REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2012/09103

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

15.5.14
DATE

SIGNATURE

In the matter between:

PHOLILE BUSINESS SOLUTION CC **PLANTIFF**

and

SIDAS SECURITY GUARDS (PTY) LTD **DEFENDANT**

JUDGMENT – ON EXCEPTION

WRIGHT J

1. This matter comes before me firstly as an exception taken by the defendant to the plaintiff's particulars of claim as amplified by further particulars supplied by the plaintiff for the purpose of trial and then secondly, for trial. By agreement I am to hear the exception first. It was agreed between counsel for the parties that irrespective of which way the exception goes the trial will be postponed indefinitely and that the question of which party is to pay any wasted costs

relating to the trial and unconnected to the exception, should be reserved. Mr HP Van Nieuwenhuizen appeared for the plaintiff and Mr AP Bruwer for the defendant.

2. The particulars of claim allege that the parties concluded a written agreement on 19 August 2009. A copy of the agreement is annexed to the particulars of claim. This allegation is admitted in the plea.

3. In essence, the plaintiff alleges that a partnership agreement came into being on 19 August 2009. The defendant denies this.

4. Clause 2.1.1 of the agreement reads "*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) Ltd and after obtaining such tender, to carry on business under the name Sidas Security Guards (Pty) Ltd. 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. Clause 1.2.1.1 defines the effective date as the date from which the partnership is to take effect. The agreement does not expressly say that it is to take effect as from signature or as from a named date. The defendant pleads that, as no date was specified in the agreement as the effective date, no partnership commenced. It also pleads in the alternative that any business it may have contracted with third parties was done outside the scope of the agreement, and particularly outside the scope of clause 2.1.1.

6. The plaintiff seeks an accounting from the defendant and ultimately payment of its share of the partnership profits.

7. Clause 6.1 provides for the opening of a current account in the name of the partnership. Clause 6.4 provides that any cheque drawn on the account must be signed by two of the partners. As the agreement envisages only two partners, namely the plaintiff and the defendant it would appear that the signatures of both parties are needed on cheques. Clause 7.1 obliges the partners to keep proper books of account and allows both partners to inspect the books and records at any time. Clause 10.1 imposes a duty of utmost

good faith on the partners. Clause 10.2 obliges each partner to promote the interests of the partnership unselfishly. Under clause 11.1 each partner shall have an equal say in the conduct of the practise and in all matters affecting it.

8. Under clause 11.2 "*The managing partners jointly shall be entitled to bind the Partnership in any way in any contracts. The managing partners shall be entitled to sign, agree or cede any of the contracts without the written consent of the other partner.*" I queried both counsel on whether or not the word "*entitled*" meant, with the balance of the agreement in mind, that for the partnership to be bound both partners needed to act jointly. They made opposite submissions. In my view, to give business efficacy to the agreement one must interpret the word "*entitled*" to mean that both partners must act jointly to bind the partnership.

9. It seemed to me that the second sentence in clause 11.2 is an obvious candidate for a claim for rectification by inserting the word "*not*" between the words "*shall*" and "*be*". The particulars of claim contain no allegations about rectification. Mr Van Nieuwenhuizen denied the need for rectification. I tested his submission by inviting him to waive any right the plaintiff may have to rectification on this point. Wisely, he declined.

10. Under clause 12, no partners shall without the prior consent of the other employ any money, property or effects of the partnership, or incur debt other than in the due and regular course of business of the partnership. Under clause 12.3 one partner may not without the permission of the other discharge any debt of the partnership.

11. Under clause 16.2 "*No amendment or consensual cancellation of this agreement or any provision or term thereof or any agreement, bill of exchange or other 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 of the provisions or terms of this agreement, bill of exchange or other document issued pursuant to or in terms of this agreement*

shall be binding unless recorded in a written document signed by the parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating strictly to the matter in respect whereof it was made or given."

12. In February 2013 the defendant requested further particulars for trial. The plaintiff replied on 25 April 2014. The matter was set down for trial on 13 May 2014.

13. The defendant asked the plaintiff to supply details of agreements concluded between the plaintiff and third parties relating to the alleged partnership agreement. The defendant replied with reference to a letter attached to the reply. The letter is dated 21 September. The year is not clear. It is from a Chief Director in the Department of Home Affairs and is addressed to the Managing Director of the defendant. It informs him that the defendant's bid was successful and that the defendant would be supplying security services to the Department in Mpumalanga. It alluded to a service delivery agreement, apparently yet to be concluded, and it warned the defendant not to commence with any service without an official order.

14. The defendant excepts to the particulars of claim as amplified by the further particulars on the ground that they do not contain averments necessary to sustain a cause of action. The point taken is that the plaintiff has not alleged that the agreement between the Department and the defendant complies with the alleged partnership agreement between the plaintiff and defendant. In particular the defendant complains that the plaintiff has not alleged that the agreement between the Department and the defendant complies with clause 2.1.1 and clause 16. Mr Bruwer argued for the plaintiff that the agreement between the Department and the defendant is one "*issued or executed pursuant to or in terms of this agreement*" as contemplated in clause 16.2. Absent an allegation (and it is common cause that there is none) that the agreement between the Department and the defendant is in writing and signed on behalf of the parties it cannot be relied on by the plaintiff. An attempt at trial by the plaintiff to lead evidence of the agreement between the Department and the defendant would be met by an objection based on the parol evidence rule. Implicit in Mr Bruwer's line of reasoning is the argument

that any agreement of the kind in question between the defendant and a third party would have to be in writing and signed on behalf of both the plaintiff and the defendant.

15. Although clause 16 is headed "*Whole agreement, no amendment*", under clause 1 the heading of clauses is not to be used in interpreting the agreement.

16. Mr Van Nieuwenhuizen argued that clause 16.2 envisaged that agreements like the one between the Department and the defendant may be oral but that if they are amended the amendment must be in writing and signed on behalf of the plaintiff and the defendant. In my view this interpretation is so far-fetched that the exception cannot be resisted on this ground. The interpretation contended for by Mr Van Nieuwenhuizen runs counter to the various clauses to which I have referred above regarding good faith and co-operation between the plaintiff and the defendant. It is most unlikely that the plaintiff and defendant intended that successful tenders would be followed by oral or tacit contracts. I hold that the agreement between the Department and the defendant, if it exists, is one "*issued or executed pursuant to or in terms of this agreement*" as contemplated in clause 16.2. The exception is well taken.

Order

1. The exception is allowed with costs.
2. The plaintiff is allowed until 5 pm on 13 June 2014 to serve on the defendant's attorneys a notice of intention to amend the plaintiff's pleadings.
3. The trial is postponed indefinitely.
4. The question of who should pay any wasted costs, occasioned by the postponement and not relating to the exception, is reserved.

JUDGE OF THE HIGH COURT

On behalf of the Plaintiff:	Adv. HP Van Nieuwenhuizen
	083 304 1181
Instructed by:	Ndhlovu A.J. Inc
	011 838 4394/5
On behalf of the Defendant:	Adv. AP Bruwer
	083 268 2170
Instructed by:	Kitching Attorneys
	011 744 4961
Dates of Hearing:	14 May 2014
Date of Judgment:	19 May 2014