



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICH EVER IS NOT APPLICABLE

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

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

(3) REVISED.

DATE 29/11/2012

SIGNATURE

CASE NO: 32818/2007

DATE: 29 November 2012

IN THE MATTER BETWEEN

BOKHONI MANAGEMENT SERVICES (Pty) Ltd

Plaintiff

and

SMALL ENTERPRISE DEVELOPMENT AGENCY

1st Defendant

DAVID HALE

2nd Defendant

JUDGMENT

LEDWABA J:

[1] The plaintiff [Bokhoni] issued summons against the first defendant [SEDA] for goods sold and delivered and for professional IT services rendered to the SEDA claiming the total amount of R461 006.78 (four hundred and sixty one thousand and six rand and seventy eight sent). Bokhoni further attached some invoices annexures F1 – F11 to the particulars of claim to support its claim.

[2] SEDA is defending the claim and it filed a plea and a counterclaim against Bokhoni and the second defendant [Mr Hale] jointly and severally in the amount of R450 916 (four hundred and fifty thousand nine hundred and sixteen rand).

[3] Mr Hale did not attend court and the trial of Bokhoni and SEDA proceeded in his absence.

[4] Mr David Johannes Pretorius [Mr Pretorius] testified for the plaintiff that Bokhoni's relationship with Ntsika started in the year 2004. Ntsika later operated its business as SEDA. The contact person or the SEDA's representative was Mr Hale for the deals between SEDA and Bokhoni.

[5] Mr Pretorius described the *modus operandi* for providing goods to SEDA as follows:

5.1 Mr Hale would invite Bokhoni to submit a quotation to SEDA by fax or e-mail or by telephone for the goods sought by SEDA.

5.2 Bokhoni would source prizes from its suppliers, add a profit of about 3 – 7 % on the costs and send the quotation to SEDA.

5.3 If the quotation is acceptable, SEDA would place an order and the goods would be delivered to SEDA or be collected from the plaintiff by SEDA's representative. For orders less than R1000 a written order was not necessary (for example, in respect of goods reflected in annexures F9 and F10).

5.4 There would be a reconciliation process done by the respective administration offices in respect of the goods purchased to verify if the correct goods were delivered to SEDA. The reconciliation process was further important to record and manage the warranty on the goods.

[6] It is common cause between the parties that since 2005 SEDA paid for goods ordered and delivered except for items on the invoice F2, F3, F4, F5, F7, F8, F9 and F10.

[7] Mr Pretorius said since he commenced business with SEDA he never received a complaint concerning goods ordered and delivered and he could not understand why SEDA stopped paying.

[8] Bokhoni In 2005 had some meeting with Hale regarding for the provision of the IT services to SEDA. Mr Hale suggested to him that the Bokhoni should employ one Glen who would render IT services to SEDA since the company that Glen worked for would not be rendering services to SEDA anymore and SEDA needed Glen's services. Glen would be stationed at SEDA's premises.

[9] To sustain the good relationship between SEDA and Bokhoni, he agreed to accommodate the issue of Glen on the basis that it would be on temporary basis that, the plaintiff would not directly employ Glen, Bokhoni would invoice SEDA for services rendered based on the job cards that Glen would provide to Bokhoni for the services that he would have rendered to SEDA. Bokhoni would charge R100 on every R300 received from SEDA for services rendered and Hale's company, Compucompass, would invoice Bokhoni for the balance. Compucompass would then pay and manage the monies paid by Bokhoni for Glen.

[10] Mr Pretorius said Compucompass previously rendered services to the plaintiff and according to him there was nothing untoward on the deal or the

arrangement. He also insisted that the transactions should be above board and be properly documented.

[11] Despite the arrangement that the plaintiff would only pay or transfer money to Compucompass after SEDA shall have settled Bokhoni's invoices for the services rendered. Glen sometimes insisted that Bokhoni should pay him before money was received from SEDA. for example. on 25 January 2006 Bokhoni invoiced SEDA (inv 828) an amount of R32 4000 and Bokhoni paid compucompass R23 3000 on 26 January 2006. see the Trial bundle pages 83 and 87 respectively, before SEDA settled the account.

