REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA **MAIN DIVISION, WINDHOEK**

JUDGMENT

Case no: I 167/2012

In the matter between:

GOAMUB QUICK SECURITY SERVICES CC **PLAINTIFF**

and

GRINAKER LTA NAMIBIA (PTY) LTD **DEFENDANT**

Neutral citation: *Goamub Quick Security Services CC v Grinaker LTA Namibia (Pty) Ltd* (I 167/2012) [2013] NAHCMD 190 (10 July 2013)

Coram: MILLER AJ

Heard: 19 - 20 June 2013; 24 June 2013

Delivered: 10 July 2013

Flynote: Absolution from the instance – Test whether there is evidence upon which a Court may find for the plaintiff – Where plaintiff relies on actual authority granted by defendant to person representing it, it is incumbent to establish that actual authority exits – If the existence of a Close Corporation is placed in issue, the founding papers must be produced – When specific damages are claimed absolution from the instance will be granted if plaintiff is in possession of relevant evidence which he does not produce.

ORDER

I grant absolution from the instance with costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] The plaintiff, which is cited as a Close Corporation styled Goamub Quick Security Services CC, instituted action against the defendant by way of summons.

[2] The plaintiffs cause of action is based on a oral agreement allegedly concluded between itself and the defendant during December 2009.

[3] The plaintiff alleges that the terms of the agreement either express, tacit or implied were the following:

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5.1 Plaintiff undertook to:

5.1.1 provide a 24 hours security services to the defendant, which services included guarding the property belonging to the defendant and defendant’s employees during the construction of the road from Omakange to Okahao, guarding of constructions sites and the camps in which the defendant’s employees resided during the construction of the said road.

5.1.2 invoice the defendant once every month for the services so rendered at a rate of N$80.00 per guard for every twelve (12) hours normal shift and N$160.00 per guard for every twelve hours shift for any shift falling on a public holiday or Sunday.

5.2 Defendant undertook to:

5.2.1 Pay the plaintiff for the services so rendered at the afore-stated rate upon receipt of an invoice.

5.2.2 Pay directly into plaintiff's bank account at Standard Bank, Katutura Branch Account number 04 279 763 2 at the end of every month through electronic payment the amount reflected on the invoice.

6. It was a further material express, alternatively tacit, in the further alternative implied in terms of the agreement that:

6.1 The agreement was valid for a period of two years commencing on the 1st January 2010 and ending on the 1st January 2012.

6.2 Either party may only terminate the agreement after first giving the party in breach of any material term(s) of the agreement a notice that such party is in breach of the agreement, and setting out in such notice fully the nature and basis of the alleged breach.

6.3 The party giving notice as contemplated in 6.2 above must give the other party one month within which to ensure compliance with the terms of the agreement and to remedy the breach.

6.4 If the party in breach should fail to so ensure compliance and to remedy the breach within the one month of such notice, the other party may give a one month notice of termination of the agreement.

7. The plaintiff complied fully with all its obligations in terms of the agreement by;

7.1 providing security services as set out above.

7.2 invoicing the defendant timely and at the rate agreed upon.'

[4] The plaintiff also alleges that the defendant was represented by a Mr. Strauss when the agreement was concluded.

[5] It is then alleged that the agreement was breached in that the defendant;

'

9.1 On 4 November served the plaintiff with a notice of termination without providing any reason and;

9.2 Failed to give the plaintiff any notice of breach of the agreement and;

9.3 Failed to afford the plaintiff the required time which to remedy the breach, if there was any and;

9.4 Failed to give the plaintiff the required one month's notice of termination of the agreement.'

[6] As a consequence of that breach the plaintiff suffered damages in the sum of N$490, 000.00 it is alleged, which damages is calculated as follows:

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10.1 N$30 000.00 being the average monthly profit that plaintiff would have made had defendant not so terminated the agreement, times 13 months being the period that was still remaining in terms of the agreement.

10.2 N$100 000.00 being the amount paid to employees lieu of notice, leave credit days and related matters and other miscellaneous expenses occasioned by the said termination.'

[7] The defendant filed a plea placing pertinent aspects upon which the claim against it was based in dispute. In essence these were the following:

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1) The *locus standi* of the plaintiff on the basis that it was denied by the defendant that the plaintiff is a Close Corporation so registered and incorporated in terms of the applicable legislation.
2) The authority of Mr. Strauss to represent the defendant and to conclude the agreement on its behalf.
3) The terms of the agreement particularly in relation to its duration and the requirement to give notice of termination.
4) Whether the plaintiff performed its obligations in accordance with the terms of the agreement.
5) The damages allegedly suffered by the plaintiff.'

[8] It is not disputed that the onus in respect of all of these issues lies with the plaintiff.

[9] Insofar as the defendant placed the authority of Mr. Strauss in dispute in its plea, there was no attempt by the plaintiff to base its case on that score, by relying

on the principles of estopped or an implied or ostensible authority. The prudent course to take would have been, to my mind, to file a replication to the effect that the defendant is estopped from denying the authority of Mr. Strauss or to allege that his authority was implied or ostensibly based upon the facts relevant thereto.

[10] That was not done with its consequence the fact that the onus to be discharged was that Mr. Strauss was actually and in fact authorized.

[11] In addition the damages claimed by the plaintiff are specific as opposed to general damages.

