

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO.: EL 799/2020

Reportable	NO
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In the matter between:

MAWONGA MDAZANE

1st Plaintiff

MDAZANE INVESTMENTS (PTY) (LTD)

2nd Plaintiff

and

PHUMLANI NENE

1st Defendant

NUTIGENT (PTY) (LTD)

2nd Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] Between December 2019 and January 2020, the Chinese authorities reported pneumonia-like illnesses in Wuhan, China. A new coronavirus was identified as a cause. The Republic of South Africa (RSA) went into lockdown from midnight on 26 March to 30 April 2020 under Alert Level 5. This lockdown was part of the government's efforts to manage the spread of the virus and prevent the healthcare system from being overwhelmed. Personal Protective Equipment (PPE) which refers to specialised clothing or gear was designed to protect users from hazards or risks in various environments. The PPE included surgical masks.

[2] During that time, the first plaintiff (Mr Mdazane) and the first defendant (Mr Nene) were extremely close friends, serving as directors of separate companies, namely the second plaintiff and the second defendant, respectively. Both companies were privately held, limited liability entities, duly registered under the Company Laws of RSA.

[3] The Department of Health, Eastern Cape (the Department) advertised a tender inviting interested parties to supply surgical masks. This was crucial for preventing the spread of airborne infections and ensuring public health safety, especially in healthcare settings.

[4] The discord between Messrs Mdazane and Nene started after the second defendant secured the tender to supply One Hundred Thousand (100 000) three-ply surgical masks, adhering to the tender stringent requirements. The issue revolves around a contractual dispute between the parties.

The plaintiffs' case

[5] In his amended particulars of claim, the plaintiff alleges that on or about April 2020 in East London, the second plaintiff represented by Mr Mdazane entered into a verbal contract with the defendants. The material terms of the contract provided that the parties would collaborate as partners on a tender awarded to the second defendant for the supply of surgical masks to the Department. The objective of the partnership was to conduct business for the mutual benefit of all parties, with the common goal of generating a profit.

[6] Specifically, the agreement stipulated that both plaintiffs would contribute tender projects, in this instance surgical masks, labour, administrative skills, and resources to the partnership. Similarly, both defendants would provide labour, administration and resources of partnership.

[7] On or about 28 April 2020, the plaintiffs fulfilled their obligations by delivering 100,000 three-ply surgical masks to the defendants. As per the agreement, upon payment by the Department, the defendants were required to pay the second plaintiff an amount of R1 071,500 (One million Seventy-One Thousand Five Hundred Rand)

which comprised a cost price of R 895, 000 (Eight Hundred Ninety-Five Thousand Rand) and a share profit of R176, 000 (One Hundred Seventy –Six Thousand Rand).

[8] The plaintiff alleges that on 15 July 2020, pursuant to the terms of the agreement, the defendants breached their contractual agreement by failing to remit the stipulated payment owed to the plaintiffs. On or about 20-21 July 2020, Mr Mdazane made a demand for payment pursuant to the contract. In response, Mr Nene indicated via a text message that payment would be effected upon receipt of payment from the Department. Notwithstanding a formal demand dated 29 July 2020, the defendants failed to pay the contracted amounts, thereby breaching their obligation under the agreement.

The defendants' case

[9] In the plea, it is denied that the second plaintiff and the second defendant, or alternatively the first plaintiff and the first defendant ever entered into a partnership agreement or agreed to collaborate as partners on this matter. At all relevant times, the understanding between the parties was that the second defendant, having been awarded the tender, would supply the masks directly to the Department for its exclusive benefit.

[10] The defendants maintain that the masks were sold to the Department at the regulated price of R12,48 each, as per Treasury's guidelines. Additionally, they allege that a specific agreement was made that Mr Nene would purchase the surgical masks from Mr Mdazane at R6,50 per mask contradicting Mr Mdazane's allegation. Further that Mr Mdazane would receive a payment of (Six Hundred and Fifty Thousand Rand) R650 000. In their plea, the defendants offer a settlement of R650,000, which the plaintiffs reject.

