

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3484/2003

In matter between:-

A J BADENHORST

Plaintiff

and

MALUTI-A-PHOFUNG MUNISIPALITEIT

Defendant

HEARD ON:

11 FEBRUARY 2009

JUDGMENT BY:

K.J. MOLOI, AJ

DELIVERED ON:

26 FEBRUARY 2009

JUDGMENT

- [1] The plaintiff, a farmer in the district of Harrismith, sued the defendant, a municipality, duly established in terms of the Local Government: Municipal Structures Act, No. 117 of 1998, having juristic personality, for breach of two oral agreements. The first agreement was for engagement of the farmer as a farm manager and mentor of small dairy farmers meant to empower emerging black dairy farmers in the district. The second related to the expenditure the plaintiff

incurred in running the project for which the defendant failed to reimburse him.

- [2] As regards claim 1, based on the first oral agreement, the essential allegations made are that the agreement was concluded during or about October 2001 at a farm Marydale in the district of Harrismith; the plaintiff acted personally while the defendant was represented by one Mr. Jan Hamer. The terms thereof were that the plaintiff would manage the defendant's farm, Marydale, from which the dairy farming would be carried on for a period of five years commencing on 1 December 2001; the defendant would pay the plaintiff a salary in the amount of R10 000,00 per month; make a contribution of R300,00 per month in respect of fixed line telephone expenses and R300,00 per month in respect of the use of his cellular telephone and make a further contribution of an amount of R1 500,00 per month in respect of medical aid and pension. It was alleged the plaintiff carried out his obligations under the agreement for the period 1 December 2001 till 30 August 2002 but the defendant failed to honour its obligations except making payments for two months only and is consequently owing an amount of

R108 900,00 to the plaintiff which amount he failed to pay despite demand.

- [3] The second claim, based on the second oral agreement, contained the following essential averments: that it was an amendment of the first oral agreement concluded during October 2001 and was concluded towards the end of December 2001 at the farm Marydale, district Harrismith, during which the plaintiff acted personally whilst defendant was represented by Mr. Jan Hamer. In terms of this amending agreement and in the execution of his duties as dairy farming manager, the plaintiff would apply the proceeds of the milk sales to pay for the expenditure he would incur in the advancement of the project. Any shortfall between the actual expenditure and the proceeds of the milk sales would be payable by the defendant to the plaintiff after submission of the invoices on a monthly basis. In addition the defendant would pay to the plaintiff an amount of R2,00 per kilometre travelled in the business of the project and would also supply diesel to the plaintiff whilst carrying out his duties in terms of the oral agreement. It was further alleged the plaintiff discharged his obligations under the agreement for the

period 1 December 2001 to 30 August 2002. The defendant, however, failed to reimburse the plaintiff the shortfall between the actual expenses and the proceeds of the milk sales in breach of the agreement and consequently owed the plaintiff an amount of R112 946,79 which was set out in a statement attached to the particulars of claim as annexure “A” together with the invoices.

- [4] The defendant’s plea was a total denial of the allegations made. In particular the defendant pleaded specifically as follows:

“2.1 The contents of these paragraphs are denied and the plaintiff is put to the proof of each and every allegation as if specifically traversed.

2.2 Defendant furthermore pleads that Mr. Jan Hammer was an independent consultant who was contracted by defendant with instructions to enter into negotiations with the plaintiff amongst others. Mr. Jan Hammer was therefore only tasked to negotiate with the plaintiff so that an agreement between the parties could be reached. Defendant furthermore pleads that at all relevant times it was made clear to the plaintiff that Mr. Jan Hammer had

no authority to enter into any binding agreement on behalf of the defendant, and that any preliminary agreement reached, would have to be evaluated by the defendant, whereafter defendant had to confirm such evaluation at a board meeting before any binding agreement could be reached.

- 2.3 Defendant furthermore pleads that no such preliminary agreement, as pleaded above, was conveyed to the defendant in order to evaluate and decide thereupon at a board meeting. In the premises defendant specifically denies that any oral agreement whatsoever was reached between the plaintiff and the defendant, and plaintiff is put to the proof thereof.”

Furthermore, the defendant referred to written agreements it concluded with the plaintiff during 2002 which are irrelevant to the determination of the issues in this matter. If anything, those agreements would only serve to prove the manner in which the defendant normally entered into agreements. What is important is that the plaintiff did not respond to the above allegations nor did he estop the defendant in its denial of Jan Hamer’s authority to act on the defendant’s behalf.

