REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5051/14

In the matter between:

PHOLILE BUSINESS SOLUTIONS CC Appellant

and

SIDAS SECURITY GUARDS (PTY) LIMITED Respondent

JUDGMENT

VICTOR, J:

[1] This appeal raises an issue well traversed in these courts as to whether an exception may be upheld based on the interpretation of a contract.

[2] The appellant's cause of action is based upon a statement and debatement of account arising out of a written partnership agreement concluded on 19 August 2009. In terms of the agreement the parties agreed

with effect from the effective date to carry on business of submitting tenders for the delivery of security services and all business related to this. They agreed that the tenders would be submitted under the name of the defendant and on being awarded such a tender to carry on business under the name of the defendant.

[3] The essence of the respondent's complaint is that the appellant should have alleged in its particulars of claim that the contracts or business agreements secured were in accordance with the provisions of clauses 2.1.1 and 16.2 of the partnership agreement. The respondent also argued that the recordal of such award and reference to the third party had to be incorporated into this partnership agreement.

Clause 2.1.1 of the partnership agreement.

[4] Clause 2.1.1 provides:

> "***Constitution of partnership***
>
> *The partners agree with effect from the effective date to carry on the business of submitting tenders for the delivery of security services and all business related thereto under the name of Sidas Security Guards (Pty) Limited and after obtaining such tender, to carry on business under the name of Sidas Security Guards (Pty) Limited. This agreement is valid for businesses and agreements secured under this agreement only, and exclude any other agreements which parties hereto have secured in the past, or will secure in the future in its own name.*"

[5] The effective date was not defined in Clause 2.1.1 but the parties both signed the agreement on the 19th day of August 2009. The respondent

submits that since no date was specified in the agreement therefore the effective date did not commence. Alternatively such business as was acquired was in its own name and not in accordance with the partnership. It is common cause that the Department of Home Affairs awarded a tender to the defendant. Whether this tender is to be regarded as partnership business is a central feature in the debatement of account.

[6] The further issue raised in relation to clause 2.1.1 are the words '*This agreement is valid for businesses and agreements secured under this agreement only, and exclude any other agreements which parties hereto have secured in the past, or will secure in the future in its own name.*' In order to understand the respondent's submission, the modus operandi of the partnership business would have to be recorded by way amplifying the partnership agreement to incorporate *businesses and agreements secured under this agreement only*. The respondent contends that since there had been no written variation/ notation as set out in clause 16.2 therefore there was no issue to debate. It was common cause that the partnership agreement had not been amended.

Clause 16.2 of the partnership agreement

[7] Clause 16.2 is as follows:

> "*No amendment or consensual cancellation of this agreement or any provision or term thereof or any agreement, bill of exchange or any document issued or executed pursuant to or in terms of this agreement and no settlement of any disputes arising under this agreement and no extension of time, waiver or relaxation or suspension of any other provisions of the terms of this agreement, bill of exchange or other document issued pursuant to it in terms of this agreement, shall be binding unless recorded in a written document signed by the parties ...*"

[8] The respondent's case is that this clause was unambiguous and meant that a tender awarded by a third party such as the Department Home Affairs (if indeed it was awarded to the partnership) would have to be evidenced by amplifying the partnership agreement in writing. It follows from the respondent's argument that in the absence of writing there was no partnership business and it was unnecessary to search for any further interpretation.

The legal principles

[9] The following general principles relating to exceptions in our law have long been accepted. The *onus* is on the respondent to prove that the particulars of claim are excipiable on every reasonable interpretation thereof. See *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others* 2008 (4) SA 302 (SCA) at 307D. The whole cause of action must be demonstrated to be vague and embarrassing. See *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899G. In *South African National Parks v Ras* 2002 (2) SA 537 (C) at 534A-B it was held that a pleading is only excipiable if no evidence led on the pleadings can disclose a cause of action. Even greater latitude was placed on the test in (*Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Limited v Transnet Limited* 2003 (5) SA 665 (W) 669A-D) where it was held that the court should not look at a pleading with a magnifying glass of too high power and the test on exception should be a charitable one.

[10] The respondent has placed reliance on the principle enunciated in *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (SCA) at 186J

> "As a rule courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where the meaning is uncertain.... contracts are not rendered uncertain because parties disagree as to their meaning."

[11] In my view and on closer analysis, the clauses in question demonstrate a number of different interpretations. I reject the respondent's contention and above all find no support for the submission that the partnership agreement had to be amplified each time a tender was awarded to the partnership. In fact the agreement is glaringly absent of any formal prerequisites as to how any future contracts between the parties must be administered and allocated.

[12] The court *a quo* upheld the respondent's exception on the basis that clause 16.2 allowed for an oral agreement between Mpumalanga Department of Home Affairs and the respondent and that this had to be in writing and find its place in a clause 16.2 variation. I cannot discern any factual matrix or interpretative principle by the court a quo to justify such a conclusion.

[13] In my view the ordinary grammatical meaning of clause 16.2 relates to the amendments and consensual cancellation of the agreement concluded inter partes.

[14] The appellant is correct in submitting that clause 16.2 relates to no more than a non-variation clause of an already existing agreement as between the parties and does not suggest the inclusion of third party clients. In my view the appellant should be given an opportunity to prove its interpretation of clause 16.2. In particular that it does not constitute a clause requiring any formalities for the valid conclusion of an agreement with a third party by the defendant pursuant to the provisions of the partnership agreement.

[15] The appellant contends that the sentence construction of clause 16.2 is plain. Amendment and cancellation of the clause on the one hand and the consequent objects on the other hand are preceded by the preposition "*of*" and separated by the conjunctive "*or*" on the other hand. In my view if meaning is to be attributed to it at this stage then it is an agreement inter se. It does not fall within the ambit of the *Sun Packaging (Pty) Ltd supra* where there is mere disagreement as to its intended meaning. The interpretation problem is far more fundamental.

Context of the contract

[16] There is a further principle which is apposite as a result of the evolving jurisprudence on interpreting contracts within a context. The context of an agreement is relevant and the evidence about the Mpumalanga contract as contended for by the appellant should not be curtailed at exception stage. See on context *KPMG Chartered Accountants SA v Securifin Limited and Another* 2009 (4) SA 399 (SCA) 409I-J and *Bothma-Batho Transport (Edms)*

Bpk v Bothma en Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) paras [10] to [12].

[17] In the result:

(a) The appeal is upheld with costs

(b) The order of the Court a quo is set aside and replaced with the following:

'The exception is dismissed with costs'

M. VICTOR

M VICTOR
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

T M MASIPA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

H FABRICIUS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

FOR THE APPELLANT	ADV H P VAN NIEUWENHUIZEN
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FOR THE RESPONDENT	ADV A P BRUWER
INSTRUCTED BY	KITCHING ATTORNEYS Brakpan Tel: (011) 744 4961 Ref: Mr Kitching/LL/WK03714

COUNSEL ARGUED THE MATTER ON THE 03/06/2015.
THE DECISION IN THIS MATTER WAS HANDED DOWN ON:

12/06/2015 MASIPA J

VICTOR J