The evidence

[11] The evidence adduced by both parties in court is sufficiently documented and requires no recapitulation. I will, however, underscore key facets of the parties' testimonies that are significant although they are already captured in the pleadings. Mr Mdazane testified that he and Mr Nene jointly submitted a bid as business

partners and they had immediate access to surgical masks obtained from a supplier in Cape Town at a cost of R8,95 per unit.

[12] When asked about the partnership he explained that it was essentially a profit-sharing arrangement. This was not the first collaborating venture, as they had previously worked together on other projects as partners. He also mentioned that during their interaction, Mr Nene claimed to have received no payment from the Department on 15 July 2020 which raised serious concerns about Mr Nene's honesty. Through his independent investigation, he discovered that the Department effected Mr Nene's payment. With this evidence, the plaintiffs closed their case.

[13] After the closure of the plaintiff's case, the defendants applied for an absolution from the instance.¹ The details of the presentation are unnecessary for this discussion. It suffices to state that the application for absolution from the instance was dismissed due to the *prima facie* evidence presented by Mr Mdazane. Notably, this evidence included: the admission of an oral agreement and Mr Nene's involvement in the contractual agreement, stemming from his role as director of the second defendant.

[14] Ms Emba Moseline Exford (Ms Exford), an employee of the second defendant, testified about her role in preparing a document related to the bid. She submitted an order form specifying the quantity of the masks to be ordered and delivered to the Department. Ms Exford denied any partnership between the plaintiffs and defendants. Supporting this Mr Nene stated that Mr Mdazane's financial difficulties presented an opportunity to procure masks from him, rather than outsourcing from an external company.

[15] Mr Nene further testified that if he had known that Mr Mdazane would demand a higher price than agreed, he would not have bought the surgical masks

¹ The test for absolution to be applied by a trial court at the end of the plaintiffs' case was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 402 (a)* where the court stated the following:when the absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the 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 or ought to) find for the plaintiff.'

from him, especially since in some companies they were priced between R6, 90, R6,50 and R4,95 each at the time.

[16] When questioned about not paying the R650,000 he had offered, he testified that Mr Mdazane was insisting on a higher amount. Despite his attempts to explain that litigation costs were already substantial, Mr Mdazane declined to settle. That was the case for the defendants.

The law

[17] In civil proceedings, the plaintiff must, in order to succeed, prove his case on a balance of probabilities. In *National Employers General Insurance Limited v Jagers*,² the court held:

“[I]t seems to me with respect, that in any civil case, as in criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.....”

[18] In the present instance, I am faced with two irreconcilable versions, therefore, I have to follow the approach that is typically adhered to by our courts in resolving factual disputes. This is outlined in *Stellenbosch Famers' Winery Group Ltd & Another v Martell ET Cie & Others*³. The approach involves three prolonged analyses where the court assesses witnesses' credibility, their reliability and probabilities.

[19] To pursue this approach, several factors, while not decisive may still play a significant role. This encompasses various characteristics including the witness's

² 1984 (4) SA 437 (E) at 440 D-G.

³ 2003(1) SA 11 (SCA) para 141J-15 A-D.

honesty and behaviour while testifying, hidden biases, inconsistencies within their testimony or with previously stated facts, the probability or improbability of specific aspects of their account, the credibility of their performance compared to other witnesses testifying about the same incident.⁴

[20] According to the tone set by the landmark case⁵, witnesses' reliability hinges on two key factors: their opportunity to experience the event in question and the quality, integrity and independence of their recall.

The parties' contentions and the evaluation of evidence by the court

[21] Regarding partnership as claimed by the plaintiffs, *Mr Kotze*, counsel for the defendants referenced to the case of *Joubert v Tarry & Co*⁶, where the court settled the essentials of partnership. The court held that each of the partners brings something into the partnership and that the business is carried on for joint benefit with the object of making the profit for a legitimate purpose.

[22] During cross-examination, Mr Mdazane's admission that the defendants secured the tender independently, directly contradicted his earlier testimony of joint participation in the bid process. Moreover, Ms Exford's direct involvement in preparing the tender documents discredited Mr Mdazane's claims of participation, which he had attributed to his purported partnership with the defendants. Additionally, when Mr Kotze denied the partnership's existence during cross-examination, Mr Mdazane's repeated refusal to comment undermined his previous testimony, in which he had claimed that a partnership existed.