[5] At the hearing three witnesses were presented for the plaintiff: firstly, Mr. Jan Hamer, secondly, the plaintiff and thirdly, Mrs. Erika van der Westhuizen. The last-mentioned was the owner of a company called Spatial Solutions (Pty) Ltd, which, in fact, was contracted by the defendant and which employed and deployed Mr. Jan Hamer to the project. In essence, all three witnesses substantiated in great detail the allegations contained in the plaintiff's claims. They all confirmed, in particular, that Mr. Hamer dealt with a sub-committee of the defendant tasked with the project. The sub-committee was composed of some councillors of the defendant, some emerging dairy farmers and other stakeholders. They confirmed also that Mr. Hamer took notes of the proceedings in the sub-committee's meetings and the decisions made, including some aspects of the plaintiff's claims, particularly the outstanding payments. They all could not say, however, that the notes with the decisions made, were presented to the defendant for approval. The defendant closed its case without leading evidence to gainsay the plaintiff's evidence.

- [6] What is important for the purposes of this judgment, however, is that both, Mr. Hamer and the plaintiff, admitted in evidence that they both knew how the defendant was supposed to take decisions that would bind it as a municipality; that the sub-committee they dealt with had limited authority to bind the defendant municipality and could only decide on authority delegated to it by the municipality and only to the extent of their mandate; that they were not aware of nor could they produce such a mandate by the defendant to the sub-committee. In particular, Mr. Jan Hamer, in unequivocal terms, admitted he personally had no authority to enter into an agreement for and on behalf of the defendant nor did he at any stage purport to nor acted on behalf of the defendant's council but for the sub-committee. They both agreed only the municipal council could validly by resolution enter into binding agreements for and on behalf of the institution like the municipality and that they both knew it all along.
- [7] Both counsel for the parties, in their written submissions, correctly pointed out that the court's decision in this matter revolved around the determination of Mr. Hamer's authority

to contractually bind the defendant. The plaintiff's counsel asked the court to find that there was such authority by implication, i.e. ostensibly, based on a number of aspects including the unproven extent and scope of the mandate of the sub-committee with which Mr. Hamer dealt, the notes that Mr. Hamer compiled during the meetings of which there is no evidence that they reached the defendant's council, the inter-action and responses of the members of the sub-committee and especially the mayor, with Mr. Hamer, the plaintiff and Mrs. Van der Westhuizen regarding the overdue payments to the plaintiff, etc. I am not persuaded that from these and other factors I can find that there was ostensible authority by the council to Mr. Hamer to enter into those oral agreements with the plaintiff.

- [8] Section 11(1) of the Local Government: Municipal Systems Act, No. 32 of 2000 states as follows:

“The executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to section 59.”

(My emphasis.)

There can be no doubt that the decision to enter into agreements is an executive act. Section 59(1) of the same Act states:

“A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may-

(a) delegate appropriate powers ... “

and in sub-section (2)(b) requires that such delegation

“must be in writing”.

No proof of such delegation to the sub-committee that Mr. Hamer dealt with could be produced. The denial of Mr. Hamer’s authority to enter into agreement on behalf of the defendant was clearly spelt out in the plea as fully quoted in paragraph [4] above and was known to the plaintiff as far back as 15 November 2004 i.e. over four years before the hearing. No estoppel was pleaded by the plaintiff against this denial.

- [9] As regards the conclusions of the said oral agreements the plaintiff's particulars of claim simply stated:

“By die sluit van die ooreenkoms is verweerder verteenwoordig deur Mnr. JAN HAMER.”

It is trite that a party wishing to rely on agency must allege and prove, not only the existence of the authority of the alleged agent but also the scope of such authority and whether it was express or implied. See **POTCHEFSTROOM SE STADSRAAD v KOTZE** 1960 (3) SA 616 (A); **GLOFINCO v ABSA BANK LTD t/a UNITED BANK** 2002 (6) SA 470 (SCA). Despite the defendant's categorical denial of authority more than four years before the trial, the plaintiff did nothing to amend his particulars of claim to incorporate these allegations without which the claim could not succeed. For the lack of these averments and the proof of the alleged mandate of the sub-committee Mr. Hamer dealt with or his direct mandate from the council of the defendant municipality to contract on its behalf, only one conclusion can be reached by this court, namely, that no such authority was given to Mr. Hamer.

[10] Accordingly I make the following order:

1. Plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs including the costs that stood over at the previous postponement.

K.J. MOLOI, AJ

On behalf of the plaintiff:

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On behalf of the defendant:

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