

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCE, PRETORIA

15/11/13

Case number 34431/11

In the matter between

ABC SPORTS MANAGEMENT LTD

and

GARY BOTHA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	Plaintiff
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED. ✓	
14/11/2013	
DATE	SIGNATURE
Defendant	

JUDGMENT

BAM AJ

1. The plaintiff is a professional agency representing rugby players. The defendant is a professional rugby player. On 5 October 2009 the plaintiff, represented by its sole director, Mr Christian Abt, entered into a written agreement with the defendant (*"the agreement"*). In terms of the agreement the plaintiff was exclusively mandated, for an initial effective period of two years, to represent the defendant in all contractual negotiations with any employer, or prospective employer anywhere in the United Kingdom or France. The contract was effective for two years and could be terminated after the expiration of the initial two years, by either party, with three months written notice. It was a term of the contract that the plaintiff's professional services were to be paid, by the defendant, as fees under the terms of all contracts entered into by the defendant during the period of the agreement at the rate of 10% plus VAT.

2. The plaintiff averred that the defendant, during or about February 2011, in breach of the terms of the agreement, negotiated a contract with the Toulouse Rugby Club in France. The contract between the defendant and Toulouse was subsequently concluded for a period of three years, allegedly, at a monthly salary of €22 000.
3. The plaintiff accordingly claimed damages in the amount of €79 200, being an amount equal to 10% of the total remuneration of the defendant, which amount the plaintiff averred was due and payable on or before March 2011, the date of the conclusion of the contract between the defendant and Toulouse. During argument the plaintiff applied for the amendment of the amount claimed to €81 641.60. The respondent opposed the proposed amendment. I will return to this issue.
4. It was further averred by the plaintiff that the defendant repudiated the agreement in a letter dated 28 March 2011, stating that he was cancelling the agreement. The plaintiff did not accept the repudiation and informed the defendant of its intention to hold the defendant to the terms of the contract.

5. The defendant in his plea admitted that he entered into the agreement but pleaded that the agreement was entered into with Mr Abt personally and not with the plaintiff. The defendant further pleaded that it was "*a common mistake*" between him and Mr Abt that the agreement did not reflect that it was actually entered into between the two of them personally, and that the contract therefore "*falls to be rectified*". The defendant did however not lodge a formal application in this regard.
6. In the alternative to the proposed rectification of the agreement, the defendant pleaded that Mr Abt was the only person in the employ of the plaintiff who had the exclusive right to represent the defendant and that Mr Abt was obliged to perform in accordance with the agreement, including finding employment for the defendant in France.
7. The defendant further pleaded that Mr Abt, or the plaintiff, would only have been entitled to a fee in the event of a successful negotiation of a contract and Mr Abt, or the plaintiff, being the effective cause of the contract. The prospective employer would then be liable to pay the fees due to Mr Abt or the plaintiff.
8. The defendant admitted in his plea that he concluded a contract with the Toulouse Rugby Club for the sport seasons 2011/ 2012, 2012/2013 but denied that he or any-one else on his behalf had any negotiations

with Toulouse during February 2011. The defendant further pleaded that at the time he concluded the agreement with Toulouse in November 2011 he had already terminated his agreement with Mr Abt, or the plaintiff. He denied that the plaintiff, or Mr Abt, had anything to do with his agreement with Toulouse.

9. The defendant further specifically pleaded that Mr Abt:

- (i) failed to negotiate any employment for him;
- (ii) was not licenced to negotiate any employment or contract on behalf of the defendant as a professional rugby player in France, and, in particular that Mr Abt had no mandate from the Toulouse club to source players for it.

10. The defendant also pleaded that due to injuries his contact with Toulouse was terminated and that he was paid the total gross salary of €331 280.82.

11. In conclusion the defendant pleaded that Mr Abt, or the plaintiff was, for the reasons stated, in breach of the agreement.

12. In preparation for trial the defendant requested the plaintiff to furnish certain further particulars. The request included the following questions.

“ 10. Is Abt registered as an agent in France?

11. Is the plaintiff registered as an agency in France?

27. Does the plaintiff admit that in order to have performed its obligations in terms of the contract of mandate it would have been obliged to obtain the mandate of Toulouse Rugby Club in addition to that of the defendant?

28. Does the plaintiff admit that in order to obtain the mandate of the Toulouse Rugby Club, it, or Abt, would have been obliged to have been registered as an agent in France at the conclusion of the contract of mandate?”

13. The answer supplied by the plaintiff to the above four questions was an unqualified “No”.

14. In its replication to the defendant’s amended plea the plaintiff pleaded that in the event it is found that the only agreement between the defendant and Toulouse was the agreement of October 2011, that the plaintiff was the effective cause of the conclusion of that agreement.

15. The plaintiff also pleaded in its replication that although it was not licenced to formally represent rugby players in France, it made use of a licenced agent to represent its rugby union players in that country. The plaintiff further pleaded that it was not obliged to be a licensed agent to represent rugby players in France.

16. At the inception of the trial, Mr Uys, appearing for the defendant, raised an exception against the plaintiff's particulars of claim on the basis that it did not disclose a cause of action and that it was bad in law. The grounds on which the exception is based can be summarised as follows:

The first ground was that the plaintiff was not entitled to hold the defendant liable on the contract after it was terminated by the defendant. It was contended that the defendant, as principal "*may freely terminate the authority conferred upon an agent . . . even if the mandate purports to be irrevocable.*" It is difficult to follow the defendant's reasoning in this regard. The plaintiff clearly set out the basis for its claim. The defendant was sufficiently informed what the plaintiff's cause of action was to enable him to plead what he did. The submission that the plaintiff's particulars of claim was therefore bad in law was clearly without substance.

The second ground of exception was that the agreement relied upon by the plaintiff was not clear and unambiguous. This ground was based thereon that the contract provided that the plaintiff had the

exclusive right to represent the defendant whilst the plaintiff subsequently, in its replication, conceded that it made use of an agent in France.

The contention that the plaintiff's averments in that regard was bad in law and that it did not disclose a cause of action, was evenly without merit. Although this ground may be a defence on the merits, it is clearly not a ground for exception as contended by the defendant.

Thirdly the defendant contended that the plaintiff endeavoured to make out a new case in pleading in the replication that it was the effective cause of the agreement the defendant admitted he concluded with Toulouse in October 2011. In this regard it was submitted that the defendant was "*ambushed*" by the plaintiff's new averment. In my view this ground was evenly without substance. The issue of the contract between the defendant and Toulouse concluded in France was in fact fully addressed in the defendant's plea.

17. The exception was not well taken and was dismissed. I indicated at the time that I would consider costs of the exception at the end of the trial.

18. The plaintiff adduced the oral evidence of Mr Laurent Quaglia, Mr Abt's agent in France at the relevant time, and Mr Abt. After the plaintiff closed his case the defendant applied for absolution. At the time I mentioned that several issues of law and fact were in dispute, this included the interpretation of certain terms of the agreement, and

that it appeared that the plaintiff has proved a *prima facie* case. The application for absolution was accordingly refused. The defendant then closed his case.

19. During argument Mr Rebelo submitted that in refusing absolution on the basis that the plaintiff has proved a *prima facie* case, it follows that the plaintiff's case became conclusive after the defendant has closed his case without adducing any evidence. This argument was without merit.

20. The criterion regarding absolution was stated in **GASCOYNE v PAUL & HUNTER 1917 TPD 170** and many subsequent decisions. The test at the end of the trial is whether the plaintiff has proved its case on a preponderance of probabilities. I deem it unnecessary to say anything further about this issue.

21. It is however clear that the only oral evidence to be considered, although challenged during cross examination, is the evidence adduced on behalf of the plaintiff.

22. Mr Quaglia's evidence can be summarised as follows. He is an authorised agent representing clubs and rugby players in France. Only French speaking agents in France are authorised to act as agents. He was Mr Abt's agent in France at the relevant time. He knew about the

defendant but has never met him. Although he corresponded with Toulouse in regards to the defendant, he was not involved in any negotiations with Toulouse as far as the defendant is concerned. He testified that the agent introducing a player to a rugby club is entitled to remuneration as agreed upon with the club. The agreement in regards to this fee does not involve the player and is paid by the club after expiration of the player's contract with the club. When another agent is involved, like what would have been the case with Mr Abt, the agent in France would share the amount paid by the club on a fifty-fifty basis with the other agent. In 2011 after having heard that Toulouse had contracted the defendant and that another agent in France was involved, he informed Mr Abt.

23. Mr Abt is the only director of the plaintiff, a limited company registered in the United Kingdom. He confirmed that he entered into the agreement on behalf of the plaintiff. Mr Abt conceded that he was not personally authorised to enter into any agreement with a rugby club in France. He however contended that nowhere in the agreement between the plaintiff and the defendant did it provide that the plaintiff was not permitted to make use of an agent in France for the purposes of contracting with a French Club. This is exactly what would have happened in the case of the defendant. The plaintiff merely made use of Mr Quaglia's services as a registered agent in France. The agreement between the plaintiff and the defendant was at no stage assigned or transferred to Mr Quaglia. Mr Abt said he corresponded with Toulouse about the defendant and that he informed defendant

that representatives of Toulouse would come to South Africa to recruit rugby players. He later became aware that the defendant has negotiated a contract with Toulouse and that defendant had entered into an agreement with Toulouse. Mr Abt contended that the fact that the defendant negotiated the contract with Toulouse was already a breach of the agreement between the plaintiff and defendant. When he heard about the agreement with Toulouse he called defendant. At first defendant denied that he entered into a contract with Toulouse. The defendant became aggressive and the conversation was terminated. On 28 March 2011 Mr Abt received an e-mail from defendant informing him that the agreement was cancelled with immediate effect.

24. At first blush it appeared that this was a simply a case where the defendant breached the agreement between himself and the plaintiff and that defendant should be liable for any contractual damages suffered by the plaintiff.

25. However, taking into consideration the defendant's plea, *inter alia* challenging the plaintiff's authority to act as an agent in France, it transpired that several issues of law came into play. The relationship between the plaintiff, represented by Mr Abt, and the defendant was clearly that of principal and agent.

26. "Agency" includes the following:

"One of the meanings in which the expression is employed is that of an agreement in terms of which one person, styled the agent, performs some task for another, called the principal, in connection with the conclusion of a juristic act by or for the principal. In this meaning "agency" is simply a contract by which the principal and the agent create rights and obligations inter se. As such it belongs to the category of contracts known as mandate or mandatum in Roman Dutch Law. Even if the task to be performed by the agent is the conclusion of a juristic act on behalf of or in the name of the principal, the contract remains a contract of mandate governed by the rules applicable to contracts of mandate in general." See LAWSA, First Re-issue, Volume 1, par 100.

27. The relationship between a principal and his agent is personal. The agent may not, in circumstances where there is personal confidence reposed and special skills required, without consent of his principal, deligate his mandate to another sub-agent. See **TURKSTRA v KAPLAN 1953(2) SA 300 (T)** at 304. The plaintiff was not authorised by the defendant to delegate his mandate to any other person.

28. The maxim *delegatus delegare non potest* is a common law principle creating a presumption against the delegation of powers. It is still part of our law. See **CHAIRMAN, BOARD ON TARRIFS AND TRADE v**

TELTRON (PTY) LTD 1979(2) SA 25 AD AT 34 C-E, and HOUSEN NO AND OTHERS v DEEDAT AND OTHERS [1997] 3 All SA 32 D at 37

Accordingly the plaintiff bears the onus to prove, if there was in fact a delegation of powers, that it was within its mandate.

29. It is in any event trite, and an inherent principle that, in the event of the agent being authorised to sub-delegate his contractual mandate, that the sub-agent can never be empowered to do something the agent could not do or was not entitled or empowered to do. The plaintiff, or Mr Abt could not mandate a sub-agent to enter into negotiations with Toulouse in view of the fact that neither the plaintiff nor Mr Abt was licensed to do so. They were precluded from transferring a right they did not have.

30. In this case Mr Abt clearly stated that the agreement between the plaintiff and the defendant was not delegated or transferred to Mr Quaglia, although Mr Quaglia was the plaintiff's agent in France.

31. It was submitted by Mr Rebelo, on behalf of the plaintiff, that the wording of the contract did not exclude the plaintiff's right to appoint a sub-agent in France. Mr Uys, on behalf of the defendant, on the other hand, pointed out the contract made no reference to even the possibility of the appointing of a sub-agent in France at all. The agreement provides that Mr Abt was at all relevant times personally mandated to act on behalf of the defendant. The agreement

specifically stated that the defendant was not entitled to employ anybody else as agent or to enter into any negotiation or agreement himself.

32. Although this issue was not specifically pleaded by the defendant, or addressed in so many words, what is clear is that the defendant challenged Mr Abt's authority to act as an agent in France. This challenge is consistent with the conceded factual situation in regards to the plaintiff's lack of *locus standi* in France.

33. The fact remains that Mr Abt was not authorised to legally represent the defendant in France. It was a factual impossibility. It follows that neither the plaintiff, nor Mr Abt, could hold the defendant to the contract insofar it involved the defendant's agreement with Toulouse.

34. That part of the agreement between the plaintiff and the defendant mandating the plaintiff to contract with a French rugby club on behalf of the defendant, is clearly divisible from the other terms of the agreement. It follows that the "*offensive*" clause of the agreement should be discharged as far as it concerns this case. The defendant was not bound by it and was entitled to terminate the agreement in so far it concerned the plaintiff's mandate to negotiate agreements with rugby clubs France. It follows that the plaintiff is not entitled to hold the defendant liable for any contract concluded by the defendant in France. The alleged negotiations between the defendant and Toulouse

prior to the conclusion of the contract in November 2011 was not substantiated, and was in any event part and parcel of the plaintiff's purported agreement to conclude agreements with clubs in France. The defendant was relieved of performance in terms of the agreement in respect of the plaintiff's sole mandate regarding contracts in France. See **BOB'S SHOE CENTRE v HENEWAYS FREIGHT SERVICES (PTY) LTD 1995(2) SA 421 AD** at 428H.

35. Mr Abt is the professional agent. He drafted the agreement. If he was aware of the fact that he was not entitled to act on behalf of the Defendant one would have expected him to include a clause in the agreement addressing the issue. He failed to do so. The defendant is not to be blamed in that regard. It is indeed, as submitted by Mr Uys, a matter of *caveat subscriptor*. The plaintiff is bound by its own contract. However, if Mr Abt, at the time the agreement was signed, was unaware of his legal status in France pertaining to his right to represent the defendant, a possible situation of mutual mistake, he has only himself to blame and cannot hold the defendant liable to the terms of the agreement.

36. Consequently the plaintiff has no cause of action against the defendant in this matter.

37. In view of the aforesaid finding I deem it unnecessary to consider whether the plaintiff has succeeded to prove the quantum of its alleged damages, if any. The evidence adduced by the plaintiff in any event proved that the plaintiff at the end of the day would only have been entitled to 50% of the amount paid out by the particular club to the agent in France. The argument that the quantum of the plaintiff's averred loss should be the full amount which would have been paid out by the club, was not substantiated. The evidence pertaining to what amount would have been paid out by the Toulouse in the case of the defendant was clearly lacking. The plaintiff bore the onus. In this regard it in any appears that the agreement, insofar it concerns the plaintiff's fees payable by the defendant if the defendant would have been employed in France, is in stark contrast with the fact that the plaintiff's fees would have been paid by the specific rugby club and not the player. The argument on behalf of the plaintiff, namely that the agreement in that regard provided security to the plaintiff, is fallacious. The agreement was drafted by Mr Abt without providing for the situation in France. In view of the above the application for the amendment of the plaintiff's figures regarding the quantum is dismissed.

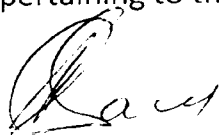
38. I have pointed out that that defendant's exception at the inception of the trial was not substantiated at all. The defendant should therefore bear the costs. I am however not prepared to grant penalty costs in the circumstances. It cannot be said that the exception was *mala fide*.

39. I have been informed by both counsel that costs were reserved in respect of the application regarding the security issue. The decision in that application favoured the defendant. I considered the situation and concluded that the plaintiff should be ordered to pay the reserved costs. The plaintiff was unreasonable in its conduct and the defendant was compelled in the circumstance to lodge that application.

40. Pertaining to the case in hand I was urged by counsel, arguing their respective cases, that penalty costs should be allowed. I am not in agreement. After having considered all the facts and the arguments advanced by counsel, especially that on behalf of the defendant, I could not find any persuasive reason to grant penalty costs against the plaintiff.

41. Accordingly the following order is made:

1. The plaintiff's claim is dismissed with costs;
2. The defendant is ordered to pay the wasted costs occasioned by the exception lodged by the defendant, heard on 5 November 2013.
3. The plaintiff is ordered to pay the reserved costs of 22 July 2013 pertaining to the Rule 47(4) application.



A J BAM ACTING JUDGE OF THE HIGH COURT

14 November 2013