[23] It was further suggested to Mr Mdazane that prior to the bid process in question, he had attempted to formalise his understanding with Mr Nene into a partnership. However, Mr Nene clarified that these were two separate entities, emphasizing that there was no partnership between them. Mr Mdazane subsequently acknowledged this statement as accurate and this contradicted his earlier version on the same issue.

⁴ Fn 2 above.

⁵ Fn 2 above.

⁶ 1915 ZATPD 47.

[24] In addition, the evidence presented by Ms Exford and Mr Nene, corroborated by Mr Mdazane's concession during cross-examination, which contradicts his initial testimony, demonstrates on a balance of probabilities that no partnership existed in this matter. While it is acknowledged that Messrs Mdazane and Nene shared a remarkably close relationship, a comprehensive examination of the evidence reveals that there was no partnership between the two parties and the respective companies prior to the court proceedings.

[25] The proceedings further reveal ambiguity in Mr *Vapi's* presentation on behalf of the plaintiffs. Notably, he simultaneously argues for the first defendant's personal liability when the evidence reveals that the surgical masks' procurement stemmed from a bid involving the second defendant. Again, this contention lacks merit.

[26] It has now been established that Mr Nene entered into a verbal agreement with the plaintiffs on behalf of the second defendant. The dispute centres on the cost of each surgical mask that the plaintiffs were supposed to charge the second defendant.

[27] In his testimony, Mr Mdazane revealed that he had unilaterally secured the surgical masks from a Cape Town-based company prior to the commencement of the bidding process. Nevertheless, he failed to substantiate the purchase price of R8, 95 per surgical mask. His earlier insistence that surgical masks cost between R12 to R15 each at the time failed to support his case. His argument, based on the logical premise that purchasing a surgical mask at R8,95 each and reselling them at R6,50 would have been unprofitable, lacks credibility without invoices to support this claim. Therefore, one concludes on the totality of the evidence tendered that Mr Mdazane's testimony lacks credibility and as such renders his evidence unreliable.

[28] Therefore, the argument positing that Mr Nene is personally liable to pay the plaintiffs an additional amount of (Four Hundred and Twenty-One Thousand Rand) R421 000 is not supported by the facts. In this regard, the plaintiffs' claim cannot succeed.

Costs

[29] The general rule is that costs follow the result. Generally, the question of costs requires individual considerations, taking into account the unique characteristics and complexities of the issues involved.

[30] In this matter, the defendants submit that if the court dismisses the plaintiffs' claims, except to the extent admitted by the second defendant, the defendants should be awarded costs. This is due to their substantial success in (a) absolving the first defendant from the proceedings; and (b) defeating the plaintiffs' claims against the second defendant who ought to be entitled to costs of suit in the trial.

[31] The defendants overlook that an application for absolution from the instance was dismissed, thereby implying that the plaintiffs succeeded in that application. Moreover, the first defendant's status as a director of the second defendant renders him an interested party in the proceedings. Additionally, given the verbal nature of the contract, the first defendant was inherently a participant in the agreement.

[32] Considering that neither party has achieved substantive success in these proceedings, I exercise my discretion and hold that neither party is entitled to costs.

Order

[33] The following order shall issue:

1. The cancellation of the oral agreement between the plaintiffs and the defendants entered into on or about April 2020 is hereby confirmed.
2. Judgment is granted in favour of the plaintiffs in the amount of R650 000 (Six Hundred and Fifty Thousand Rand) as tendered by the defendants, jointly and severally the one paying the other to be absolved.
3. The plaintiffs' claim for breach of contract against the defendants in the amount of R421 000 (Four Hundred and Twenty-One Thousand Rand) is dismissed.
4. There shall be no order as to costs.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant	:	Mr S Vapi
Instructed by	:	c/o Siyathemba Sokutu Attorneys East London
 Counsel for the Respondent	:	 Adv. Kotze
Instructed by	:	Gravett Schoeman Inc. East London
 Heard on	:	 17 July 2024
Judgment Delivered on	:	29 October 2024