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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(THE REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 31951/2013

11/10/2013

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DATE: 11/10/2013
SIGNATURE: [Signature]

In the matter between:

MNJIYA CONSULTING ENGINEERING (PTY) LTD

PLAINTIFF

And

CHRIS FERDINAND KOEN

DEFENDANT

JUDGMENT

RAULINGA J.

- [1] In this application the plaintiff seeks an order for summary judgment in the sum of R5million plus interest and costs. The claim arises from an agreement entered into between the plaintiff and the defendant on the 25 August 2011.
- [2] It is common cause that the plaintiff concluded a written agreement with the defendant, an attorney, and a certain Anthony van der Merwe ("van der Merwe").

Van der Merwe was a businessman who was in a position to facilitate, through his strategic associations, the procurement of financial instalments necessary for the plaintiff to undertake the road construction project in the DRC. The plaintiff was prepared to put down the sum of R5million as a commitment fee to pledge its commitment to commencement and the success of the road construction project. (Clause 1.3 and 1.4)

- [3] The defendant had agreed that his firm's trust account should be utilised to receive and retain the commitment fee. The commitment fee would only be paid out by the defendant once the plaintiff had concluded an agreement with the party to whom the money was to be transferred (clause 4.5).
- [4] The gravamen of the plaintiff's argument is that the defendant acted in material breach of the agreement, in that the defendant paid out and/or misappropriated the commitment fee in circumstances where:
- (i) The agreement with the party to whom the commitment fee was to be transferred had not been concluded; and/or
 - (ii) The plaintiff had not provided the defendant with written instructions to pay out commitment fee; and/or
 - (iii) The plaintiff's attorneys had not provided the defendant with written instructions to pay out the commitment fee. The defendant raised a point in limine of the non-joinder of Van der Merwe.
- [5] It is prudent to mention that the agreement referred to in paragraph 4 (i) above was concluded and signed between a certain Carlos de Araujo and the plaintiff on the 7th September 2011. It is also important to mention that the agreement between the plaintiff and the defendant of the 25 August 2011 was signed by Van der Merwe on behalf of the plaintiff and Christiaan Koen on behalf of the defendant.
- [6] Clause 4.5 of the agreement between the plaintiff and the defendant reads as follows:

"The sum of R5,000,000,00 shall only be paid out by Chris Koen Attorneys once MCE has concluded an agreement with the party to whom the money is to be transferred"

Whereas clause 4.6 reads:

"Koen hereby gives his written undertaking that he will not pay out the sum of R5,000,000,00 to any party unless and until the duly signed agreement referred to herein above has been provided to him and also that written instructions have been issued by MCE and its attorneys(being Ndumiso Voyi Incorporated) on such payment, with the name and details of the receiver of the funds clearly stipulated thereon"

- [7] Clause 4.1.2 of the agreement between Carlos de Araujo and the plaintiff reads as follows:

"Party -2 will upon signing of this agreement, release the funds currently held in the bank Trust Account of C Koen Attorneys to Party-1, in order to provide and obtain the necessary insuance of the required Bank Guarantee and monetizing of the bank Guarantee"

- [8] In my view the requirements of clause 4.5 of the agreement between the plaintiff and defendant was complied with. The requirements of clause 4.6 were partially complied with in that the agreement between Carlos de Araujo was concluded and provided to the defendant. My reading of clause 4.1.2 of the agreement between Carlos de Araujo and the plaintiff ousts the last portion of clause 4.6 of the agreement between the plaintiff and the defendant.

- [9] Pertaining to the issue of non-joinder, the plaintiff is wrong when it submits that Van der Merwe has no legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In

the first place, there is a close relationship between Van der Merwe and the plaintiff in that Van der Merwe signed the agreement on behalf of the plaintiff. Van der Merwe therefore has a close relationship with the defendant through the agreement concluded between the plaintiff and the defendant. Moreover, Van der Merwe received about R1 million from the defendant. Therefore there exists a need for all this issues to be ventilated. Van der Merwe ought to have been joined.

[10] The plaintiff's contention that the defendant's opposing affidavit does not disclose a bona fide defence to the plaintiff's claim cannot be sustained.

[11] In the event I make the following order:

- (a) The plaintiff's application for summary judgment is dismissed with costs.
- (b) The defendant is granted leave to defend the action.



T J RAULINGA
JUDGE OF THE HIGH COURT