



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

25/1/17

Case No: 59839/2014

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. ✓
25/1/17	
DATE	SIGNATURE

In the matter between:

MANHATTAN HOTEL (PTY) LTD

Plaintiff

and

SOUTH AFRICAN GYMNASTIC FEDERATION

Defendant

JUDGMENT

D S FOURIE, J:

[1] The plaintiff claims payment from the defendant in the amount of R2 576 408.83 for accommodation, meals and transportation provided to certain delegates and gymnasts for the 12th African Gymnastic Championships which were held from 24 March to 31 March 2014. The event was promoted, organised and hosted by the defendant, the South African Gymnastic Federation.

[2] The defendant was assisted by Algrodex (Pty) Limited and the City of Tshwane. Algrodex was the sponsorship underwriter of the event and the City of Tshwane acted as the host city. A management committee was established to oversee the event from its inception and to manage and guide it to successful conclusion. The members of the management committee comprised of four stakeholders, viz the defendant, Algrodex, the Department of Sport and Recreation and the City of Tshwane ("the MANCO").

[3] On or about 30 March 2014 two of Algrodex's employees, Mr Janse van Rensburg and Ms De Sousa, concluded an oral agreement with the plaintiff, represented by Mr Rowan, in terms of which the plaintiff would provide accommodation, meals and transportation for certain delegates and gymnasts who participated in the event.

[4] The main issue between the parties relates to the question on whose behalf did Mr Janse van Rensburg and Ms De Sousa act when entering into the agreement? It is the plaintiff's case that they represented MANCO, but this is denied by the defendant. According to the defendant neither MANCO, nor Mr Janse van Rensburg or Ms De Sousa had a mandate to represent the defendant when the agreement was concluded.

THE PLEADINGS

[5] In its particulars of claim the plaintiff relies on four alternative causes of action. However, on the first day of the trial, the plaintiff withdrew

paragraphs 13 to 15 of its particulars of claim and thereby abandoned two of its alternative causes of action. What remains is a main claim based on an agreement and an alternative claim where the plaintiff relies on the statutes of the Federation Internationale de Gymnastique ("FIG") as well as some other documents such as the defendant's constitution and the bidding and housing of international sport and recreational events regulations.

[6] With regard to the main claim it is alleged that on or about 30 March 2014 the plaintiff, represented by Mr Rowan and the defendant, represented by "MANCO's Jodell de Sousa and Nico Janse van Rensburg" entered into an oral agreement in respect of the defendant's obligation to provide accommodation, meals and transportation for delegates and gymnasts who participated in the event.

[7] In its alternative claim the plaintiff relies on a legal duty. It is alleged that the defendant was under a legal duty to render the services and deliver the goods for which the plaintiff claims payment. The plaintiff relies on the statutes, regulations and the ethical code of FIG (as well as the other documents referred to above) and pleads that these documents were applicable to and binding on the defendant during the hosting of the championships.

[8] In its plea the defendant denies the conclusion of an agreement as alleged and also denies that any principal-agent, employer-employee or similar relationship existed between the parties. It is pleaded that Janse van

Rensburg and De Sousa acted on behalf of Algrodex and that neither of them had a mandate to represent the defendant.

[9] With regard to the alternative cause of action it is denied that the defendant was under a legal duty as alleged, that the championship was a FIG event or that any agreement was concluded between the defendant and FIG. It is also pleaded that no valid cause of action exists for the allegation that the defendant is liable to pay the plaintiff.

[10] In its replication the plaintiff relies on estoppel. It is alleged that, if it is found that MANCO was not duly authorised to represent the defendant, the plaintiff was induced to its detriment, by representations made by the defendant, to enter into a contract "with MANCO ostensibly as the agent of the defendant".

[11] The parties have also agreed in writing on certain common cause facts and what the main issues in dispute are. It is not necessary to refer to these documents now, but I will do so later if it becomes necessary. I shall now proceed to summarise the evidence.

EVIDENCE FOR THE PLAINTIFF

Coetzer

[12] Mr Coetzer is the managing director of Algrodex. In 2013 he was requested to become involved as the sponsorship underwriter of the

championships event. Algrodex displayed a keen interest and on or about 1 October 2013 Algrodex and the defendant entered into a sponsorship underwriting agreement. In terms of this agreement Algrodex was entitled to use the defendant's trade marks in advertising and promotional activities, to sell products and/or services at the event hall and to have trade marks printed on stationery, business cards and other brochures used by the defendant in connection with the event. Algrodex undertook to secure sponsorships in favour of the event in the total amount of R10 million, payable directly to the expenses related to the event. It was also agreed that in the event where a profit is realised, 70% of that profit (after all expenses have been paid), will be paid to the defendant.

