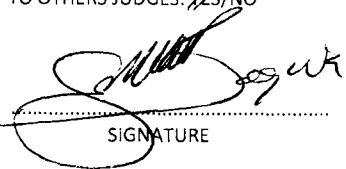




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

24/2/2017.

CASE NO: 3960/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
24/02/17	
DATE	SIGNATURE

In the matter between:

SHIYA PHANTSI CLEANING AND SECURITY CC

Plaintiff

and

PRIMAT CONSTRUCTION CC

Defendant

JUDGMENT

Baqwa J

- [1] This is an action for payment in respect of an amount allegedly owed for services rendered by the plaintiff to the defendant arising out of an oral agreement entered into between the parties during or about June 2009.
- [2] Initially the summons was issued out for the sum of R120 000.00 for the period June 2010 to 30 November 2010 but this was later amended to a claim for the entire year of 2010, namely January to December 2010.

[3] The amount claimed was also amended to R532 800.00.

Facts which are Common Cause

[4] It is common cause between the parties that the agreement entered into was oral and that it was entered into by Mr Pila representing the plaintiff and Mr Cola representing the defendant.

[5] It is also common cause that the plaintiff would render security services in respect of the defendant's three sites, namely Daveyton, Kempton Park and Soshanguve Extension 10.

[6] It is further common cause that there would be a night guard provided for each of the aforesaid sites.

[7] Lastly it is common cause that the defendant paid an amount of R202 200.00 to the plaintiff in respect of the contract.

Disputed Issues

[8] The parties dispute what the rate per day was, which days the day guard was for and what the total monthly amount was.

[9] Also in dispute is the period during which services were to be rendered. According to the defendant services were rendered until July 2010.

- [10] According to the plaintiff there was a day guard 30 days per month whereas the defendant avers that the day guard was only agreed upon for Saturdays and Sundays only and that the chargeable period for the day guard would be eight days per month.
- [11] The plaintiff's version is that the rate was R240.00 per day per guard whereas the defendant claims the rate was R190.00 per day per guard.
- [12] According to the defendant the total amount due per site per month was R7 220.00 with a grand total of R21 660.00 and that the total due to the plaintiff for the seven month period, including July 2010 was R151 620.00.

The Evidence and Evaluation

- [13] The plaintiff presented evidence by calling three witnesses, namely Mr Pila, Miss Mthombeni who was the community liaison officer (CLO) and Mr Mataba who was a sub-contractor at Soshanguve Extension 10.
- [14] Mr Pila testified that the defendant owes him money for security services rendered on the three sites mentioned in the contract. He stated that there was one guard in respect of each site during the day and another guard at night and that the guards were on site from Monday to Sunday. He also testified that he rendered services to the defendant until December 2010.
- [15] The plaintiff initially appeared quite confident about the facts until he was cross-examined when cracks began to emerge in his testimony. He was cross-examined in particular with regard to invoices presented as bundle "C" and bundle "D" of the pleadings.

[16] When confronted with "C 7" which was identical to "D 9" he testified that it related to guarding a broken down truck and that that invoice had been delivered to Mr Cola. He denied even having seen "D 9" and denied that it was his signature appearing on that document or that he gave it to Mr Cola. It was only when the Court asked him about the undeniable similarities in the documents that he was prepared to make the concession that the documents were identical.

[17] Whether one considers the contents of C 7 or C 9, the contents thereof are of some significance. Regarding the aspect of guarding both documents read as follows:

"Guarding per night shift 30 days"

"Unit price R190 per day"

"Total R5 700 per month"

"Guarding per day shift days for 8 days"

"R1 520 per month"

Even though the total is given as R5 700.00, addition of that amount to R1 520 amounts to R7 220.

[18] These figures which are admitted by the plaintiff as being correct with the exception of the total, tally with the version of the defendant with regard to the daily rate for the guards and the testimony that the agreement was for night guards only except for weekends when the plaintiff would also provide day guards.

- [19] Quite clearly if guard duties were provided for something else such as guarding broken down vehicles, logic would dictate that this would have been specified in the invoice detail with specification of the relevant dates. None of this was done and one encounters this detail in the evidence of Mr Pila only. Such evidence is at variance with even the documentary evidence which he himself admits is true. It is particularly in this regard that I come to the conclusion that Mr Pila's evidence is unreliable.
- [20] One would expect that Mr Pila's evidence would find corroboration from the witnesses he called but this was not the case. Miss Mthombeni, the CLO, could not corroborate him even with regard to the number of security guards the plaintiff had at the Soshanguve site. Miss Mthombeni was adamant that the plaintiff employed two security guards a night which was contrary to Mr Pila's own evidence that at all times he employed one security guard at night. This, in my view was a significant contradiction not only because of the position that Miss Mthombeni held during the execution of the Soshanguve project but also because she was the person to whom all the parties related and who was present on the site on a daily basis. The credibility of the plaintiff's case suffered yet another body blow from Miss Mthombeni's evidence.
- [21] Motapa who was another witness called by the plaintiff did not improve the status of the plaintiff's case. He was only on site until June 2010 and he confirmed that his job was completed by that time. This was a sub-contractor who was critical to the laying of pipes and reticulation project. It is not clear how his role could have been completed if the project continued until December 2010. His evidence therefore contradicts both Mr Pila's and Miss Mthombeni's evidence and supports the defendant's version that the reticulation project had been completed by June 2010.

