

SOUTH AFRICA / JUDGMENT

## Diamond Markerting Consultants (Pty) Ltd v Alexkor RMC JV (1690/2014) [2015] ZANCHC 16 (14 May 2015) [2015] ZANCHC 16

COURT

Northern Cape High Court, Kimberley

BEFORE

S L Erasmus

CASE / FILE NUMBER

1690/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGHT COURT)

CASE NO: 1690/2014

Case Heard / Judgment delivered: 24/04/2015

Date Reasons provided: 14/05/2015

In the matter of

DIAMOND MARKETING CONSULTANTS (PTY) LTD APPLICANT/PLAINTIFF

ALEKKOR RMC JV RESPONDENT/DEFENDANT

### REASONS

FOR JUDGMENT

ERASMUS AJ

- [1] I shall hereinafter refer to the parties as the plaintiff and defendant.
- [2] The plaintiff instituted action against the defendant for payment R1,628,528.22 plus interest and costs. The defendant gave notice of its intention to defend the action, after which the plaintiff applied for summary judgment. The defendant opposed this application and the matter was heard on 24 April 2015.

[3] On 24 April 2015 I refused the application for summary judgment and granted the defendant leave to defend the action. The costs in respect of the application for summary judgment were reserved. I indicated that I would provide reasons for my judgment, if requested to do so. I have now been requested by the plaintiff to provide reasons and my reasons follow.

[4]The plaintiff's claim, as set out in the particulars of claim, is based on the defendant's alleged breach of 'an oral, alternatively partly oral partly written agreement' in terms of which the plaintiff was to afford the defendant valuation and marketing services. The plaintiff attached a document, annexure 'DMC1', which was referred to as 'a written copy of the partly oral partly written agreement'.

The plaintiff's claim, as set out in the particulars of claim, is based on the defendant's alleged breach of '

an oral, alternatively partly oral partly written agreement

' in terms of which the plaintiff was to afford the defendant valuation and marketing services. The plaintiff attached a document, annexure 'DMC1', which was referred to as '

a written copy of the partly oral partly written agreement'.

[5]Annexure 'DMC1' appears to be a letter dated 23 April 2007, addressed to the chief executive officer of the defendant, in which the plaintiff provides the defendant with a description of the services which the plaintiff provided during the valuation and tender process in Johannesburg. In the last paragraph reference is made to an attachment to the letter containing the breakdown of the plaintiff's general fee structure, 'as was discussed'. The alleged attachment does not form part of the papers. Annexure 'DMC1' does not contain any of the terms of the agreement, as alleged in the particulars of claim and has not been signed by any representative of any of the parties.

Annexure 'DMC1' appears to be a letter dated 23 April 2007, addressed to the chief executive officer of the defendant, in which the plaintiff provides the defendant with a description of the services which the plaintiff provided during the valuation and tender process in Johannesburg. In the last paragraph reference is made to an attachment to the letter containing the breakdown of the plaintiff's general fee structure, '

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. The alleged attachment does not form part of the papers. Annexure 'DMC1' does not contain any of the terms of the agreement, as alleged in the particulars of claim and has not been signed by any representative of any of the parties.

[6]The plaintiff, in its particulars of claim, alleged thatthe material express, alternatively, implied terms of the said oral, alternativelypartly oral partly written agreement' were,inter alia:

The plaintiff, in its particulars of claim, alleged that

the material express, alternatively, implied terms of the said oral, alternatively partly oral partly written agreement

' were,

inter alia

6.1 The defendant would pay the plaintiff 'annually alternatively monthly a fee in respect of services rendered by it';

The defendant would pay the plaintiff '

annually alternatively monthly a fee in respect of services rendered by it

6.2 The said fee 'would be subject to an escalation which would be finalised between the parties in January of any particular year', which amount was alleged to be R148,048.02 at the time of the termination of the agreement.

The said fee '

would be subject to an escalation which would be finalised between the parties in January of any particular year

', which amount was alleged to be R148,048.02 at the time of the termination of the agreement.

6.3 The defendant 'would be entitled to terminate the agreement on reasonable notice';

The defendant '

would be entitled to terminate the agreement on reasonable notice'

6.4 The plaintiff 'was required to make itself available during the 8 periods of any one year and as a result would lose other contracts in the process';

The plaintiff '

was required

to make itself available during the 8 periods of any one year and as a result would lose other contracts in the process

[7] The plaintiff further alleges that during January 2014 the defendant breached alternatively repudiated its obligations in terms of the said agreement by informing the plaintiff that it would no longer require its services with effect from January 2014. The plaintiff further alleged that this notice did not constitute reasonable notice and stated that a reasonable notice period should have been 12 months.

[8] The amount claimed as damages by the plaintiff was arrived at by multiplying the monthly fee as at January 2014 by the twelve months,

based on what the plaintiff considers to be a reasonable notice period and subtracting the payment received in January 2014.

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based on what the plaintiff considers to be a reasonable notice period and subtracting the payment received in January 2014.

[9]It was submitted on behalf of the defendant that the plaintiff's claim cannot be regarded as one for a liquidated amount of money, as contemplated in Rule 32(1)(b).

It was submitted on behalf of the defendant that the plaintiff's claim cannot be regarded as one for a liquidated amount of money, as contemplated in Rule 32(1)(b).