[13] According to Mr Coetzer the role of Algrodex as sponsorship underwriter was to identify various sponsors who would be prepared to make sponsorship payments. In the event of a shortfall, Algrodex would be prepared to accept liability for payment thereof. Algrodex identified various potential sponsors, such as ABSA Africa, the Department of Sport and Recreation and the City of Tshwane. Algrodex did not expect to receive any sponsorship monies into its own account and was under the impression that all such monies would be due and payable to the defendant. The City of Tshwane was initially prepared to sponsor the event in an amount of R15 million.

[14] During April 2014 a host city agreement was entered into between the defendant and the City of Tshwane. Algrodex was also cited as a party to

this agreement, but it was never signed on behalf of Algrodex. This agreement makes provision, among other things, for the establishment of a management committee (MANCO) with the purpose of becoming the committee responsible for hosting and staging the championship. It was also agreed that MANCO will identify and recommend to the defendant suitable hotels for the creation of team base camps throughout the host city. In terms of this agreement the City of Tshwane was only prepared to sponsor the event in an amount of R3 million and according to the witness this amount was negotiated in his absence.

[15] During February 2014 (before the event) he attended a meeting where the defendant and the City of Tshwane were also represented. It was reported that the University of Pretoria and the Manhattan Hotel are accredited service providers. MANCO also identified the Manhattan Hotel, Holiday Inn and the Burgers Park Hotel as hotels suitable for the creation of team base camps. According to the witness representatives of the defendant were aware of these hotels which had been identified as service providers. According to him no agreement was concluded between the Manhattan Hotel and Algrodex in terms whereof Algrodex would be liable for payment. The defendant was the "event owner" and Algrodex's responsibility was to stand in for any shortfall or deficit.

[16] In cross-examination the witness testified that Algrodex had a mandate to represent the defendant. He was then referred to clause 15 of the sponsorship underwriting agreement which provides that the agreement

shall not be deemed to create a joint venture, partnership or principal-agent relationship between Algrodex and the defendant. The witness then conceded that in terms of this clause Algrodex did not have a mandate to represent the defendant. According to him he was not aware that there was a shortfall and was only informed about it during the trial.

[17] He also testified that Mr Van Rensburg and Ms De Sousa were employees of Algrodex who acted on behalf of MANCO. According to him they had been mandated by MANCO to arrange for meals and accommodation. When it was put to him that Mr Van Rensburg and Ms De Sousa had no mandate to represent any of the MANCO members, he disagreed. With reference to a letter dated 20 June 2014 (paragraph 3 thereof) the witness admitted that Algrodex had received an invoice from the Manhattan Hotel which was made out to Algrodex. He also admitted that he had signed as surety for Algrodex in favour of the Manhattan Hotel.

Rowan

[18] Mr Rowan is the managing director of the plaintiff. On or about 7 March 2014 he was requested to provide a quotation for hotel accommodation. A quotation was prepared and sent to the City of Tshwane, being one of the sponsors of the event. According to a certain Ms Naude the client was the management committee responsible for the event.

[19] He was then introduced to a Mr Van Rensburg and Ms De Sousa of the management committee who was responsible for the finalisation of certain arrangements. According to him the invoice had been made out to the City of Tshwane because he was informed by Mr Van Rensburg and Ms De Sousa that the City of Tshwane would be responsible for the payment of the plaintiff's account. They did not mention the name of Algrodex and he first became aware of this company when he received a letter from it on 24 March 2014 indicating that they will assist to obtain payment from the City of Tshwane. At a later stage he also sent a statement to the defendant in an attempt to obtain payment because he had been sent from pillar to post. On 28 March 2014 he was requested by Mr Coetzer to provide an invoice made out to Algrodex as he was not aware to whom the City of Tshwane had made the payment.

[20] A booking was made to accommodate gymnasts and delegates who participated in the event and Mr Mogotsi of the defendant provided him with a comprehensive list in this regard. He was not present at the meeting which was held on 24 March 2014 and is also unaware of resolutions which were adopted at this meeting. He was made to believe that the plaintiff's account would be paid and it was not important to him who will make payment at the end of the day.

[21] In cross-examination he testified that Mr Van Rensburg and Ms De Sousa were representatives of MANCO. They did not say that they represented the defendant, although they were there to discuss a booking for

the defendant. He also did not ask them who their employer was, but he assumed that they could have been employees of MANCO or the defendant.

