred and registered into their respective names in equal share upon payment of the sum of R406 000 mentioned in Clause 4.1 of the MOU. It is common cause that the amount ultimately paid to Legacy Ventures by the Plaintiffs amounted in all to R506 000. He said that they had to make a further payment of R100 000 because it so transpired that Legacy Ventures found itself needing additional funds to attain certain business goals. He testified further that he and the Second Plaintiff discharged their duties as they arise in terms of Clauses 4.2 and 4.3 of the MOU. In this regard, he elaborated that:

7.3.1 He provided support to the Legacy Project and facilitated business opportunity meetings with key potential clients and funders, and especially the Anglo Gold mines, the Small Enterprise Funding Agency (SEFA), ADT and the Industrial Development Corporation;

7.3.2 Anglo went so far as to place an order and made partial payment towards the placement of the prototype Aqua Sola machines;

7.3.3 SEFA granted approval for the submission of applications for funding.

7.4 His understanding was that the reference to 'Opportunity presented' was in reference to the 70% equity offered and that the reference to 'Requirements' was in

reference to clauses 4.2 and 4.3. Comprehended in that manner, Clauses 4.2 and 4.3 merely required the Plaintiffs to offer support to Legacy Ventures raising firstly, R5 million and later R10 million. Supporting those fund-raising processes did not impose obligations beyond. He believed that their performance in terms of the agreement consisted in paying the amount of R506 000, supporting the Legacy Project by facilitating meetings and deals with clients and funders.

7.5 While they, as Plaintiffs, have complied with the terms and conditions imposed in terms of the MOU, the Defendants have failed to appoint them as shareholders. Furthermore, they did not observe the provisions of Clauses 7.2 and 9 insofar as they did not transfer and register shares equivalent to a 70% stake into their respective names. The Defendants had also failed to deliver the prototype products to Anglo notwithstanding that the latter had made payment for them. He added that the Defendants have since 2014 been avoiding the Plaintiffs and to date they still do not answer their calls.

7.6 Under cross-examination, he testified that he addressed a letter to the Defendants on 26 November 2014 requesting a meeting of Legacy Ventures. The essence of the message in the letter is that if he and the Second Plaintiff were not bought out they would take over operations of Legacy Ventures to advance the project. However, he added that the threat was subject to receiving all necessary documents from the Defendants. No meeting happened subsequent to the letter. Accordingly, their objective of taking over could not be realised.

7.7 It was put to him that mere support and introduction of Legacy Ventures to various entities did not amount to leveraging. The process according to the Defendants consisted in the influence and ultimate conclusion of business transactions with entities. The Plaintiff as the chief executive officer of Legacy Adventures had failed to accomplish this. In response, he was persistent that support involved the introduction and promotion of Legacy project as pursued by Legacy Ventures. He realised part of this when Anglo-American gave them money and support.

7.8 SEDA and SEFA gave them what they required for the conclusion of business transactions but the Third Defendant did not execute. He put the blame squarely at the door of the Third Defendant, the technical director. The attitude of the Plaintiffs is that the Defendants were responsible for the failure of the Legacy Ventures. Asked who would have given them letters of appointment, he stated that he expected it to come from the Third Defendant who was also the managing director of the Legacy Ventures. This concluded both the evidence and case for the Plaintiffs.

EVIDENCE ON BEHALF OF THE DEFENDANTS

[8] The Third Defendant testified in support of the case for the Defendants. His testimony is substantially similar to that of the First Plaintiff except in some parts, which can be put down to interpretation of events and matters. His testimony revolved mainly around the agreement concluded between the parties and he stated that:

8.1 He knows the Plaintiffs. The MOU represented the initial understanding between the parties. His explanation of Clauses 1 to 4 was that the Plaintiffs were required to influence or have capability to network or open doors for the Legacy Ventures. That said, the primary purpose for bringing the Plaintiffs on board was that they would assist in raising funds for Legacy Ventures to embark on the business project. He conceded that the Plaintiffs brought certain people and entities with the intention of raising funds but this did not work.

8.2 SEFA and other potential funders would not commit to anything before a working business model. The Plaintiffs failed to comply with Clauses 4.2 and 4.3 of the MOU. He added that Clause 7 dealing with shareholding was conditional upon Clause 4 of the MOU being attained. Opportunity presented relates to the conditions set out in clause 4 of the MOU. The First Plaintiff, as the chief executive officer was expected to satisfy the conditions stipulated in 4.2 and 4.3. Clause 9 states that certain documents had to be signed and executed. This clause could not be enforced as the conditions were not discharged.

8.3 At a meeting of the shareholders, the Plaintiff stated that Legacy Ventures would raise the required capital through profit. Consequently, subclauses 4.2 and 4.3 were rendered superfluous. In this regard, he referred to an e-mail message dated 18 April 2013. He confirmed that the Plaintiffs had proposed to take over the operations of Legacy Ventures but subject to the Defendants handing over the necessary documents. The meeting that was meant to take place on 26 November 2013 could not proceed because the Defendants did not attend.