[12] Mr Pretorius further said he was of the view that the invoices submitted for service rendered could be verified by SEDA.

[13] In March 2006 Bokhoni through Billy Ditshego sent a letter to SEDA claiming the outstanding payments, it, *inter alia*, wrote the following:

"We ask you to react on the following:

- 1. We are entitled to information and we need you to explain to us why withhold payments till now and more specifically why you withhold money for equipment already in use by you!*
- 2. How are you going to assist or compensate us for this deliberate failure to pay your account for items and services you ordered from us*
- 3. Please forward to us your vision and mission statement with reference to your approach to develop business and support SMME's.*
- 4. Could you ensure that the full outstanding amount of R461 006.78 (Four hundred and sixty one thousand and six rand and seventy eight sent) is paid over to us without delay as nothing of this is in dispute as far as we are concerned and in the unlikely event that you are in disagreement. that we doubt. we ask you to pay the undisputed amounts or return the equipment in the same state and packages that*

it was delivered in. This has to be done within 48 hours as your failure to pay or communication to us put us in a difficult financial position.

We trust that you shall at least now react on our request failing which we shall be forced to take the matter further (that is so unnecessary)." See page 146 of the trial bundle.

[14] SEDA's responded and requested outstanding invoices signed orders relating to the said invoices and signed delivery notes to prove delivery. Bokhoni's response was that *all documentations are in order and sent to finance*.

[15] During cross-examination Mr Pretorius conceded that Glen was not an employee of Bokhoni and that Bokhoni did not render any services to SEDA. The plaintiff's counsel, correctly in my view, informed the court that the plaintiff is no more pursuing claims for services rendered in annexure F6 and F11. The plaintiff's claim would be reduced with an amount of R73 359.00.

[16] SEDA called one witness Mr GJJ Martins as its witness. He testified that he was instructed by SEDA's management to investigate the relationship between Bokhoni and Mr Hale. He interviewed Mr Hale. He further said Glen made certain revelations about the conduct of Mr Hale and he (Glen) was indemnified for any charges that could be preferred against him. A forensic investigation was made by Gobodo Risk Management.

[17] He also stated that in January 2006 he was instructed not to make any payments to Bokhoni.

[18] He said in his investigation he could not find any notebooks that Bokhoni alleged were delivered nor could he find any quotations from Bokhoni that were accepted by SEDA. I interpose to state that Mr Pretorius produced the quotations that were sent to SEDA and they formed part of the Trial bundle. He further said

the purchase orders were to be issued and be signed by SEDA but he could not trace any signed purchase order.

[19] The payment were done by the finance unit on recommendations of the procurement unit which means that before Bokhoni was paid for other invoices the finance unit and procurement unit checked if the documents were in order.

[20] Importantly, he said prior to November 2005 there was no policy on procurement. The internal policy on procurement which came into effect in November 2005 was not communicated to the service providers.

[21] Mr Martins further said he was the only person who gave instructions to SEDA's attorneys of records. In the letter dated 28 July 2002 on pages 160 -161 of the bundle SEDA's attorneys stated that SEDA does not deny liability for the amount claimed and a set off is proposed.

[22] For convenience sake I am going to first deal with Bokhoni's claim of services rendered, thereafter the claim of goods sold and delivered separately and conclude with the counterclaim.

[23] RE: CLAIM FOR SERVICES RENDERED:

As indicated above the invoices relating to the services rendered are the following:

Invoice No 828 (annexure F1) for the amount of	R36 936
Invoice No 836 (annexure F6) for the amount of	R35 568
Invoice No 866 (annexure F11) for the amount of	<u>R37 971</u>
Total	<u>R110 475</u>

[24] Bokhoni's counsel stated that Bokhoni was no more pursuing claims on invoices 836 and 866. The only claim I would deal with is in respect of invoice 828 for the amount of R36 936. Mr Pretorius said the reason why Bokhoni is pursuing the claim in respect of invoice 828 is because he had paid

Compucompass the amount of R23 3000 before it received the payment from SEDA.

[25] When Mr Pretorius explained the arrangements between Bokhoni and Mr Hale on the services to be rendered by Glen to SEDA, he further said, in terms of the arrangements, Bokhoni would not deposit any monies into Compucompass account before SEDA settled the account(s) for services rendered.