[22] The defendant's case was presented through the evidence of Mr Mnisi and Mr Cola. Mr Mnisi was the site foreman for the duration of the project on the site at Soshanguve Extension 10. He testified that there was one night guard on a weekly basis and a day guard from the plaintiff on Saturdays and Sundays only. The site was broken down and fences taken down in July 2010. At that time the reticulation project had been completed. All that was left post July was site clearance of boulders which had been stockpiled during the laying of the pipes which the client, Tshwane Municipality wanted removed from the site prior to the signing off on the project. This was done by October 2010 and the signing off process was done in November 2010.

[23] Mr Cola testified as the sole member of the defendant. His testimony was in line with the defendant's version already alluded to above with regard to the terms of the contract. His evidence went unchallenged during cross-examination and the veracity thereof ought to be accepted in those circumstances. I found Mr Cola's evidence to be consistent with Mr Mnisi's testimony. Mr Cola testified, **inter alia**, that the plaintiff never provided services again after July 2010 even in respect of Kempton Park and Daveyton. He explained that this was related to an incident when one of the defendant's vehicles went missing at the Kempton Park site.

[24] In a situation where the oral contract is common cause, it is trite that the onus is on the plaintiff to prove breach of contract and the fact that the plaintiff suffered damages. The onus is also on the plaintiff to prove a causal link between the breach and the damages.

See **Amler's Precedents of Pleadings**, pp 117-8, Eighth edition by HARMS.

[25] The evidence tendered by the plaintiff has not been of the quality necessary to tip the scales in his favour. He did not achieve corroboration with his own witnesses. Instead, in some respects, the plaintiff's evidence tended to corroborate the defendant's version. As already mentioned earlier, it is common cause that the defendant paid the plaintiff the sum of R202 200.00. The credible evidence currently before this Court is that the project at Soshanguve lasted for seven months. That would entitle the plaintiff, all factors considered, to a payment of R151 620.00 when one accepts that the plaintiff walked away even from the Kempton Park and Daveyton contracts after July 2010.

[26] As matters stand, the plaintiff simply denies the version tendered by the defendant and tenders insufficient evidence to demonstrate that such evidence is not true. In other words this Court is simply left with two mutually destructive versions on the table.

[27] It trite that where the two versions are mutually destructive and the Court is unable to accept the version of either party, the proper judgment is absolution. See **African Eagle Life Assurance Co. Ltd v Cainer** 198 (2) SA 234 (W) at 237 F and **S v Molautsi** 1980 (3) SA 1041 (B) at 1042-3.

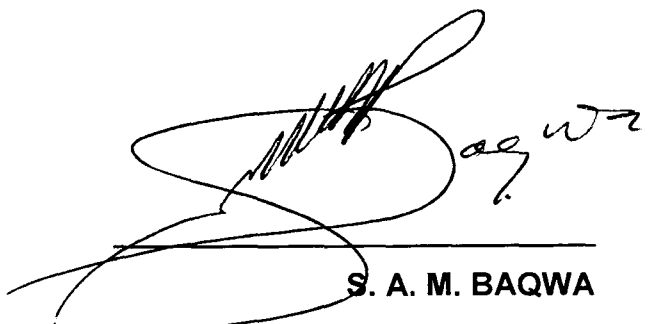
Absolution from the instance will however only apply where there are no probabilities either way.

[28] The defendant has argued for an order for costs on a punitive scale due to the submission of an inflated claim which the plaintiff ought to have known he was not entitled to. The evidence shows that the defendant did not adhere to the agreed monthly payment terms. He would make up for the shortfalls as the implementation of the contract progressed. There was even a dishonoured cheque in the process. The plaintiff testified that these irregular payments caused a measure of confusion in his mind. Further, what may appear as an inflated claim may have arisen from a miscommunication when the parties entered into the oral contract. In other words, this was the direct result of the parties not recording the terms of their contract in a written format. There is therefore, in these circumstances no basis for this Court to adopt a punitive stance towards the plaintiff.

[29] **In casu**, I have therefore come to the conclusion that the probabilities favour the defendant and in the result I make the following order:

29.1 The plaintiff's claim is dismissed.

29.2 The plaintiff is ordered to pay the costs.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 20, 21, 22 & 23 February 2017
Delivered on: 24 February 2017

For the Plaintiff: Mr M. B. Seoka (Attorney with right of appearance)
Instructed by: Seoka Attorneys

For the Defendant: Advocate C. M. Rip
Instructed by: Van Huyssteens Commercial Attorneys