REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 9/7/15

CASE NO: 927/2015

In the matter between:

ZANEZA HOLDINGS (PTY) LTD Plaintiff

and

PAN SOUTH AFRICAN LANGUAGES BOARD Defendant

REASONS FOR THE ORDER

MAKGOKA, J

[1] On 9 July 2015, and after hearing argument and reserving judgment on 30 June 2015, I granted summary judgment in favour of the plaintiff against the defendant for R1 075 000 plus interest on the said amount at 9% per annum from 20 October 2014 to date of final payment. I undertook to furnish the reasons for the order at a later stage. These are the reasons.

[2] The plaintiff instituted action against the defendant for R1 075 000, interest and costs on attorney and client scale. The claim arises from a service level agreement concluded between the parties on 30 April 2013 in terms of which the defendant appointed the plaintiff as its service provider for fund-raising activities, on certain terms and conditions. The plaintiff alleges that pursuant to the service level agreement, and on 27 March 2014, it raised for and on behalf of the defendant, funding in the amount of R20 million. In terms of the service level agreement, it was entitled to 12,5% of the amount raised, which is R2 500 000. Of this amount, the

defendant paid R1 425 000 in April 2014, thus rendering the balance owing by the defendant in the sum of R1 075 000.

[3] The plaintiff issued summons against the defendant for payment of the above sum. The defendant delivered a notice of intention to defend, hence the application for summary judgment. The defendant delivered its affidavit opposing summary judgment on 25 February 2015. On 23 April 2015 the defendant filed an application for leave to file a further 'supplementary' opposing affidavit.

[4] At the hearing of the main application, the defendant moved the application referred to above, which was opposed by the plaintiff. After hearing argument on the issue, I dismissed the application and refused the defendant leave to file the further affidavit. I undertook to furnish reasons for that order as part of this judgment. Here are the reasons. Both the original and 'supplementary' opposing affidavits were deposed to by Mr Zixolisile Feni, the acting chief executive officer of the defendant. The affidavit in support of the application to file a 'supplementary' opposing affidavit is brief. In paragraph 4 he provides the following as a reason to file it:

> 'I have deposed to an affidavit on 12 February 2015 resisting summary judgment. Although the defendant's defence has been fully set out then I wish to further elaborate and present the available evidence in so far as the affidavit resisting summary judgment lacks detail and in so far as it does not sufficiently disclose the nature and grounds of the facts on which the defence is based.'

[5] This is simply not sufficient a reason. One would expect that an explanation would be proffered as to the reason why the original affidavit was drafted and deposed to in the manner it is. The deponent seems to have taken a supine attitude to the matter. The fact is, the defendant seeks an indulgence – an unusual one for that matter. It is trite that an indulgence is not there for the asking, and that an applicant must make out a case for the granting thereof. The defendant has failed in that regard. For this reason the application for the filing of a 'supplementary' opposing affidavit was dismissed.

[6] Now to the main application. In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence, which means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a complete defence to

the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol"(Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88).

The defendant's opposing affidavit

[7] In its affidavit opposing summary judgment, five defences are raised. First, it is contended that the agreement was 'void *ab initio* and/or voidable and further alternatively was *contra bones more*' (sic) because Mr Mxolisi Zwane, who was the defendant's care-taker chief executive officer, and who concluded the agreement on behalf of the defendant, was illegally appointed. Second, it is stated that the service level agreement, and in particular, the payment of a fee or commission, was prohibited by the Grant Agreement concluded between the National Lotteries Board, acting as principal for the National Lottery Distribution Fund Trust, and the defendant. Third, it is argued that the defendant has waived its entitlement to commission. Fourth, that the plaintiff used the material of the defendant in fulfilling its contractual obligations. Fifth, that the plaintiff had 'alluded' to withholding money that it would only pay over to the defendant on payment by the defendant to the plaintiff. I deal with these contentions in sequence.

Voidness of agreement due to illegal appointment of the acting CEO

[8] The defendant has contended itself with a bald assertion of the illegality of the appointment of the care-taker CEO. No facts are stated, nor is any basis set out, why his appointment is illegal. Nothing more needs to be said about this argument.

Payment of commission prohibited by agreement with the National Lotteries Board

[9] What the defendant has failed to do in this regard is to set out facts concerning the nature of its relationship with the National Lotteries Board, and how it impacts on the contractual relationship it has with the plaintiff. What is the role of the National Lotteries Board in the affairs of the defendant? Does the alleged prohibition render the agreement between the plaintiff and the defendant illegal, or does it only mean that the National Lotteries Board would not make a grant to the defendant for a commission it contracted for with the plaintiff? These are pertinent questions which the defendant is required to unequivocally set out. It has failed to do so. What is clear, though, is that the plaintiff is not party to the agreement between the defendant and the National Lotteries Board, and is certainly not bound by it. I fail to see how

any contractual provision between two parties can invalidate an agreement between one of them and a third party.

