/SG

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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

16/11/09
DATE

SIGNATURE

DATE: 20/11/2009

CASE NO: A87/2007

In the matter between:

AHMED TAYOB	1ST APPELLANT
FREDDY MANTIKWE	2ND APPELLANT
And	
ZIBC CONSTRUCTIONS	RESPONDENT

JUDGMENT

OMAR, AJ

[1] This is an appeal against the judgment delivered by Magistrate DUBE at Polokwane on 25 August 2006 in terms of which the respondent succeeded in its claim against the appellants for payment of the amount of R71 000.00, the one paying to release the other together with interest on the said amount at the rate of 15.5% per annum from 1 September 2004 to date of payment.

[2] All the parties were legally represented at the trial. Mr Patrick Maroka, the only member of the respondent testified on behalf of the respondent. The first appellant and one witness testified on behalf of the first appellant and the second appellant testified on his own behalf.

[3] The magistrate called an addition witness to testify on behalf of the respondent.

[4] No heads of argument were filed on behalf of the respondent nor was there any legal representation on behalf of the respondent during the hearing of the appeal.

[5] The appellants grounds of appeal are set out in their notices of appeal dated 15 September 2006 and 26 September 2006 respectively which forms part of the record.

[6] It is common cause that the respondent and the second appellant attended at the business premises of the first appellant on 12 August 2004 in order to negotiate and cash a cheque in the amount of R111 720.00.

In terms of an agreement between the parties the first appellant gave a cash amount of R40 720.00 to Mr Patrick Maroka and the balance was to be collected at a later stage.

[7] What is in issue are the terms of the agreement as to who should receive the balance of the monies.

[8] An invoice (slip) marked as exhibit “A” was handed into court with the consent of the parties.

[9] The respondent issued summons against the appellants approximately one year after the incident.

[10] Mr Patrick Moroka briefly testified that he gave the first appellants employee copies of the certificate of the company his identity document and telephone number. He received cash in the amount of R40 720.00 and then went to Frazier. He was in the company of Mantikwe, the second appellant and Freddy Ramaphakela and Ike Mapoto. He was given an invoice by first appellant's employee and he left the invoice at the office of the second appellant.

The balance of the monies were given to the second appellant. He did not authorise the second appellant to receive the monies on his behalf.

[11] The first appellant briefly testified that on 12 August 2004 Mr Patrick Moroka and the second appellant, Freddy Mantikwe, came to his store with a cheque to the value of R111 720.00 which they wanted to cash.

In terms of an agreement between the parties an amount of R40 720.00 was given to Mr Patrick Moroka in cash and the balance of R60 000.00 was to be given to Mr Freddy Mantikwe the following day and he had to purchase goods for the amount of R11 000.00. An invoice (slip) was issued and the monies were to be paid to whoever produced the invoice. Mr Freddy Mantikwe produced the invoice the following day and the monies were paid to him.

[12] Ms Paulinah Tsantsa briefly testified that she was present when the agreement was entered into between the parties and that the balance of the monies were paid to Mr Freddy Mantikwe after he had produced the invoice.

[13] The second appellant briefly testified that in terms of an agreement between the parties, the balance of the monies were paid to him by the first appellant which he subsequently gave to Mr Patrick Moroka. The invoice was given to him by Mr Patrick Moroka at the first appellant's business premises.

[14] At the end of the case there were two versions before the court, namely, the version of Mr Patrick Moroka on the one hand and the version of the first appellant on the other hand,.

[15] It is clear from the record that the testimonies of the first appellant's witness and the second appellant supported the version of the first appellant.

[16] The magistrate in the court *a quo* did not reject the testimony of the first appellant's witness nor the testimony of the first appellant or the testimony of the second appellant.

[17] In granting judgment against the appellant the court *a quo* –

1. took into consideration the fact that the respondent is a single witness and the cautionary rule applies;

2. found that it was highly unlikely if not improbable that the fist appellant's witness requested the particulars of the plaintiff when she paid out the R40 000.00 but did not take details of the second appellant when he came to fetch the balance of the monies nor did she make him sign to show that he actually received the monies;

3. accepted the testimony of the respondent but failed to make a ruling on the credibility of the first and second appellants witnesses testimonies;

4. believed that there was a duty of care on the first appellant to ensure that he pays the right person;

5. found that the first appellant acted negligently when he paid the monies to the second appellant without any identification;

6. found that on a balance of probabilities the respondent's claim succeeds.

[18] It was submitted by first appellant's counsel that –

1. the magistrate erred in not making a finding as to the credibility of the first appellant and second appellant's witnesses and that their testimonies corroborated each other.

2. the magistrate acted irregular and was biased in favour of the respondent in calling on her own, a witness to clarify a point on behalf of the respondent and despite objections from the first and second appellant's legal representative.

3. the magistrate erred in not finding that the respondent's version is improbable.

4. the magistrate erred in finding that the identification of the person that must collect the money from the first appellant is of importance.

5. the magistrate erred in finding that the first appellant acted negligently when he paid out to the second appellant.

6. the magistrate erred in finding that the first appellant had a duty of care towards the respondent in view of the method of payment.

[19] There are a number of problems with the judgment of the magistrate in the court *a quo*.

[20] In my view the magistrate erred in not making a finding as to the credibility of the first appellant and second appellant's witnesses. Where there are two mutually destructive versions before the court, the magistrate must be satisfied that the plaintiff's version is true and the defendant's version false.

In *Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199 it was held that it must be clear to the court of first instance that the version of the litigant upon whom the *onus* rests is the true version. The court must be satisfied on adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false.

[21] In my view the magistrate acted irregularly in calling a witness on her own despite objections from the first and second appellants' legal representatives.

It was held in: *Rowe v Asst. Magistrate PTA and Another* 1925 TPD 361, that a court cannot call a witness whom no party to the case has thought fit to call without the express or tacit consent of the parties.

[22] It is also clear from the record that the witness called by the magistrate, in any event, did not corroborate the evidence of the respondent. His evidence in fact contradicted the evidence of the respondent which was given under oath.

[23] In my view, the magistrate, in finding that the first appellant acted negligently and had a duty of care towards the respondent, misdirected herself as the cause of action is based on contract for specific performance between the first appellant and the respondent.

[24] I agree with first appellant's counsel that the magistrate erred in not finding that the respondent's version is improbable.

It is highly improbable that a person in the position of the respondent would wait approximately one year before instituting action against a person who owes him a substantial amount of money. It is further improbable that a person in the position of the respondent would not lay a criminal charge of theft against the second appellant who received his money.

[25] In my view, the probabilities favour the first appellant and judgment should have been granted in his favour. His evidence was not contradicted and his version was corroborated by his witness and by the second appellant.

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[26] I am satisfied that in terms of the agreement between the parties the second appellant was entitled to receive payment of the balance of the monies and as such the appeal must succeed.

[27] In the result the following order is made:

1. The appeal by the appellant succeeds.

2. The order of the court *a quo* is set aside.

3. The respondent is to pay the costs of appeal.

S S OMAR
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

M H ISMAIL
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A87/2007/sg

Heard on:
For the Appellants: Adv
Instructed by: Messrs
For the Respondent: Adv
Instructed by: Messrs
Date of Judgment: