

**IN THE HIGH COURT OF SOUTH AFRICA
[NORTH GAUTENG HIGH COURT, PRETORIA]**

CASE NUMBER: 21793/11

12/12/2012

In the matter between :

MAHMOUD ABOU-ZEID

PLAINTIFF

and

CYBERLISTING SERVICES (PTY) LTD t/a iFIND

FIRST DEFENDANT

FANIE VENTER

SECOND DEFENDANT

JUDGMENT

SJ MARITZ AJ

DECEMBER 2012

- [1] The Plaintiff sues the Defendants for salaries in the total amount of R600 000.00 in terms of an employment contract. A second claim is for payment of the amount of R1.5 million in damages emanating from a joint venture agreement. The Plaintiff's claims are pleaded as follows in paragraphs 4, 5, 6 and 7 of the particulars of claim:

"THE AGREEMENT"

4. *During the period October 2007 to February 2008, at Johannesburg and/or Pretoria, second defendant ("Venter") acting personally; alternatively acting on behalf of the first defendant ("ifind"); further alternatively acting for himself and ifind, entered into an oral agreement with plaintiff.*
5. *The oral agreement entailed:-*
 - a. *a joint venture with plaintiff, for plaintiff to establish an electronic based directory advertising business; and*
 - b. *the employment of plaintiff as sales and marketing manager.*
6. *The express; alternatively implied; further alternatively tacit terms of the joint venture and employment agreement, as aforesaid, were as follows:-*
 - a. *plaintiff would be employed to manage a sales department for a fixed term of 6 months, beginning on the first day of February 2008 and ending at the end of June 2008;*

- b. *plaintiff's employer would be either Venter or ifind, alternatively both Venter and ifind;*
 - c. *plaintiff would be paid a salary of R600 000-00 for the 6 months period, payable at the end of the 6 months (30 June 2008);*
 - d. *at the end of the 6 month period, that is at the end of June 2008, Venter alternatively ifind further alternatively both Venter and ifind would pay to plaintiff an amount of R1 500 000-00;*
 - e. *plaintiff would use the R1 500 000-00 as establishment costs for the establishment of an electronic based directory advertising business;*
 - f. *plaintiff would hold 85% interest in the business;*
 - g. *Venter alternatively ifind would hold 15% interest in the business; further alternatively Venter would hold 7.5% of the business and ifind would hold 7.5% of the business.*
7. *Plaintiff complied with all of his obligations under both the*

employment and joint venture agreements."

- [2] In paragraphs 8, 9, 10 and 11 of the particulars of claim it is pleaded that the Defendants failed to pay the salary at the end of June 2008, alternatively, that the employment agreement was unlawfully terminated on 11 April 2008, which entitled the Plaintiff to damages in the sum of R600 000.00.
- [3] In respect of the joint venture agreement it is then alleged that the amount of R1.5 million was due and payable on 30 June 2008, but that the Defendants breached their duty of payment. In the alternative it is pleaded that the joint venture agreement was unlawfully terminated on 11 April 2008, which entitles the Plaintiff to the amount of R1.5 million in damages.
- [4] The particulars of claim were subsequently amended to read that the Plaintiff was to be paid R50 000.00 per month for the 6 month period, and that the remainder in the sum of R300 000.00 would be paid at the end of the 6 month period.
- [5] In response to a request for particulars for purposes of trial the Plaintiff furnished the following relevant further particulars: the purpose of the joint venture was to establish an electronic based directory advertising services which would be run through a company, and all the parties

would benefit from the establishment thereof. The parties would also hold shares in the company in the proportions pleaded in the particulars of claim (see paragraphs 6(f) and 6(g) quoted above). It was further alleged that the joint venture commenced on 1 February 2008 and that it would terminate at the end of June 2008. To the question "*Who was to manage the joint venture?*" the Plaintiff replied as follows: "*All parties were entitled to their input; generally however, the plaintiff would manage the day-to-day affairs of the joint venture.*" In response to a question as to what the Plaintiff brought into the joint venture the response is that the Plaintiff brought his knowledge of media sales and marketing and his knowledge of electronic media sales and marketing into the joint venture. Further, as to the question what the Defendants would bring in the answer is capital, products and bundled products. In response to a further question the Plaintiff pleaded that: "*... the plaintiff manage(d) the day-to-day running of the joint venture with the second defendant.*"

- [6] From the foregoing it immediately becomes apparent that there is a material flaw in the claims presented by the Plaintiff. In essence the joint venture pleaded by the Plaintiff is a partnership (See **Countertrade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd 1995 (1) SA 762 (N) at 768B**), which is entirely inimical to the legal figure of employment. In law the relationship between partners is governed by the terms of the partnership agreement and partners

cannot serve one another in an employer/employee relationship. The position of the Plaintiff is made clear in the pleadings, i.e. that the joint venture partnership commenced on 1 February 2008 and was to have terminated at the end of June 2008; and that the Plaintiff was to manage the day-to-day affairs of the joint venture partnership.