The plaintiff has waived commission

[10] Similarly, the defendant simply makes a bald allegation of an agreement. No details such as the date, or the terms of such agreement are set out. Only a bald averment is made. It is quite instructive in this regard that the letter which it places reliance on in this regard, dated 16 September 2014 is its own, to the Auditor-General. There, too, the allegation is made with the same baldness, without any detail. One would have expected that the letter was written with sufficient facts at the writer's elbow to enable her to set out with sufficient particularity, the terms of the alleged waiver.

[11] What is also significant is that the plaintiff would have waived commission provided that the plaintiff benefitted from co-coordinating the implementation of certain projects. There is no allegation that the condition was met, and that the plaintiff indeed benefitted from such coordination, thus triggering the supposed waiver. It should also be borne in mind that the defendant has made part-payment of the plaintiff's initial claim. This very fact militates against the defendant's contention in this regard, for, if indeed there was a waiver, the defendant would not have made any payment at all.

[12] There is also another upshot of the letter referred to above. The letter was written from the office of the acting chief executive officer, presumably the deponent to the opposing affidavit, Mr Feni. In paragraph 2 of the letter the service level agreement between the defendant and the plaintiff is mentioned in affirmative terms, including the commission payable. There is no mention of the agreement being void, or the payment of commission being prohibited, contrary to what is argued in this application. This is an indication that these arguments are an after-thought geared at frustrating payment of the amount claimed by the plaintiff.

The plaintiff used the defendant's material

[13] The defendant complains that the material used by the plaintiff to raise the lotto grant was generated by the employees of the respondent which 'mysteriously' found its way into the hands of the plaintiff which the plaintiff passed it off as its own

material. Once more, the defendant does not state any basis, contractual or otherwise, which would disqualify the plaintiff from receiving its commission, even if its allegation is true.

Money retained by the plaintiff

[14] In this regard, the defendant states that in a letter to it on behalf of the plaintiff, the plaintiff 'alluded to monies which she (sic) was still withholding and would pay it over once payment was effected to her (sic) company...' For this contention, the defendant relies on a letter dated 19 September 2014 written by the plaintiff's managing director, which is annexure 'PAN02' to the opposing affidavit. In the two relevant paragraphs, the plaintiff records, firstly, the accomplishment of its contractual obligations, and secondly, it laments the non-payment of its invoice for work done. The paragraph which the defendant apparently relies on as a defence reads:

'We also request an account to which we can immediately transfer the funds remaining for the implementation of the cancelled publishing workshops.'

[15] Clearly, all what is stated is that the plaintiff was having unutilized funds which it had to refund to the defendant. There is certainly no suggestion of the plaintiff withholding any monies from the defendant as leverage for payment by the defendant of its invoice. The contrary is true. In any event, I do not see how this is supposed to even remotely, serve as a defence.

Drastic nature of summary judgment

[16] I am quite aware of the 'drastic' nature of the remedy of summary judgment as it allows judgment to be entered against a defendant without evidence. On the other hand, the court would be remiss in its duties if unmeritorious defences, clearly devoid of any *bona fides*, stand in the way of a plaintiff who is clearly entitled to relief. The ever-increasing perception that any defence, whatever its merits, is sufficient to stave off summary judgment, is misplaced and not supported by the trite general principles developed over many decades. See for example the well-known decision of *Maharaj v Barclays National Bank Ltd* (supra). See also generally, *Herb Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) 31 (T) at 31H-32A-B; *Caltex Oil*

(SA) Ltd v Webb and Another 1965 (2) SA 914 (N) AT 916D-H; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) 462 (N) at 467A-H and *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) 226 (T).

[17] Recently the Supreme Court of Appeal (the SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA). At paras 31 and 33 the following is stated:

'[31] [I]t was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[33] Having regard to its purpose and its proper application, summary judgment proceedings do not hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.'

[18] In the present case, the defendant has been content with bald assertions, none of which is worthy of reference to trial. It is also instructive that while claiming that the service level agreement is void, the defendant has does not offer restitution of the money it received as a result of the fund-raising by the plaintiff. In the result I conclude that the defendant discloses no *bona fide* defence to the plaintiff's claim. The plaintiff is entitled to judgment. Costs should follow the event. However, due to inadvertence on my part, I did not invite the parties to address me on the costs occasioned on 2 March 2015. On that occasion, the matter was postponed *sine die*, and costs were reserved. As a result, I deem it prudent to invite the parties to either agree on the aspect, alternatively to proffer argument on the reserved costs. Upon that, I would make a globular costs order, inclusive of the costs of the application for summary judgment, which, as already stated, the defendant is liable to pay.

[19] For the above reasons, I made the following order:

1. Summary judgment is granted in favour of the plaintiff against the defendant as follows:

1.1 Payment of the amount of R1 075 000;

1.2 Interest on the above amount at the rate of 9% per annum from 20 October 2014 to date of final payment.

T.M. Makgoka
Judge of the High Court

Date of hearing:	30 June 2015
Order made:	9 July 2015
Reasons furnished:	27 July 2015
Appearances:	
For the plaintiff:	Adv. H.P. van Nieuwenhuizen
Instructed by:	Tshabalala Attorneys, Johannesburg
	Helen Karsas Attorney, Pretoria
For the defendant:	Adv. CH Badenhorst
Instructed by:	Makhafola Attorneys, Pretoria