[22] He was also referred to a transcript of a telephonic discussion which he had with Ms Smith-Cameroon of the defendant on 13 June 2014. He conceded that during this telephonic discussion he did not put it to Ms Smith-Cameroon that the defendant is liable for the payment of the plaintiff's account. According to him the agreement was concluded between the plaintiff and MANCO, representing the defendant.

[23] He was then referred to an affidavit, signed by him on 26 January 2015, in support of an application between the plaintiff and the defendant for the delivery of certain documents relating to the championships event. In paragraph 11.2 he explained that Mr Van Rensburg and Ms De Sousa were representatives of Algrodex and in that capacity also members of MANCO. According to this affidavit he accepted, at the time when the accommodation for the championships was negotiated with him, that they were acting on behalf of Algrodex. It was then put to him that this can only mean that they had concluded an agreement with the plaintiff on behalf of Algrodex. His response was "I have no evidence to prove that".

EVIDENCE FOR THE DEFENDANT

Mogotsi

[24] Mr Mogotsi is the Chief Executive Officer of the defendant. During 2014 he was the performance manager and the responsible person for attending to the accommodation arrangements of the championships event. He testified that the defendant concluded an agreement with the Holiday Express Hotel for accommodation. According to him Algrodex was responsible for payment of all expenses, including that of hotel accommodation. He was therefore under the impression that Algrodex will accept responsibility for payment of the Holiday Express Hotel account.

[25] On 11 March 2014 there was a MANCO meeting. There are no minutes of this meeting. No mandate was given to anybody at this meeting to negotiate or enter into a contract with the Manhattan Hotel. After this meeting Ms De Sousa requested him to provide her with information regarding delegations. She was given the information and on 13 March 2014 she was supposed to supply accommodation lists to the Holiday Express Hotel. Ms De Sousa then submitted a reduced list to make provision for certain guests to be accommodated elsewhere. He then requested Ms De Sousa to communicate directly with the agent who was responsible for doing the bookings.

[26] He also testified that the defendant had entered into an agreement with the University of Pretoria, but not with the plaintiff. According to him the members of MANCO did not have a mandate to represent each other and he is not aware of a mandate which authorised a person to represent the defendant. This was also not an official event of FIG and no representation had been made that either MANCO or Ms De Sousa and Mr Van Rensburg could represent the defendant. He and Ms Smith-Cameroon were both members of MANCO. He was aware of the fact that a booking was made for accommodation at the Manhattan Hotel, but was unaware that Mr Van Rensburg and Ms De Sousa had discussions with the plaintiff on 13 March 2014 to make these bookings.

[27] In cross-examination he conceded that MANCO had the overall responsibility for the hosting and staging of the event. He persisted in his view that neither Mr Van Rensburg, nor Ms De Sousa was authorised or mandated by the defendant to enter into the agreement with the plaintiff. He further testified that the defendant had paid the Holiday Express Hotel's accommodation account because it had entered into an agreement with it and also had a longstanding relationship with this hotel.

[28] He was also aware of the fact that delegates and gymnasts would stay at the Manhattan Hotel. According to him Algrodex initiated this arrangement and it was also indicated that Algrodex would accept responsibility for payment of the account. According to him it was Algrodex who entered into the agreement with the plaintiff and not the defendant.

DISCUSSION

[29] Before considering the issues, it is not only appropriate but also necessary to say something about the credibility and reliability of the witnesses. Counsel for the plaintiff criticised the witness for the defendant by pointing out that in cross-examination he was uncomfortable and nervous, suggesting that his evidence should be approached with caution. An assessment of the credibility and reliability of a witness has to take into account the general context, the witness's memory and the ability to express him- or herself properly. It is a well-known fact that sometimes witnesses do make mistakes and even contradict themselves. One should therefore distinguish between *bona fide* errors and an intentional untruth. I have had the opportunity to observe the demeanour of all the witnesses and to listen carefully to their evidence. I did not get the impression that any of them intentionally tried to mislead the Court or knowingly told an untruth. It is possible that their evidence with regard to some incidents is not so reliable, I shall later refer to it again. Notwithstanding my observations in this regard, I have no reason to conclude that they were untruthful. This is a matter that should be decided on the evidence and the probabilities.

The main claim

[30] It is common cause between the parties that the only dispute with regard to the main claim is whether an agreement was entered into between the plaintiff and the defendant. It is alleged in the particulars of claim that on

or about 30 March 2014 the plaintiff, represented by Mr Rowan and the defendant, represented by "MANCO's Jodell de Sousa and Nico Janse van Rensburg" entered into an oral agreement in respect of the defendant's obligation to provide accommodation, meals and transportation for delegates and gymnasts who participated in the event. This is denied by the defendant and it is pleaded that Janse van Rensburg and De Sousa acted on behalf of Algrodex and that neither of them had a mandate to represent the defendant.