[10]The issue as to whether the plaintiff's claim is for a liquidated amount of money was not specifically dealt with in the heads of argument on behalf of the plaintiff. It was submitted though that the contents of the affidavit filed in opposition to the application for summary judgment, contains hearsay evidence and is inadmissible and that the defendant therefor has not complied with the provisions of Rule 32(3)(b).

The issue as to whether the plaintiff's claim is for a liquidated amount of money was not specifically dealt with in the heads of argument on behalf of the plaintiff. It was submitted though that the contents of the affidavit filed in opposition to the application for summary judgment, contains hearsay evidence and is inadmissible and that the defendant therefor has not complied with the provisions of Rule 32(3)(b).

[11]It is trite that a court has a discretion whether or not to grant summary judgment. Rule 32(5) provides that a Court may enter summary judgment even if the defendant does not satisfy the court by way of an affidavit by a person who can swear positively to the fact that he has a bona fide defence to the action.[1]If, having regard to the nature of the cause of action and the nature of the facts involved, it is reasonably possible that a plaintiff's

application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.[2]If, on the papers before me, there is a reasonable possibility that an injustice may be done if summary judgment is granted, it constitutes sufficient basis on which to exercise my discretion in favour of the defendant.[3]

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that the defendant has a good defence, the issue must be decided in favour of the defendant.[2]If, on the papers before me, there is a reasonable possibility that an injustice

be done if summary judgment is granted, it constitutes sufficient basis on which to exercise my discretion in favour of the defendant.[3]

[12]In exercising my discretion whether or not to grant summary judgment, I had to be satisfiedthat the plaintiff had an unanswerable case in the sense that its claim fell within the ambit of Rule 32(1) and in this instance, that it is that the claim is for a liquidated amount of money.

In exercising my discretion whether or not to grant summary judgment, I had to be satisfied that the plaintiff had an unanswerable case in the sense that its claim fell within the ambit of Rule 32(1) and in this instance, that it is that the claim is for a liquidated amount of money.

[13]A claim cannot be regarded as one for a liquidated amount in money unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation.[4]

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[14]Incasuthe plaintiff relies on a partly written and partly oral agreement. The alleged written part of the agreement, annexure 'DMC1'

to the particulars of claim, does not support any of the averments pertaining to the material terms of the agreement, as set out in the particulars of claim. In this document reference is made to an attached breakdown of the general fee structure, which had not been attached to annexure 'DMC1'. The plaintiff's averments in respect of the terms of the agreement appear then to be based solely on an oral agreement.

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to the particulars of claim, does not support any of the averments pertaining to the material terms of the agreement, as set out in the particulars of claim. In this document reference is made to an attached breakdown of the general fee structure, which had not been attached to annexure 'DMC1'. The plaintiff's averments in respect of the terms of the agreement appear then to be based solely on an oral agreement.

[15]The allegations contained in the particulars of claim, pertaining to the material terms of the agreement, are framed in such a manner that the ascertainment of the amount payable is not a matter of mere calculation.

The allegations contained in the particulars of claim, pertaining to the material terms of the agreement, are framed in such a manner that the ascertainment of the amount payable is not a matter of mere calculation.

[16]The averment that the defendant would be entitled to terminate the agreement on reasonable notice, in itself introduces uncertainty

and/or debate in respect of the plaintiff's claim. It was never agreed as and/or specified what would constitute reasonable

notice. The notice period impacts on the calculation of damages and the amount claimed by the plaintiff. The issue as to what would constitute reasonable notice is dependent on the facts of the case and is, in my view, an issue that needs to be canvassed during the trial. A further issue that appears to be relevant in the computation of the plaintiff's damages, is the reasonable effort by the plaintiff to mitigate its damages. In my view the plaintiff's claim is therefor not for a liquidated amount.

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[17]In view of the above I was and am still of the view that a reasonable possibility exists that an injustice may be done if summary judgment were to be granted and therefore I exercised my discretion to refuse summary judgment and to afford the defendant the opportunity to defend the action.

In view of the above I was and am still of the view that a

reasonable possibility exists that an injustice

be done if summary judgment were to be granted

and therefore I exercised my discretion to refuse summary judgment and to afford the defendant the opportunity to defend the action.

[18] In the light of the above I do not deem it necessary to deal with the plaintiff's arguments in respect of the defendant's

affidavit which had been filed in opposition of the application for summary judgment.

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ACTING JUDGE

On behalf of Plaintiff: Adv. W.J. Coetzee (oio Adrian B. Horwitz & Associates)

On behalf of Plaintiff:

Adv. W.J. Coetzee (oio Adrian B. Horwitz & Associates)

On behalf of Defendant: Adv. T.J. Golden (oio Mathews & Partners)

On behalf of Defendant

: Adv. T.J. Golden (oio Mathews & Partners)

[1] Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973(3) SA 49 (A) at 58-59

Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973(3) SA 49 (A) at 58-59

[2] Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959

(3) SA 362(W) at 366

Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd

1959

(3) SA 362(W) at 366

1959

(3) SA 362

[3] First National Bank of South Africa Ltd v Myburgh 2002

(4) SA 176(C) at 184H

First National Bank of South Africa Ltd v Myburgh

2002

(4) SA 176(C) at 184H

2002

(4) SA 176

[4]Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (2) 1978(1) SA 164 (w) at 168; See also Standard Bank v Renico Construction 2015(2) SA 89 para [21] to [29]

Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (2) 1978(1) SA 164 (w) at 168; See also Standard Bank v Renico Construction 2015(2) SA 89 para [21] to [29]

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