[12] The following passage from ***S M Goldstein & Co. (Pty) Ltd v Gerber*** **1979 (4) SA 930 (A)** finds application:

'The last of the defendant's ground of appeal concerns the value of the roller when sold to Chicks Scrap Metals by defendant. It was contended on appeal that plaintiff failed to establish what that value was. In this regard counsel for the defendant referred to several passages in decided cases dealing with the onus which rests on a plaintiff to adduce evidence in proof of the damage which he claims to have suffered including the following passage in the judgment of GALGUT J in ***Enslin v Meyer*** 1960 (4) SA 520 (T) at 523 and 524:

"Nevertheless where there is evidence that damage is caused a court will make some assessment on the material before it even if the damage cannot be computed exactly (see *Turkstra Ltd v Richards 1926 TPD 276).* A plaintiff is, however, expected to lead evidence which will enable an accurate assessment to be made if such evidence is available (See *Klopper v Mazoko* 1930 TPD 860 at 865).

In Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 51 DE VILLIERS J quoted with approval the following passage from *Hermans v Shapiro & Co* 1926 TPD 367 at 379:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but, even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. *It is not so bound in the case where evidence is available to the plaintiff*

which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."'

[13] This dictum was cited with approval in this Court by van Niekerk J in ***Abner v K L Construction and Another*** (I 1976-2011) [2013] NAHCMD 139 (27 May 2013).

[14] It follows that in cases where there is evidence available to a plaintiff to prove its damages which it did not produce, absolution from the instance may be granted.

See also ***Mkwanazi v van der Merwe*** 1970 (1) SA 609 (A).

[15] Turning to the issue of the *locus standi* of the plaintiff, the plaintiff was obliged to prove that the entity cited as the plaintiff in fact existed.

[16] In ***Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council*** 2008 (1) NR 372 HC a similar situation arose when the existence of the plaintiff as a company was placed in dispute.

[17] In an application for absolution on the basis that the plaintiff had not proved its existence, Angula AJ stated the following at page 378 D – G:

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[20] In the matter of *s v Omega Bearing Works (Edms) Bpk en Andere* 1977 (3) S 978 (O), the existence of the company was placed in issue and had not been admitted. The court expressed itself as follows:

…in the present case, the existence of first appellant as a company, and thus as a legal persona, had been placed in issue by the appellants' plea and it had to be proved by the State beyond reasonable doubt. For that purpose the production of the above documents

themselves or evidence thereof produced in terms of ss 239 (3) or 64 (2) of the Act was necessary.

Even though that was said in the context of a criminal case, the manner of proof for the existence of a company is still the same in a civil matter. No such certificate has been produced in evidence. No reason was advanced why it could not be produced. The only evidence led about the existence of the plaintiff company was the registration number of the plaintiff company. In my view that is not good enough. Not only is Mr. Kwala a legal practitioner, he is also a director of the plaintiff. His legal practice is the legal representative of record for the plaintiff. He is in full control of the plaintiff. He must be in possession of the statutory documents of the plaintiff such as a copy of the certificate of incorporation, the certificate to commence business, etc. No explanation was given why these certificates could not be produced in evidence.'

[18] During the course of the trial, the plaintiff called as its only witness Mr. Goamub, who states that he is the sole member of the plaintiff.

[19] Thereafter the case for the plaintiff was closed.

[20] Counsel for the defendant thereupon brought an application for absolution from the instance.

[21] The application was premised upon the issues raised in the pleadings to which I have referred to already.

[22] The test to be applied was formulated in this Court in a number of cases.

See in this regard ***Lofty-Eaton v Gray Security Services Namibia (Pty) Ltd and Others*** 2005 NR 297 HC;
Bidoli v Ellistron t/a Ellistron Truck and Plant 2002 NR 451 HC and ***Alluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd*** 2007 (2) NR 494 HC.

[23] In essence in these cases the enduring formulation of the test in ***Gascoyne v Paul and Hunter*** 1917 TPD was approved. In that case the following appears at page 173:

'The question therefore is, at the close of the case for plaintiff, was there a *prima facie* case against the defendant Hunter; in other words was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?'

[24] It therefore remains for me to consider whether the evidence adduced by the plaintiff on the issues raised is such that it can be said that a Court may find in its favour on those issues. I shall deal with the issues and the evidence pertaining to those seriatim.

1) <u>Does the plaintiff exist as a Close Corporation:</u>

Mr. Goamub states that the plaintiff was incorporated as a Close Corporation during 2007. He does not know its registration number. He states that he is in possession of the founding statements and other relevant documentation. None of these was discovered or produced in evidence. I will follow the approached adopted by Angula AJ in the ***Absolute Corporate Services*** case and hold that absolution from the instance will follow.

2) <u>Authority of Mr. Strauss:</u>

I indicated earlier that the plaintiff opted to confine its case on this issue to an allegation that Mr. Strauss had actual authority to bind the defendant. The evidence of Mr. Goamub in this regard fails pitifully short and he was constrained to concede that he simply did not know what the true situation was.

3) <u>Damages</u>

Mr. Goamub in his testimony states that the caused proper books of account to be kept in respect of the business of the plaintiff. These he maintains are in his possession at his office. None of these were discovered or produced in evidence. Instead all that was placed before me, were some bank statements which relate to the bank account operated by Mr. Goamub in his personal capacity. From these, even if I were entitled to take them into account, in order to try and determine the issue of quantum, it is simply impossible to do so.

[25] In my judgment it follows that there is no evidence upon which a Court may find for the plaintiff. I venture to add that the case for the plaintiff was poorly prepared and presented. Litigation in the High Court is important and expensive business. It requires that proper care be given to the preparation and presentation of the case.

[26] I grant absolution from the instance with costs which will include the costs of one instructing and one instructed counsel.

P J MILLER

Judge

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APPEARANCES

PLAINTIFF: S RUKORO
Instructed by Sisa Namandje & Company Incorporated, Windhoek

DEFENDANT: J-P R JONES
Instructed by Ellis Shilengudwa Incorporated, Windhoek

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