[7] Whatever the basis for the payment of the said amount of R600 000.00 may have been, it certainly could not have been an employment agreement. For this reason alone the Plaintiff's claim for payment of the sum of R600 000.00 in salaries must fail. At the commencement of the trial the Plaintiff withdrew his claim for damages in the sum of R1.5 million.

[8] As I understood the evidence, the First Defendant marketed and sold products individually to customers. Towards the end of 2007 the Plaintiff approached the First Defendant through the Second Defendant with the proposition that products could be bundled together in differing proportions for sale to customers according to their needs. As I further understand the evidence, this was a novel concept which found favour with the Defendants. The entire concept was that a new business would be established to market the bundled products. A new marketing structure was therefore to be established, headed by the Plaintiff, and sales representatives were to be recruited by the Plaintiff for that purpose.

- [9] The concept was in fact implemented during February, March and the first part of April 2008. A dedicated call centre was also established for marketing purposes. What is also clear from the evidence, is that the Plaintiff did not serve the First Defendant in any of its existing business enterprises, but that he devoted all his efforts to the establishment of the new business enterprise.
- [10] Media 24, a listed company, is the controlling shareholder of the First Defendant. The First Defendant did not have the funds to launch the new business venture, and it was dependant upon Media 24 for funding. It was therefore necessary to obtain the approval of Media 24 of the new business venture, as well as its willingness to provide the necessary funding. A budget, drawn by the Plaintiff in conjunction with the Second Defendant, was duly presented to Media 24, which approved the project and the funding. What is glaringly absent in the budget, is any provision for remuneration of whatever description for the Plaintiff. *The payment of R600 000.00 over a period of 6 months to the Plaintiff is certainly not insignificant, and if it was in the offing, I find it impossible to accept that Media 24 would not have been informed accordingly. If the contentions advanced by the Plaintiff were to be correct, it would mean that he and the First Defendant wilfully misled Media 24 as to the cost of the project for no apparent beneficial reason. On the contrary, the failure to budget any form of remuneration for the*

Plaintiff inexorably leads to the conclusion that no such remuneration was agreed upon at any time.

[11] The Defendants deny the existence of a joint venture partnership, and pleads as follows in paragraph 2.2 of their amended plea:

"2.2 Without derogating from the aforesaid denial the Defendants plead that:

2.2.1 The Plaintiff and the First Defendant represented by the Second Defendant, entered into an oral agreement during or about November 2007 with the following terms:

- a) The First Defendant would assist the Plaintiff into establishing an independent business, which would be conducted through a company ("the new business venture");*
- b) The First Defendant would make available office space during the initial phase ("the pilot phase") to assist the Plaintiff in establishing the new business venture;*
- c) The First Defendant would also give backup such*

as making its facilities and personnel available;

d) The First Defendant would in its discretion advance monies to the new business venture against initial sales being done by the new business venture;

e) The First Defendant would do all the invoicing and receive all monies from sales of any product sold by the new business venture.

2.3 The Defendants therefore deny that any joint venture agreement was entered into;

2.4 The Defendants therefore also deny that the Plaintiff was ever employed by any of the Defendants;”.

[12] In my view it is immaterial whether a joint venture partnership was established, or whether the First Defendant assisted the Plaintiff in establishing a new business venture, and I do not have to decide the issue. However, what is clear, is that in both concepts the concept of employment is a legal impossibility.

[13] It remains to explain the significance of the date 11 April 2008. It is

common cause that during February and March 2008 the Plaintiff recruited sales representatives of an entity known as Easy-Info. At the time there was a non-solicitation agreement between Media 24 and Easy-Info. In the view of Media 24 such agreement was being breached, and on 11 April 2008 Media 24 instructed the First Defendant to sever its ties with the Plaintiff, which instruction was unceremoniously complied with. This brought an end to the joint venture partnership alleged by the Plaintiff, or the new business venture alleged by the First Defendant, the difference being immaterial. In the ensuing months the Defendants attempted to assist the Plaintiff in preserving the initial concept of bundled sales in a re-seller agreement, which failed. Given the state of the pleadings and the abandonment of the claim for payment of R1.5 million, I find it unnecessary to discuss these events or to decide any issue emanating therefrom.

- [14] The final consideration is a letter dated 18 June 2008 by the Plaintiff's attorneys of record to Hofmeyr Herbststein & Gihwala Inc. Although the letter was never sent, the factual contents thereof could only have emanated from the Plaintiff. The relevant portion thereof reads as follows:

"For the purposes of clarity, I am setting out hereunder the facts on which my client engaged with your client and the resultant

consequences.

Your client was aware that my client was previously employed by Interface Media. My client's contract with Interface Media was subject to a 6 (six) month restraint and after this period had expired my client approached Mr. Fanie Venter, the MD of IFind, which was an SMS directory service, to join them. My client at this stage was advised that IFind is 85% owned by Media 24 and the remaining 15% by Cyber listings of which Fanie Venter is the owner. My client reached an agreement with Fanie Venter regarding the following.