[31] It was contended on behalf of the plaintiff, having regard to the evidence and the objective facts, that an agreement as alleged has been proven. On behalf of the defendant it was argued that the plaintiff bears the onus of proving, not only that an agreement was concluded, but also who the parties to the agreement were. The plaintiff therefore bears the onus of proving that Algrodex had a mandate to act on behalf of the defendant, alternatively that MANCO had a mandate to represent the defendant.

[32] According to the evidence of Mr Coetzer the role of Algrodex was to identify various sponsors who would be prepared to make sponsorship payments. It was only in the event of a shortfall that Algrodex would be liable for payment. According to his evidence the defendant was the "event owner" and Algrodex had a mandate to represent the defendant.

[33] In cross-examination he was referred to clause 15 of the sponsorship underwriting agreement which was entered into between Algrodex and the plaintiff during October 2013. It provides as follows:

"This agreement shall not be deemed to create a joint venture, partnership, principal-agent, employer-employee, or similar relationship between SAGF and sponsorship underwriter."

When this was put to him Mr Coetzer conceded that in terms of this clause Algrodex did not have a mandate to represent the defendant.

[34] It is common cause that Mr Janse Van Rensburg and Ms De Sousa were employees of Algrodex. Mr Coetzer testified that they had been mandated by MANCO to arrange for meals and accommodation, suggesting that they represented MANCO when the agreement was concluded with the plaintiff. This implies, as I understand his evidence, that the defendant was represented by MANCO and that Algrodex was not a party to this agreement. However, in cross-examination he admitted that Algrodex had received an invoice from the Manhattan Hotel which was made out to Algrodex. He also admitted that he had signed as surety for Algrodex in favour of the Manhattan Hotel.

[35] Mr Rowan testified that he was introduced to Mr Janse Van Rensburg and Ms De Sousa of the management committee who was responsible for the finalisation of certain arrangements. They did not mention the name of Algrodex and he was informed by them that the City of Tshwane would be responsible for payment of the plaintiff's account. He confirmed that on 28 March 2014 he was requested by Mr Coetzer to provide an invoice

made out to Algrodex as he was not aware to whom the City of Tshwane had made the payment.

[36] In cross-examination he testified that Mr Van Rensburg and Ms De Sousa were representatives of MANCO. They did not say that they represented the defendant, although they were there to discuss a booking for the defendant. He assumed that they could have been employees of MANCO or the defendant. When he was referred to a transcript of a telephonic discussion which he had with Ms Smith-Cameroon of the defendant on 13 June 2014, he conceded that he did not put it to her that the defendant was liable for the payment of the plaintiff's account. However, he indicated in cross-examination that according to him the agreement was concluded between the plaintiff and MANCO, representing the defendant.

[37] He was then referred to an affidavit, signed by him on 26 January 2015, in support of an application between the plaintiff and the defendant for the delivery of certain documents. In paragraph 11.2 he explained that Mr Janse Van Rensburg and Ms De Sousa were representatives of Algrodex and in that capacity also members of MANCO. He said the following:

"The accommodation for the championship was negotiated with me by Nico van Rensburg and Jodell de Sousa. Both these persons were members of MANCO whose duty was to ensure that the championships are successfully concluded. ... These two persons were also representatives of Algrodex and are in that capacity members of MANCO. I accepted at the time that they were acting

on behalf of Algrodex but since being informed of the contents of this directive and the obligations of the first respondent to pay the accommodation and transport costs. The applicant has been seriously and intensively defrauded by Algrodex. The SA Police is investigating serious fraud charges committed by Algrodex and I have been informed that ... will in all probabilities be arrested and charged."

[38] According to this paragraph it appears that Mr Rowan accepted that "at the time" Mr Janse Van Rensburg and Ms De Sousa were acting on behalf of Algrodex. That also explains why he took a firm stand against Algrodex by alleging that he had been defrauded. When it was put to him that this could only mean that they had concluded the agreement with the plaintiff on behalf of Algrodex, his response was only "I have no evidence to prove that".

