REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 35644/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

29/09/2021

SIGNATURE DATE

In the matter between:

MASSBUILD (PTY) LTD	Plaintiff
and	
ANDRIES SEHLOHO	First Defendant
RUSSEL STEAD	Second Defendant
TM ECOGLOBAL ENTERPRISES (PTY) LTD	Third Defendant

JUDGMENT ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

MALUNGANA AJ

[1] The plaintiff in this matter has instituted an action against the three defendants for damages, wherein the plaintiff seeks to hold the first and second defendants liable for their delictual acts as well as breach of their employment contracts with the plaintiff. The claim for damages against the third defendant is solely based on delict.

[2] At the close of the plaintiff's case, the second and third defendants brought an application for absolution from the instance in terms of Rule 39(6) of the Uniform Rules of Court.

[3] Before dealing with the merits of the application I need firstly to sketch out the following relevant background. It is contended on behalf of the plaintiff that on 28 February 2017, at or near Midrand, Gauteng, the first and second defendants purportedly acting on behalf of the plaintiff concluded a written agreement with Reatha Acquisition and Management (Pty) Ltd (herein referred to as "Reatha"). In terms of the said agreement the plaintiff would supply material and provide repair and upgrading services to Reatha in respect of certain storm damaged schools in Limpopo at a fee of R11,442,180.00. A copy of the agreement is shown in annexure 'POC4.1" to the particulars of claim.

[4] Pursuant to the conclusion of the above contract Reatha transferred an amount of R5,018,474.69 into the plaintiff's bank account. It is further contended that during March 2017, the first defendant purported to conclude a written agreement on behalf of the plaintiff with the third defendant, in terms of which the plaintiff would sub-contract its obligations in terms of the Reatha Limpopo Contract to the third defendant.

[5] According to the plaintiff, in concluding the Reatha Limpopo Contract, the first and second defendants lacked the requisite authority, and therefore acted in breach of their respective employment contracts. Furthermore the defendants lacked the necessary authority to conclude the sub-contract with the third defendant[1].

[6] Essentially the plaintiff contends in paragraphs 11.2.2.1-11.2.2.2 of its particulars of claim that the first and second defendants failed or rather abused the One-Time Vendor process by:

> "11.2.2.1 procuring approval of and or approving the Third Defendant as one-time vendor for the provision of services as opposed to the provision of materials; and/or

[1] Particulars of Claim para.11. Case- lines 082-15

11.2.2.2 procuring the approval and /or approving the registration of the Third Defendant as one-time vendor when one or more of the directors of the Third Defendant is or are family members of the First Defendant."

[7] In paragraph 11.2.3 the plaintiff alleges that the first, and or the second defendant procured payments by the plaintiff to the third defendant in the absence of authorised agreement and/or compliance with the rules, regulations and policies of the plaintiff in the absence of the third defendant rendering the services in terms of the alleged sub-contract.

[8] I now turn to the merits of the application before me. When 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 established what would finally be required to be established, but rather 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.

[9] It is the second defendant's case that the plaintiff has failed to produce a *prima facie* evidence concerning each of the elements required for a claim based on breach of contract. The second defendant further contends that the plaintiff failed to prove damages it allegedly suffered that naturally flow from either Reatha or his employment contract with the plaintiff.[2]

[10] On Reatha contract, counsel for the second defendant submitted that via an express decision taken by the plaintiff to uphold the Reatha contract, for the express purpose of not losing Reatha as a customer, and pursuant to an audit conducted by Visagie in terms of which the respondent proposed a recovery contract plan, which effectively amounted to settlement of Reatha contract, the plaintiff had ratified the Reatha contract.

[11] As regards the breach premised on the employment contract, counsel for the defendant sought to argue that plaintiff's conclusion of the 'full and final' settlements with the second defendant and Reatha in respect of the execution of Reatha contract bear significance of respondent's condone-ment and implicit acceptance of the Reatha contract.[3]

[12] The case for the third defendant on the other hand was that the plaintiff had not made out a *prima facie* proof of its delictual claim for damages, accordingly absolution from instance in terms of rule 39(6) should be granted with costs. In particular the third defendant argues that no evidence has been adduced to prove that the plaintiff's allegation that the third defendant had devised some scheme in the signing of the Reatha Contract.