8.4 Under cross-examination, he testified that Legacy Ventures was in existence when the MOU was signed. He reiterated that insofar as clauses 4.2 and 4.3 were concerned, the Plaintiffs performed partially. Second Plaintiff opened the door to Anglo-American while the First Plaintiff facilitated a meeting with SEFA. Asked whether the Plaintiffs would have succeeded had they been given the essential documents relevant to the running of Legacy Ventures, he said that they might have but it would have depended on availability of funding. Some machines from Anglo-American were not delivered. Those machines that were delivered by Anglo-American cost R80 000. This marked the end of the evidence and case of the Defendants.

PLEADINGS

[9] In their original combined summons, the Plaintiffs based their claim on specific performance alternatively; restitution but later amended their particulars to premise their claim squarely on restitution. Lastly, a claim relying on the *condictio furtiva* and misrepresentation. However, as the papers of the Plaintiffs stand now, restitution is the only remedy that arises as per the amended founding papers of the Plaintiffs whereas the others were raised during argument in Court or in the Plaintiffs' heads.

ISSUES FOR DETERMINATION

[10] At first glance, one of the issues to be decided is interpretation of the MOU. In my view the need to decide on that issue has been obviated by the manner in which the Plaintiffs have pleaded their case. I note that Counsel for the Defendant has gone to great lengths to demonstrate that on the plaintiffs' version and interpretation

of the MOU, the Plaintiffs failed to perform. On the contrary, the Plaintiffs did not traverse the issue at all. The central issue for decision has now become the determination of whether or not the Plaintiffs are entitled to payment of the amount claimed having regard to the manner in which they have pleaded their case.

LEGAL PRINCIPLES

[11] Insofar as the mutability of the Plaintiffs' case is concerned, this Court per Heher J, as he then was, in *Jowell V Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898F – J held:

'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation... Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in the pleadings. In the

adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such agenda there is no room for an item called “any other business” in the sense that points other than those specified in the pleadings may be raised without notice.’

[12] The essence of the passage above is that a party cannot canvass one approach in the papers and then adopt another in his heads of argument and/or during argument without having amended his papers to be in line with his argument. The rationale behind is manifest – the other party must come to court knowing what case he is expected to meet. Lack of adherence to that principle will inexorably result in injustice and unfairness on the other unsuspecting party. I intend to approach the determination of this matter with guidance from this salutary principle.

EVALUATION

[13] In consequence of the view that I take of this matter, it is not necessary to decide on the interpretation of the MOU. That approach means that the only critical issue for the determination of this matter leans on how the claim has been pleaded. The ‘agenda’ set by the Plaintiffs in their papers is one of restitution. This Court is as such confined to that ‘agenda’. To emphasise the restitution claim, the Plaintiffs’ prayer reads: ‘... Pay an amount of R506 000.00(Five Hundred and Six Thousand Rand) to the Plaintiffs as a refund of the initial investment made by the Plaintiffs;’

[14] Although the claim of the Plaintiffs is based on the Defendants’ breach of the MOU, the prayer sought is incompatible with the particulars of claim insofar as the particulars of claim do not make a case for restitution. An integral part of a claim to

restitution is cancellation of the agreement, the MOU in this instance. In this regard, it could be useful to refer to the case of *Sackstein v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA) where it was stated:

'The alternative claim is clearly one for restitution following cancellation. This court said in *Extel Industrial (Pty) Limited and Another v Crown Mills (Pty) Limited*: 'That a tender of restitution, or the explanation and excuse for its failure, is a requirement in proceedings for restitution is indeed trite.'

[15] The Plaintiffs' failure to allege and prove cancellation of the MOU is incurable. See in this regard, *Cash Converters Southern Africa (Pty) Ltd V Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA), a case to which the Defendants referred this Court. The Plaintiffs' assertion during argument in court that the breach by the Defendants 'was so material' such that lack of a cancellation clause in the MOU is 'rendered unnecessary' is vain. If that were the case and the cancellation so devastating, it makes it aberrant why the Plaintiffs selected to be bound by the MOU.

[16] I agree with Counsel for the Defendants that the Plaintiffs' dependence on *Singh v McCarthy Retail LTD t/a mcintosh motors* 2000 (4) SA 795 (SCA) is misguided. One of the things that make Singh distinguishable from the instant case is that the Plaintiff in that case sued for cancellation of the agreement, which the Plaintiffs have not done in this case.

[17] I am mindful that the Defendants have entertained some of the arguments raised by the Plaintiffs outside of their papers. I have strictly chosen to work within the four corners of the papers or agenda of the Plaintiffs. I have deliberately refrained from dealing with the *condictio furtiva* and misrepresentation because they are not canvassed in the papers of the Plaintiffs. In this regard, perhaps I should remind the parties of one of the principles established in the Jowell case supra – ‘... each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made...’

CONCLUSION

[18] I have consciously decided not to explore the question of the interpretation of the MOU. The reasoning behind that decision is that once the manner in which the claim has been pleaded is wrong, it would be superfluous to decide on the correct interpretation of the MOU. In the result, the claim against the Defendants fails and I make the following order:

1. The claim is dismissed with costs.



B A MASHILE
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

For the Plaintiffs: Adv. M Mathaphuna
Instructed by: Nyachowe Attorneys

For the Defendants: Adv. J Bhima
Instructed by: Bhika Inc