[26] It is clear from the evidence of Mr Pretorius that Bokhoni did not render any services to SEDA. I see no reason why should SEDA pay Bokhoni for acting contrary to the arrangement it made with Mr Hale. Bokhoni should have, in my view, re-claimed the money from Compucompass. The claim against SEDA in respect of invoice 828 for the amount of R36 936 should therefore fail.

[27] **RE: CLAIM IN RESPECT OF GOODS SOLD AND DELIVERED:**

The modus operandi how quotations were sent to SEDA and how orders were made by SEDA is to some great extend supported by some of the documents in the trial bundle.

[28] SEDA's defence is mainly that it did not authorize Mr Hale to act on its behalf and that according to its policy the purchase order had to be signed.

[29] The alleged policy of signed purchase orders, Mr Martins conceded, was not made known service providers.

[30] Mr Pretorius explained in detail how he dealt with Mr Hale. The issue of signatures on the purchase orders was not a condition to be complied with before delivering of the goods ordered could be delivered. In my view, the fact that purchase orders were not signed cannot nullify the plaintiff's claim.

[31] What exacerbates the defences raised by SEDA is that SEDA could not show that it only paid Bokhoni in respect of claims where there were signed purchase orders and proof of delivery. The fact that other claims in respect of goods delivered were paid supports Bokhoni allegations that there was an order for goods to be delivered.

[32] The fact that the alleged goods delivered could not be found does not *per se* means they were not delivered. They could have been stolen after delivery.

[33] SEDA failed to rebut the evidence of Mr Pretorius that the goods were delivered.

[34] Mr Pretorius was, in my view, a credible witness and I have no reason to reject his evidence in respect of the claims based on invoices 829, 831, 833, 834, 846, 848, 849 and 850. The total amount thereof being R350 711.78 (three hundred and fifty thousand seven hundred and eleven rand and seventy eight sent).

[35] In my view SEDA failed to show any fraudulent misrepresentation on the part of Bokhoni.

[36] **SEDA'S COUNTERCLAIM**

SEDA filed a counterclaim of R450 916 against Bokhoni and Mr Hale jointly and severally.

[37] It was submitted on SEDA's behalf that since SEDA paid Bokhoni the total amount of R620 916 for services rendered by Glen the difference between the amount claimed by Bokhoni and the amount paid by SEDA to Bokhoni for services rendered justifies SEDA's counterclaim. That is, the amount paid to Bokhoni extinguishes Bokhoni's claim.

[38] In exhibit 'B' Bokhoni admitted that it received the amount of R413 657.00 in respect of services rendered by Glen, which amount includes call-out fees of R20 850 plus VAT which amounts to R50 799.98.

[39] SEDA must prove its counterclaim on the balance of probabilities. It did not call Glen to support its allegations of fraudulent misrepresentations against Bokhoni or to prove that services were not rendered.

[40] Mr Pretorius explained that there was an arrangement that he would be entitled to about 33% of the amount that would be claimed for services rendered by Glen to SEDA for the administration work that Bokhoni would render. There is no evidence to contradict his version.

[41] I am persuaded to accept that Glen did render service otherwise SEDA would not have paid large sums of monies if there was nothing to support that service were not rendered. The least that SEDA could do was to call Glen to prove that services were not rendered. I am not satisfied that SEDA proved its counterclaim on the balance of probabilities.

[42] I therefore make the following order:

1. The first defendant (SEDA) is ordered to pay the plaintiff an amount of R350 531,78, for goods sold and delivered;
2. The first defendant is ordered to pay interest on the said amount at the rate of 15,5% per annum from the date of issue of the summons to date of payment.
3. The first defendant's counterclaim against the plaintiff is dismissed with costs.
4. The defendant to pay the plaintiff's costs of the action.



A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 10 October 2012

FOR THE PLAINTIFF: Adv H M Barnardt

INSTRUCTED BY: Len Dekker & Associates, Pretoria

FOR THE FIRST DEFENDANT: Adv K Tsatsawane

INSTRUCTED BY: The small enterprise development agency, Pretoria