

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA41/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE <u>20/05/2024</u> SIGNATURE.. 	

In the matter between:

KENOSIMA TRADING & PROJECTS (Pty) Ltd

: FIRST APPELLANT

SIMANE EPHRAIM KENOSHI

: SECOND APPELLANT

And

BASWARA TRADING

: RESPONDENT

JUDGMENT

Heard on **08 MARCH 2024**. The date and time for hand-down is deemed to be **on the 20 MAY 2024 at 10:00**. This judgment handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII.

DEANE AJ:

Introduction

- [1] This is an appeal against the whole judgment and order of the magistrate made on 26 June 2023. The written judgment was made available to the parties on or about 10 July 2023, wherein the magistrate found in favour of the Respondent (Plaintiff in the court *a quo*) in terms of a breach of a verbal agreement, wherein it was ordered as follows:
- (1) The 1st and 2nd defendants are ordered to pay an amount of R119 606, 00 jointly and severally, the one paying the other to be absolved.
 - (2) Interest on the capital amount at the rate of 10,25% per annum calculated from 2nd August 2018 to date of final payment.
 - (3) Costs of suit.
- [2] The grounds of appeal succinctly stated are that the magistrate erred in the following respects:
- (1) The granting of a judgment against both Appellants jointly and severally.
 - (2) Finding that the Respondent had proved, without the necessary information/evidence, that the services were rendered by the Respondent and ordering the Appellants to pay for the rendering of services without proof thereof.
 - (3) Ordering the Appellants to pay an amount of R119 606.00 which amount is inclusive of VAT, without any evidence before the court that the Respondent was entitled to claim VAT.

- (4) That the Respondent had discharged its burden of proving that services were rendered.
- [3] The First and Second Appellants (Appellants) seek an order that the appeal be upheld with costs and that the order by the court *a quo* be set aside and that they be granted absolution from the instance.

Background

- [4] On or about 30th May 2017 a verbal agreement was entered into by the First Appellant and the Respondent,¹ both legal personas. The Plaintiff was represented by one Maboko Shilajoe (Shilajoe), the sole Director of the Respondent and the First Appellant was represented by the Second Appellant as its manager.²
- [5] The First Appellant was contracted by the Modimolle-Mookgophong Municipality (the Municipality) to supply the Modimolle community with water. Since the Respondent did not have enough tankers, the agreement was that:
- (a) The First Appellant will hire a ten thousand litre (10 000L) water tanker (the tanker) to enable the First Appellant to carry out its contract between it and the Municipality;
 - (b) The First Appellant is to pay one thousand eight hundred rands (R1800.00) per day for same. If the tanker was not used, it was not to be paid;
 - (c) The Respondent was to invoice the First Appellant;
 - (d) The Respondent provided the water tanker;
 - (e) The Respondent rendered invoices as agreed and the First Appellant made some payments;
 - (f) One such payment was done on or about 2nd July 2018 wherein payment in terms of an invoice rendered by the Plaintiff to the amount of R119 606 was duly paid.

¹ Record of Proceedings p 20, 1st and 2nd Defendant's Plea, p 19.

² Record of Proceedings, p 22.

The Evidence

[6] The Respondent called one witness, Shilajoe, who testified that:

- (i) He represented the Respondent as its sole director, whilst the First Appellant was represented by the Second Appellant as its manager.³
- (ii) According to the agreement, and his understanding thereof, he was to invoice the First Appellant, as the parties to the agreement were legal personas.
- (iii) He had on previous occasions invoiced the First Appellant for other services and they were paid.
- (iv) The Respondent provided the water tank truck and rendered invoices which were paid by the First Appellant.
- (v) However, the invoice dated 2 July 2018 for R119 606.00 to be paid on 2 August 2018 was never paid.
- (vi) Around July 2018, and on behalf of the Respondent, he sent invoices to the Second Appellant, who was representing the First Appellant
- (vii) Despite demanding on numerous occasions, through verbal demands and through emails and WhatsApp messages to the Appellants requesting that the amount claimed be paid, it was not paid.
- (viii) He continued reminding the Second Appellant of the amount outstanding on behalf of the First Appellant but was told by the Second Appellant that the Municipality had not yet paid the First Appellant.
- (ix) He was in constant contact with the Second Appellant and at all times the Second Appellant did not dispute the amount due to the Respondent.
- (x) He constantly reminded the Second Appellant about payment until the Second Respondent told him that he will not pay because he was being pestered and nagged.
- (xi) After realising that the Second Appellant had no intention of settling the invoice, he gave his attorney all WhatsApp and email communications

³ Record of the Proceedings, p 21, 23.

between himself and the Appellants, the municipality records proving the services and to prove the amount owed.