[39] Mr Mogotsi of the defendant testified that it had entered into an agreement with the University of Pretoria, but not with the plaintiff. According to him the members of MANCO did not have a mandate to represent each other and he is not aware of a mandate which authorised a person to represent the defendant. There is, to a certain extent, corroboration for this version. The host city agreement which was concluded between the City of Tshwane and the defendant (Algodrex was intended to also be a party, but never signed it), contains a similar clause to that in the sponsorship underwriting agreement. Clause 9.13 of the host city agreement provides as follows in this regard:

"Neither this host city agreement nor the course of the dealing between the parties shall create a joint venture, partnership, agency or similar relationship between SAGF, Algrodex and MANCO and the host city. The host city shall not act or purport to act as a partner or agency of SAGF, Algrodex or the MANCO. This host city agreement shall not be deemed to give either party general authority or power to act on behalf of SAGF, Algrodex or the MANCO except to the extent expressly provided in this host city agreement. The parties are in all respects independent contractors, and have separate financial interests under this host city agreement."

[40] Taking into account the evidence referred to above, it seems to me that the plaintiff is confronted with the following difficulties: First, Mr Coetzer conceded that in terms of clause 15 of the sponsorship underwriting agreement Algrodex did not have a mandate to represent the defendant. He also admitted that Algrodex had received an invoice from the plaintiff and that he also had signed as surety for Algrodex in favour of the plaintiff. One must now consider the obvious question: why would the plaintiff expect the managing director of Algrodex to sign a suretyship, if the plaintiff believes that it contracted with the defendant? Furthermore, why would Mr Coetzer be willing to sign a suretyship if the agreement was in fact concluded with the defendant and not with Algrodex?

[41] Second, the affidavit signed by Mr Rowan on 26 January 2015 is not in support of the plaintiff's case. In that affidavit he accepted, at the time when the accommodation for the championships was negotiated with him,

that Mr Janse Van Rensburg and Ms De Sousa were acting on behalf of Algrodex. There appears to be a contradiction between his evidence on affidavit and his evidence in Court when he testified that, according to him, the agreement was concluded between the plaintiff and MANCO representing the defendant. This apparent contradiction could have been explained by either Mr Janse Van Rensburg or Ms De Sousa, but neither of them was called to testify. Put differently, there is no direct evidence to indicate on whose behalf did Mr Janse van Rensburg and Ms De Sousa act when entering into the agreement.

[42] The plaintiff's reliance on estoppel is also not without difficulties. A party relying on estoppel must prove, among other things, a representation by words or conduct which caused him to act to his or her detriment. If regard is had to what Mr Rowan stated under oath in his affidavit, it is clear on a proper interpretation thereof that, to his mind, the plaintiff was contracting with Algrodex and not with the defendant. This appears from the fact that he accepted that, at the time, Mr Janse van Rensburg and Ms De Sousa were acting on behalf of Algrodex. If this were in fact the position then no misrepresentation was made by or on behalf of the defendant. Having regard to all these considerations, I am unable to find that the plaintiff has proven that an agreement was concluded between the plaintiff and the defendant.

The alternative claim

[43] In its alternative claim the plaintiff relies on a legal duty. This cause of action is premised on FIG's statutes (and the other documents referred to above) which the plaintiff contends places an obligation on the defendant to pay the travel and accommodation expenses. I shall assume (without deciding) that such an obligation exists *inter partes*, i.e. between the respective members of FIG or the bodies affiliated to it. Assuming the existence of such an obligation, the question is whether it also applies between the defendant and a third party, such as the plaintiff?

[44] It should be pointed out that it is not the plaintiff's case that FIG documents (such as its statutes or other documents referred to above) constitute a *stipulatio alteri* (a contract for the benefit of third parties) or that these documents enjoy the status of legislation in South Africa. It was therefore contended on behalf of the defendant that the legal status of the statutes of FIG is analogous to a constitution of a voluntary association. In the absence of any other proposition, I have no reason not to accept this submission. It therefore appears that these statutes, read with all the other documents upon which the plaintiff also relies, should be regarded as an agreement between the respective members of FIG, binding on each other *inter partes*. It is also common cause, or at least not in dispute, that the plaintiff is not a member of this association or organisation.

[45] The doctrine of privity of contract is well established in our law. The learned author Christie (*The Law of Contract in South Africa*, 6th Ed, p 269) describes it aptly as follows:

"The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine which prevents this ridiculous situation arising is usually known as the doctrine of privity of contract: parties who are not privy to a contract cannot sue or be sued on it."

[46] Christie then goes on to list several examples to illustrate this principle. One of them is that a sub-contractor cannot sue or be sued by the party with whom the main contractor has contracted. The plaintiff may be regarded to be in an analogous position of a "sub-contractor" in this case. Having regard to these considerations, I am of the view that the plaintiff was unable to prove a transaction or underlying cause giving rise to liability.

ORDER

In the result I make the following order:

1. Absolution from the instance is granted on both the plaintiff's main and alternative claim;

2. The plaintiff shall pay the costs of suit.



D-S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 25 January 2017