- 1. The products sold would be the IFind SMS directory, the IFind online directory, My Week Lifestyle Magazine, 24.com search, latitude email branding, website development and ewheels gps point of interest.*
- 2. The costing of the products that were agreed on was that each of the products would be at a cost price and a markup would be added to it.*
- 3. Fanie Venter in his capacity as shareholder of another company called Media in Africa, suggested that a new company called Media in Africa Communications be registered, and that my client would be the major shareholder and would be the MD of*

this company and that Fanie Venter would be a minority shareholder and a director of same.

- 4. My client drew up the financial projections for the year and this was presented to Media 24. Media 24 agreed to finance the project as a pilot project for 6 (six) months and if so proved, to grow on a larger scale.*
- 5. It was agreed that all billing would be passed through IFind.*
- 6. The project commenced and all administration and delivery to clients occurred through IFind. My client's main objective was to get the sales going and IFind would take care of the rest.*
- 7. It was agreed that my client would be remunerated at the rate of R100 000-00 (One Hundred Thousand Rand) per month and that my client would only receive R50 000-00 per month in the initial stage and that once the project had taken off and all parties were comfortable with the numbers then the shortfall would be paid to my client.*
- 8. To date my client has not received any money from IFind or any other entity. My client has requested on several occasions to finalise the Agreement so that he could be paid. My client is*

aware that the sales for the month of April far exceeded the expectations and was expecting to be paid.

9. *It was agreed further between the parties on putting together 2 (two) teams, an outbound sales team and a call centre operation. The outbound sales teams would sell packages to clients face to face and the call centre would sell the remaining products.*
10. *It was agreed further that the staff were to be hired to assist my client and he was charged with attending to this.*
11. *The call centre was running from One Call Solutions, a call centre situated in Midrand whilst the outbound representatives were running from IFind's office in Pretoria.*
12. *At the time all of the above had been finalized. My client had been out of work for 6 (six) months and was eager to start. The agreement, although reached, was not yet reduced to writing."*

[15] It is glaringly obvious that no reliance was placed on any agreement of employment. As a matter of fact it would appear from paragraphs 7 and 8 that the so-called "remuneration" was entirely dependant on the success of the venture and the sales realised. This may have formed

part of the joint venture partnership alleged by the Plaintiff, but the letter itself lacks any allegation to substantiate a separate employment agreement.

[16] The bulk of the Plaintiff's evidence in chief was directed at the applicability of Section 83A of the Basic Conditions of Employment Act, Act No 75 of 1997, which reads as follows:

"83A. (1) A person who works for or, renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

- (a) The manner in which the person works is subject to the control or direction of another person;*
- (b) the person's hours of work are subject to the control or direction of another person;*
- (c) in the case of a person who works for an organisation, the person is a part of that organisation;*
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
- (e) The person is economically dependent on the other person for whom that person works or renders services;*
- (f) the person is provided with tools of trade or work equipment by*

the other person; or

(g) the person only works for or renders services to one person."

[17] Reliance was placed on features such as providing the Plaintiff with office accommodation, providing him with a computer, an iFind e-mail address and iFind business cards, paying the salaries of the sales representatives for the marketing of the First Defendant's bundled products, at least three of whom were in fact employed by the First Defendant, that the Plaintiff worked regular office hours, and that the Plaintiff was required to report his activities to the Defendants.

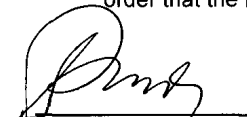
[18] In my view these considerations apply equally to the joint venture partnership, which commenced on 1 February 2008, the day to day affairs of which were managed by the Plaintiff. Indeed, the managerial skills and expertise of the Plaintiff is exactly that which he brought into the partnership, and it was his function to manage and promote the sales concept which he brought to the table. What the First Defendant brought into the partnership was to provide the infrastructure and funding of the new business enterprise, at least in the initial 6 month period. It is therefore evident that all the features relied upon by the Plaintiff apply equally to the joint venture partnership. In my view it matters not whether all these features apply to the joint venture partnership relied upon by the Plaintiff, or the new business venture relied upon by the Defendants. Accordingly I find that the Plaintiff's

reliance upon the provisions of Section 83A of the Basic Conditions of Employment Act is misplaced.

[19] Consequently, I find that the Plaintiff has failed to prove his claim.

[20] Should I be wrong in my findings above, I deal briefly with the evidence of the respective parties. The Second Defendant testified on behalf of himself and the First Defendant. Although there could be minor criticisms, on the whole I found him to be a satisfactory witness. As to the Plaintiff, he found himself in a dilemma because of the state of the pleadings. He was therefore constrained to rely on the factors which would establish the presumption provided for in Section 83A of the Basic Conditions of Employment Act. At the very best for the Plaintiff the evidence is evenly balanced, and I hold that in this respect the Plaintiff has also failed to discharge the onus of proving his claim.

[21] In the result I find that the Plaintiff's claim must fail, and I make the order that the Plaintiff's claim is dismissed with costs.


SJ MARITZ AJ

6 DECEMBER 2012