- [7] During cross examination, the Appellants representative did not dispute the amount owed, but disputed that the agreement was between the Respondent and the First Appellant.⁴
- [8] The WhatsApp communications and emails were not disputed, however there was a demand made that it should have been annexed to the Summons.
- [9] The witness was willing to submit any document deemed necessary.
- [10] When the witness was further questioned on whether the Second Appellant had asked him to invoice the First Appellant because the Second Appellant was not registered, this was refuted by Shilajoe, the witness.
- [11] Upon further cross-examination Shilajoe refuted the allegations that the agreement was between him as the director of the Respondent and the Second Appellant because the party that had a contract with the municipality was the First Appellant.
- [12] Furthermore, Shilajoe testified that he understood that the Respondent would be paid from the proceeds of the tender granted to the First Appellant.
- [13] Shilajoe further stated that when he had invoiced the First Appellant on the first paid invoices the Second Appellant did not object to the invoices.
- [14] Shilajoe reiterated that the services were rendered, that the records from the Municipality serves as proof thereof and that the Municipality officials were also monitoring the services rendered through the tanker.

⁴ Index: Volume 2/2 Court *a quo* bundle, pp 43-44.

- [15] He testified further that the Second Appellant, until the day that he was giving his evidence, on 24 March 2023,⁵ never previously queried that the service was not rendered. Shilajoe went on to state that the only reason payment was not made on behalf of the First Appellant, by the Second Appellant, was because Shilajoe became a nuisance and was pestering or annoying the Second Appellant by making follow up requests for payment.⁶
- [16] The Respondent after calling their one witness closed their case.
- [17] The Applicants thereafter applied for absolution from the instance and such a request was dismissed by the magistrate. The magistrate indicated in his judgment that reasons for the dismissal thereof was given to all parties.
- [18] Thereafter, both the First and Second Appellants did not testify or call witnesses and closed their case without leading evidence

The Law

Regarding absolution from the instance

- [19] As indicated above, the relief in prayer 1 of the notice of motion is sought in terms of Rule 39(6) of the Rules which reads as follows:

“At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which case the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.”

⁵ Index: Volume 1/2 Appeal Bundle, p 46.

⁶ Index: Volume 1/2 Appeal Bundle, p 38.

- [20] The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its final conclusion. The essential inquiry in determining whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or *prima facie* case.
- [21] Furthermore, the test, as stated in Supreme ***Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd***, is not “what ought a reasonable court to do” at the close of the defendant’s case. Thus, the threshold required by the law, which the plaintiff has to satisfy in opposing an application for absolution from the instance at the close of his or her case, is very low.
- [22] In ***Claude Neon Lights (SA) Ltd v Daniel***, the test for absolution was further articulated as follows:
- “(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (***Gascoyne v Paul and Hunter 1917 T.P.D 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T)***).”

Regarding the onus of proof

- [23] The standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the onus lies, in order to be successful, to satisfy the court that he is entitled to succeed on his claim or defence, as the case may be.⁷ The onus of establishing a case in accordance with this standard is on the party who makes the assertion since if a person claims something

⁷ *Pillay v Krishna* 1946 AD 946 at 952- 953.

from another in a court of law, he has to satisfy the court that he is entitled to it.⁸ In **Pillay v Krishna and Another** it was described as follows:⁹

“The only correct use of the word ‘onus’ is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be.....”