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[2] Second Defendant's Heads of Argument, para 15-16, Case- lines 054-8
[3] Second Defendant's Heads of argument, para 27, Case- lines 054-11

[13] According to the third defendant there is evidence that the latter had made quotations to the plaintiff which were accepted, and no evidence was led to the effect that third defendant ought to have known or expected to have known that people who accepted the quotes and issued purchase orders had no authority to do so.[4]

[14] The following submissions from the third defendant's heads of argument deserve consideration. In argument, counsel for the third submitted under paragraph 22 that:

> "22 It should be indicated that the claim by the Plaintiff against the Third defendant is not for the manner in which its director Ms Nhlapo conducted its affairs, but for a wrongful conduct in its dealings with the Plaintiff's through its representatives. There is no claim against Ms Nhlapo on the embezzlement of the Third Respondent's funds, and /or against the manner in which she conducted the business of the Third Defendant that led to the Plaintiff suffering any damages. Therefore no evidence was led showing any relevance for those bank account statements to the Plaintiff's case."

[15] The plaintiff's response to the defendants submissions is briefly as follows: Its causes of action arise from the scheme which was devised by /and or implemented by all of the first, second and third defendants, acting individually or together. According to the plaintiff evidence had been led to support the critical elements which were designed to cause the respondent to suffer the damages claimed in the present proceedings. , the respondent submits that evidence has been adduced upon which this court could or might find for the respondent. Over and above this a case where absolution from the instance should not be granted in that the applicants are in possession of the evidence against one another which is relevant for these proceedings.

[16] On the Reatha Contract, the plaintiff referred on the evidence of Anthony Riley, who testified that it was not the business of the plaintiff to provide construction, repair or project management services. The plaintiff's witnesses had testified that the business of the respondent is that of material supply.[5] It is the evidence of Mr. Riley that both the first and second defendants were not authorized to conclude the Reatha Contract.

[17] The plaintiff further relied on the evidence of Daphine Meiring for Reatha, who testified that the second defendant's signature as Acting Branch Manager gave them peace of mind in concluding the contract in that the first defendant was just a 'key account manager', whose role does not carry much weight. According to the plaintiff the second respondent played a critical role in providing guarantees and assurances to Reatha. In support of this

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[4] Third Defendant's Heads of argument, para.18, Case-lines 054-108
[5] Plaintiff's Heads of Argument, para.22 Case-lines 054-250

argument she pointed out the letter signed by the first applicant on the 28 of February 2017.[6]

[18] Regarding the selection of third defendant) by the first defendant as a contractor, counsel for the respondent had this to say, inter alia:

> "36 The first defendant selected the third defendant in circumstances where, as the director of the third defendant, Nhlapo testified:
>
> 36.1 She had formed the third defendant after terminating her employment with Anglo Coal in Kriel where she had been an underground operator. The registered addresses of the third defendant was her mother's house in Kriel. The second director of the third defendant had been her sister who was at school at the time that the third defendant had been formed.
>
> 36.2 The first defendant was known to her because she was her brother -in- law. She is married to his brother. There was accordingly a direct familial relationship between the first defendant and the third defendant.
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> 36.3 The third defendant had provided virtually none of the extensive services that were listed in its profile/brochure and which were represented as services which were offered the defendant. The third defendant had in fact only supplied "more than 20 barricades" and five or six hoses" / lay flats to Anglo Coal.
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> 36.4...
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> 36.5 The third defendant had never (1) previously performed any construction work; (2) engaged a sub-contractor to perform construction work; or (3) contracted any employees who had carried out construction work.
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> 36.6 Ms Nhlapo's only experience of construction work was the renovation of houses owned by her in her personal capacity.
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> 36.7 The third defendant only registered with the Construction Industry Development Board (CIDB") on 08 March 2017 (after the conclusion of the Reatha Contract) and then only registered at the very lowest level namely Grade 1GBPE and 1CEPE.Meiring testified that Reatha required a contractor

[6] Plaintiff's Heads of argument, para.33 Case lines 054-253

with much higher CIBD rating because this was a requirement of the Development Bank of South Africa who had awarded the contract to Reatha.