- [24] In **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**¹⁰ Corbett JA (as he then was) explained the distinction between the burden of proof properly so called and the evidential burden as follows:

*“As was pointed out by Davis AJA in **Pillay v Krishna and Another 1946 AD** at 952-3, the word onus has often been used to denote, inter alia two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In **Brand v Minister of Justice and Another 1959 (4) SA 712 (A)** at 715 Ogilvie-Thompson JA called it ‘the overall onus’. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (‘weerleggingslas’). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.”*

- [25] If the party on whom the onus lies is the plaintiff, as is often the case, this onus is discharged by leading evidence since if no evidence is led at all, the plaintiff must fail because he would not have proved the cause of action. Similarly, if evidence is led but the court cannot decide whether the cause of action has been established or not,

⁸ *Pillay v Krishna* at 951; and *Van Wyk v Lewis* 1924 AD 438 444.

⁹ *Pillay v Krishna* at 952-3.

¹⁰ 1977 (3) SA 534 (A) at 548.

the plaintiff again must fail because one of the facts essential to the cause of action would remain unproved.¹¹ The question is whether at the close of the plaintiff's case there is sufficient evidence in support of the claim, by which is meant no more than that on the whole the evidence tends to show a greater probability that the facts as alleged by the plaintiff are correct, than the contrary.¹² If at the conclusion of the case the evidence is evenly balanced, the plaintiff cannot succeed in his claim as he would not have discharged the onus resting upon him.¹³

Analysis

- [26] The Appellants case is that the oral agreement was entered into by and between the Respondent and the Second Appellant in his personal capacity,¹⁴ and that "despite no evidence that an agreement was entered into between the Respondent and both Appellants, and that the Respondent stated the agreement was with the First Appellant, the court proceeded to grant judgment against both the First and Second Appellants, jointly and severally".¹⁵
- [27] The Appellants further argued that the court *a quo* misdirected itself when it found that the "Respondent proved, on a balance of probabilities, that "services" were rendered to the Respondent, which the Appellants must pay"¹⁶ and that "the undisputed evidence is that no invoice was ever sent to either the first or second appellant" and that they do not know how the amount of R119 606.00 was calculated.¹⁷ Furthermore that there was no evidence that the Respondent was entitled to claim VAT on the said amount and that Respondent failed to discharge its burden of proving that services were rendered.¹⁸

¹¹ *Pillay v Krishna* at 955.

¹² *Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 397.

¹³ *Van Wyk v Lewis* at 444.

¹⁴ Appellants Heads of Arguments: In re: Appeal p. 6.

¹⁵ Appellants Heads of Arguments: In re: Appeal p. 6.

¹⁶ Appellants Heads of Arguments: In re: Appeal p. 8.

¹⁷ Appellants Heads of Arguments: In re: Appeal p. 7.

¹⁸ Appellants Heads of Arguments: In re: Appeal p. 8.

- [28] Having regards to the *dicta* that the burden of proof in an action will not necessarily fall on the one party alone, but each of the parties may bear a burden of proof in relation to different issues, in *Pillay v Krishna* the general approach was explained as follows:¹⁹

"If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states... as follows: 'He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute'. The onus is on the person who alleges something and not on his opponent who merely denies it."

- [29] The court in *Pillay v Krishna* went on to state that:

1. The resolution of a civil dispute such as the present one turns on the probabilities of the competing versions, coupled with the evidence presented before this Court by both parties.
2. The Plaintiff was a single witness regarding the events that occurred on the day in question. However, this does not necessarily entail that the Plaintiff is automatically in a disadvantaged position. His evidence still needs to be considered holistically to arrive at an objective conclusion. The Court, in *S v Saulus and Others*,²⁰ correctly found that:

"[t]here is no rule of thumb test or formular to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh

¹⁹ *Pillay v Krishna* at 946; 951-3.

²⁰ 1981 (3) SA 172 (A) at 180E-G.

his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told . . .”

- [30] It is clear that where there is evidence presented by one party that calls for an answer, and the other party chooses not to lead evidence, in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove otherwise. Whether such a conclusion is justified will depend on the weight of the evidence presented.
- [31] *In casu*, the magistrate was faced with the following uncontested evidence. It was testified to by Shilajoe, on behalf of the Respondent that the Second Appellant represented the First Appellant when entering into an oral agreement with the Respondent.²¹ In this respect, the magistrate found that the Appellants did not have any problems to plead to the Respondent's summons.²² Annexure A,²³ which was the only document annexed to the summons, is the invoice statement comprising of two invoices amounting to R761 36.00 and R 434 70.00 respectively and which amounts to R119 606.00.²⁴
- [32] The magistrate found the evidence of Shilajoe to be very clear and not contradictory. Looking at the record, his evidence withstood cross-examination and the magistrate correctly concluded that the Second Appellant at all times represented the First Appellant.
- [33] Shilajoe further gave *viva voce* evidence in respect of the oral agreement, the terms thereof and what had transpired between the parties.²⁵

²¹ Index: Volume 1/2 Appeal Bundle, pp 25; 32

²² Index: Volume 1/2 Appeal Bundle, p 13.

²³ Index: Volume 2/2 Court *a quo* bundle, p 110.

²⁴ Index: Volume 2/2 Court *a quo* bundle, p 39.

²⁵ Index: Volume 1/2 Appeal Bundle, pp 23-25.

- [34] In support thereof he provided evidence of WhatsApp communications that were exchanged between the parties, invoices that were e-mailed to both Appellants,²⁶ and he testified to telephonic communications about the amounts owed and claimed.²⁷
- [35] Additionally, evidence was given by Shilajoe that there were records, the ledger was obtained, and those documents were given to the attorneys to show how many times the tanker was used and how much money was to be paid.
- [36] Furthermore, the use of the tanker was monitored by the Municipality officials. During the telephone conversations, especially those demanding payment the services were not denied or ever disputed.
- [37] It was further testified to that the invoices were not, not paid because the services were not rendered but it was not paid due to the witness, Shilajoe, becoming an annoyance to the Second Appellant.²⁸
- [38] Following this evidence on behalf of the Respondent, there was nothing preventing the Appellants from dispelling or leading evidence to the contrary at the hearing before the magistrate. They, however, chose not to do so.
- [39] On the papers before me, the Appellants argue that regarding the invoices, emails with invoices sent to the Appellants, the documents at the Municipality and WhatsApp messages,²⁹ “the fact that the Defendants didn’t deny the existence of these documents does not mean or prove their existence” and that “to be regarded and considered by Court, these evidence should have been produced in court. There is no onus on the defendants”.³⁰

²⁶ Index: Volume 1/2 Appeal Bundle, pp 37-41.

²⁷ Index: Volume 1/2 Appeal Bundle, pp 37-41.

²⁸ Index: Volume 1/2 Appeal Bundle, p 38.

²⁹ Index: Volume 2/2 Court *a quo* bundle, p 131.

³⁰ Index: Volume 2/2 Court *a quo* bundle, p 131.

- [40] I now turn to whether the Respondent, Plaintiff in the court *a quo*, had on a balance of probabilities discharged the onus of proof that rests with them. The question of whether the onus has been discharged was dealt in **Selamolele v Makhado**³¹, where the court confirmed what the approach to follow is:

"Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

- [41] Further, in **Maitland and Kensington Bus Co (Pty) Ltd v Jenningswhere**³² Davis J said:

*"For judgement to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one."*³³

- [42] It is clear from the legal principles stated above that when a party adduces evidence in support of their case, that a mere denial of the evidence is not sufficient to disprove the evidence of a *prima facie* case.
- [43] The evidence led shows that the Second Appellant at all times acted within his scope of employment and created the impression that he has the necessary authority to act on behalf of the First Appellant.

³¹ 1988 (2) SA 372 (V) at 374J–375B.

³² 1940 CPD 489 at 492.

³³ It was further stated in *Ocean Accident and Guarantee Corporation Ltd J v Koch* 1963 (4) SA 147 (A), at 157D that the evidence present by the burdened party must be such that the court can say that "[w]e think it is more probable than not" for the burden to be discharged. However, if the probabilities [in relation to the evidence of all the parties] are equal, then the burden has not been discharged by the burdened party.