36.8 The third defendant was contracted by the first defendant (purportedly on behalf of the plaintiff) to supply building materials despite the fact that the plaintiff is itself the supplier of building materials (something which the third defendant accepts to be a common cause)."

[19] Mr Visagie testified at length that the amounts quoted by the third defendant were far in excess of the amounts contained in the bill of quantities issued by Reatha in respect of the Limpopo schools project.[7]

[20] It was Ms Hlapo's evidence that she would receive a purchase order by email from the first defendant after she had submitted a quotation from him, prepare an invoice and delivery note which would submit to the first defendant. The total sets of quotations, invoices and delivery notes issued by the third defendant amount to R4,927,016.58.[8]

[21] The delivery notes were signed by the first defendant on the authority of the second defendant.[9]

[22] The progress reports of Kayamba corroborated by the Meiring, is to the effect that the materials listed in the delivery notes had not been delivered by the time that the first defendant signed the delivery notes. According to Mohamed Bodait's testimony the delivery notes were signed for the sole purpose of the respondent making payment.[10]

[23] It was submitted that the second defendant used his authority as an acting manager to request the plaintiff's merchandise department to approve the supply of certain products and services by the third defendant.[11]

[24] It is not necessary for me do to go through the facts in greater detail. Immediately I proceed to consider the legal principles applicable in this matter.

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[7] Plaintiff's Heads of Argument, para 054-260
[8] Plaintiff's Heads of Argument, para 51-52, Case-lines 054-260
[9] Plaintiff's Heads of Argument, para 56, Case-lines 054-261
[10] Plaintiff's Heads of Argument, para 60, Case lines 054 262
[11] Plaintiff's Heads of Argument, para 74, Case lines 054-266

Applicable legal principles and evaluation

[25] It is trite that the test to be applied by a court when absolution is sought at the end of the plaintiff's case is whether there is evidence upon which a reasonable person might (not should) find for the plaintiff.[12]

[26] In *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) the Court held that:

> 'The test for absolution to be applied by a trial court at the end close of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms:
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> > "...(W) hen absolution from instance is sought at the close of 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, nor ought to) find for the plaintiff."

[27] The test for legal causation based on the breach of contract is succinctly explained by Corbet CJ in *International Shipping Co (Pty) Ltd v Bentley* [1990] 1 All SA 498, *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* [1998] 4 All SA 281. If it cannot be shown that the loss would not have occurred but for the breach, the plaintiff's claim fails. If the plaintiff's claim passes the *'but- for' test,* Corbet CJ explains:

> " The second inquiry then arises, *viz* whether the wrongful act [in a contract case, the breach of the contract] is linked sufficiently closely or directly to the loss for legal liability to ensure or whether, as is said, the loss is too remote. This is basically a juridical problem in the solution of which consideration of policy play a part. This is sometimes called "legal causation."

[28] If at the end of the plaintiff's case there is evidence upon which a court, applying its mind reasonably, could hold that it had been established that either the one defendant or the other defendant or both of them were legally liable, and is uncertain as to which of the alternatives claims was the correct one, the court should not grant absolution at the suit of either defendant.[13]

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[12] Gascoyne v Paul and Hunter, 1917 T.P.D, 170 at para.173, Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 307 (T).

[13]Mazibuko v Santam Insurance Co Ltd and Another 1982 (3) SA 125 (A), Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA 771 (W).

[29] In the case of doubt as to what a reasonable court 'might' do, the court should lean on the side of allowing the case to proceed, for the plaintiff should not be lightly deprived of his remedy without the evidence of the defendant being heard. A defendant who might be afraid to go into the witness -box should not be permitted to shelter behind the procedure of absolution from instance.[14]

[30] Returning now to the facts of this case. The respondent's contractual claim is based on the allegation that the first and second defendants have breached their employment contracts by entering into an agreement with Reatha without the requisite authority. Evidently it is not disputed by the second and the first defendant did not have the authority to conclude the Reatha contract. It emerged from the evidence adduced that the first defendant had procured the services of the third defendant to provide the services stipulated in the Reatha's Contract without the necessary authority to do so. There is evidence for the plaintiff that the second defendant had acted wrongly by procuring the registration of the third defendant as a one -time vendor', and instructing the first defendant to sign the delivery notes. There is evidence that the first defendant was authorised by the second defendant to sign the relevant approval in terms of the one -time vendor system as well as the delivery notes.