- [44] This is because it is clear that the Second Appellant was actively involved from the very beginning of the agreement when he represented the First Appellant during the oral agreement with the Respondent and in taking the decision not to pay the Respondent.
- [45] When the Respondent sent the invoices, they were sent to the Second Appellant, and it was the Second Appellant that informed Shilajoe that he is not going to pay the Respondent because Shilajoe was pestering him.
- [46] The Second Appellant took decisions for the First Appellant and the Respondent was therefore indeed correct in citing both Appellants.
- [47] Based on the evidence before him, the magistrate was faced with one tested version which in his considered reasoning withstood cross-examination. Having regard to the record, I am in agreement.
- [48] Consequently, faced with this, on a balance of probabilities the court *a quo* was also correct in finding that the Appellants should be held jointly and severally liable.
- [49] On a balance of probabilities, the court *a quo* was also correct in finding that the Respondent rendered services and that the Respondent was therefore entitled to be paid.
- [50] Looking at the evidence before the court *a quo*, it was not in dispute that the First Appellant was awarded a tender by the Municipality. It is further not disputed that the First Appellant needed water tankers for it to be able to deliver water or that the Respondent provided a water tanker to the First Appellant and that the First Appellant did indeed pay some invoices, but not all.
- [51] The Appellants are however disputing the two invoices.
- [52] The evidence of Shilajoe is that a document which is attached to the Respondent's Particulars of Claim and marked as Annexure A was sent to the First Appellant.

- [53] Evidence was also further led by Shilajoe to the effect that after the document was sent to the First Appellant both the Appellants never disputed it, the amount or that the services were rendered.
- [54] The Annexure A of the Particulars of Claim was sent to the Appellants like the previous invoices and that were paid.³⁴
- [55] The said document is under the letterhead of the Respondent, it is directed to the First Appellant, and it indicated what services were rendered.
- [56] I was directed by the Respondent to the definition of an invoice in terms of the Oxford Dictionary and by Longman Dictionary of Contemporary English which defines "invoice" as a list of goods that have been sold, work has been done, showing what must be paid. Indeed, the Annexure A includes these, and it can be seen as a request for payment which includes payment details so that the Appellants can pay the Respondent.
- [57] After receiving this the Appellants undertook to settle the amount. The delay in payment thereof was only occasioned because the First Appellant had not yet been paid by the Modomolle Municipality.
- [58] Accordingly, the court *a quo* was correct in finding that the Respondent had proved on a balance of probabilities that services were rendered.
- [59] The Appellants further allege that the court *a quo* misdirected itself in ordering the Appellants to pay an amount of R119 606.00 which amount is inclusive of value-added tax (VAT).
- [60] It is not disputed that VAT can only be charged by a person who is VAT registered.
- [61] The evidence was that the Respondent is VAT registered and further that a person

³⁴ Index Vol 2/2 p 110.

who is not registered cannot charge VAT.³⁵

- [62] *In casu* and based on the evidence that is before the court, the court *a quo* was correct in ordering that the Appellants pay an amount of R119 606.00 which in VAT inclusive.
- [63] Furthermore, after the Respondent closed its case the Appellants applied for absolution from the instance, but such application was dismissed by the court *a quo*.
- [64] Looking at the authorities cited above regarding absolution from the instance, there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. Absolution was correctly not granted in these circumstances.
- [65] Accordingly, when the Appellants then chose not to place specific facts before the court, they ran the risk of their opponent's version being found to be more probable.
- [66] *In casu*, it is common cause that the First Appellant was awarded a tender to provide water to the Municipality, and that the Respondent did provide the First Appellant with a water tanker and were previously paid for its services.
- [67] The Respondent's witness testified that services were rendered, that invoices were sent to the First Appellant and that the Second Appellant on numerous occasions promised that payment will be made as soon as the First Appellant received payment from the Municipality.
- [68] This evidence was not rebutted and it is clear that a *prima facie* case was made out by the Respondent. The evidence adduced before the court *a quo* was therefore correctly found to be favouring the Respondent.
- [69] In all of the above, I find that the court *a quo*, correctly found in favour of the Respondent.

³⁵ Index Vol 1/2 p 70.

[70] There is no basis on which to find that the costs of the appeal should not follow the results.³⁶

ORDER

(a) The appeal is dismissed with costs.

[REDACTED]

T. DEANE
ACTING JUDGE OF THE HIGH
COURT POLOKWANE; LIMPOPO DIVISION

COURT

I agree, and it is so ordered.

[REDACTED]

JUDGE OF THE HIGH COURT
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

For the appellants : Adv. C. Marais

Instructed by : Jaco de Villiers Attorneys

For the respondent: Mr N.C Malumbete

Instructed by : Malumbete & Makhubele Attorneys Inc.

³⁶ *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).