[31] One cannot turn a blind eye to Mr. Visagie's evidence which reveals that he conducted investigation on the Reatha project, and found that in most cases the work that had been invoiced had not been done, and the priced materials and work were quite excessive and not in accordance with the bill of quantities. Bearing in mind that the plaintiff's delictual claim against the third defendant is based on the allegations that it manufactured quotations, invoices and delivery notes on the instructions of the first defendant, it is difficult for the court find bases upon which it can absolve the third defendant from instance of this case. There is evidence that the third would issue invoices against the delivery notes, and according to Kayamba the materials which were listed in those delivery notes were not delivered at the time of signing. Visagie testified that the value of work done and materials delivered on site where the project was being conducted was far less than the plaintiff had paid out in terms of the invoices submitted by the third defendant. Consequently the respondent had to refund R4,927,750.21, which amount the plaintiff claims the defendants are jointly and severally liable to the plaintiff.

[32] Where one party is possessed of knowledge the other party does not have, lesser evidence is required of the party not having the knowledge to establish a *prima facie* case. See *Union Government (Minister of Railways) v Sykes* 1913 AD at 173-4. Colman AJ was confronted with a similar kind of situation in *Putter v Provincial Insurance* referred to *supra.* He summarised his decision to grant absolution from instance by referring to the English

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[14] Supreme Services (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA) at 93H, and 93G

case of *Hummerstone and Another* [1921] 2 KB 664 and summed up the effect of his decision as follows:

> "The action there, like the present action, was one under the Rule of Court entitling the plaintiff, who was uncertain which of the two persons was responsible for damage sustained by him, to sue them both in the alternative, and in that case the Court was concerned with an application by one defendant for absolution from the instance at the close of the plaintiff's case. It was held that as long as there was some evidence indicating negligence on the part of one of the defendants neither of them should be dismissed from the case but the matter be decided on the evidence as a whole, namely all the evidence that might be placed before the Court by all the parties."

[33] In light of the facts of this case, it seems to me that the *Hummerstone's* case is applicable to the current case. The three defendants *in casu* are being sued together in the same suit, and from the evidence placed before either of the parties possesses the so called knowledge the other party does not have. Evidence reveals that the second and first defendants cooperated with each other to ensure that the Reatha contract is signed despite their apparent lack of authority to sign such a contract. The other facts emerging from the evidence, is that proper procedure leading up to the conclusion of the Reatha Contract and the sub-contract with the third defendant were not adhered hereto in contravention of the plaintiff's standard rules and regulations, policies and procedures. As per Visagie 's testimony, uncertified delivery notes were issued and monies were paid to the third defendant for work not actual done or material being supplied. Consequently the respondent had to refund an amount of R4, 927, 750.21 to Reatha. To my mind, this evidence leads one to conclude that there is at least *prima facie* case for the defendants to answer.

[34] Having heard considerable submissions from counsels, and considered the relevant authorities referred to by all the parties involved in the application, I am of the considered view that there is evidence on which a reasonable court might give judgment in favour of the plaintiff.

[35] The following order is accordingly made:

(1) The application for absolution from the instance by the second and third defendants is refused.

(2) The second and third defendants are to pay the costs occasioned by the application.

P H MALUNGANA
Acting Judge of the Gauteng Division, Johannesburg

APPEARANCES

Counsel for the Plaintiff:	**Adv. P Bosman**
Instructed by:	**Edward Sonnenbergs Inc**
For the Second Defendant:	**Adv. Francious Slabbert**
Instructed by:	**David Mey and Partners**
For the Third Defendant:	**Adv. G. Mashimbyi**
Instructed by:	**Makobe & Associates**