

SOUTH AFRICA / JUDGMENT

Media MOB Productions CC v PPC Limited (41709/2015) [2019] ZAGPJHC 282 (16 August 2019)

[2019] ZAGPJHC 282

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

41709/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

CASE NO: 41709/2015

16/08/2019

In

the matter between:

MEDIA MOB PRODUCTIONS

CC

Plaintiff

(formerly Africa Eyethu

Video Productions CC)

and

PPC LIMITED

Defendant

JUDGMENT

YACOOB J:

1. The plaintiff in this matter, formerly known as Africa Eyethu Video Productions, claims payment from the defendant of R2 006 400,

which was amended to R2 640 000 and then R3 036 000, as payment of a monthly retainer for the months allegedly remaining in an annual contract after the plaintiff cancelled the contract, following the defendant's alleged breach. This is claim 1 in the plaintiff's particulars of claim.

2. The plaintiff also sought payment for the storage of video footage produced for and belonging to the defendant, and for the production

of video footage in excess of the amount covered by the retainer. These claims (claims 2 and 3 in the particulars of claim) were

settled between the parties and I made an order on the second day of the hearing in that regard.

3. The defendant had also instituted a counterclaim, for the return of the stored video footage, and the counterclaim was withdrawn.
4. Only claim 1 remains to be determined, together with costs in the counterclaim.
5. The plaintiff called one witness, Ms Engelbrecht. The defendant called Ms Khanyile, Mr Tomes and Ms McCarthy.
6. The dispute between the parties turns on when the contract between them was renewed, and on what terms. The defendant also takes the position that, even if the contract was renewed as Ms Engelbrecht alleges, the payment claimed by the plaintiff amounts to a penalty which is out of proportion to any prejudice it suffered.
7. The contract was signed on 28 February 2014, and states that it commences on date of signature and continues for a year, with automatic renewal thereafter unless it is cancelled a month before the end of the first year. The defendant gave the plaintiff notice on this basis in December 2014 that the contract would not be renewed for another year but would terminate on 28 February 2015.
8. It was argued for the plaintiff that, nonetheless, the contract ran from October 2013 and was renewed by Mr Tomes in October 2014. Therefore, it was submitted, the termination is in terms of clause 5 of the contract and the plaintiff is entitled to the monthly retainer for the remainder of the year until the end of September 2015.

THE PLAINTIFF'S CASE

9. Ms Engelbrecht, the sole member of the plaintiff, was the plaintiff's only witness. She became a television journalist for the SABC in 1990, and left in 1995. At first she worked for another company doing videos for their clients, which included the defendant. In 1998 she struck out on her own and the defendant was her "most loved" client.

10. The plaintiff made small films for the defendant of about 8-10 minutes each week on various subjects. It used scriptwriters, professional camera operators, voice over artists and video editors. From 1998 until about 2013 the plaintiff had other clients as well but after that the work for the defendant became so big that it was the exclusive client.

11. The films were about the defendant and its activities and community development – a kind of public relations exercise which was sent out to employees to motivate them. It was published on the defendant's intranet, although initially it was published

physically on a video or a "stick". The plaintiff also produced an animation series for the defendant. There were also some projects intended for wider broadcast.

12. In April 2013 the plaintiff became the defendant's only service provider.

13. The plaintiff received instructions mainly through the Public Relations manager or the sales relationship office. Occasionally there was someone from an art department. For each project the plaintiff would give a quote and then invoice for it before being paid.

14. In 2012 or 2013 the workload became so big that the plaintiff had to hire special office space and hire a video editor. Ms Engelbrecht

decided to try and negotiate a contract or a retainer because invoices were not always paid on time and sometimes she had to use

her bond to pay people.

15. Ms Engelbrecht had a meeting in April 2013 with Mr Tomes, who was the sales and marketing director, and later the managing director, Mr Odendaal who was "something administrative", and Ms Khanyile, the PR manager. At that meeting she presented a proposal motivating for a retainer because the work had got so big, and she had to expend more money to get it done.

16. They agreed on a six month trial period to see if it would be successful, on the basis that the plaintiff would be paid R180 000 plus VAT per month for a specified number of minutes of video per month, that it would still invoice every month and would get paid on time. They would re-evaluate in October because the financial year ended in September. Another meeting was held in October at Mr Tomes's offices, with the same people in attendance. Ms Engelbrecht explained to them that the arrangement was working and asked for an increase. They all agreed on R220 000 plus VAT per month. The plaintiff would produce 800 minutes per year and every three months anything over 200 minutes produced in those three months

would be paid for separately. Additional work (it was not clear what sort of additional work) would be charged for separately.

17. The new amount was not paid until the contract was finalized, which took a few months. However, later in her evidence-in-chief Ms Engelbrecht also testified that she was operating on the new amount from October 2013.
18. Mr Tomes asked Ms Khanyile and Ms Engelbrecht to put together a written contract. Ms Khanyile sent Ms Engelbrecht a draft to work on. Ms Engelbrecht asked “people she knows” to help her with the contract (it turned out that this was her brother who is a lawyer). The contract was sent back and forth before it was finally agreed upon. No evidence was produced of the back and forth, or of any changes that had been made by the defendant to the plaintiff’s version of the contract.
19. In the interim period there was still some late payment, and Ms Engelbrecht would ask Mr Odendaal to sign off on invoices. However in February 2014 he informed her that he would not pay again until the contract is signed. The contract was signed by Ms Engelbrecht and Ms Khanyile on 28 February 2014 but had been running since October.
20. It was not clear on what basis Ms Engelbrecht believed that the contract had been running since October, since she also stated that she only was paid on the new basis after signature of the contract. No invoices have been produced to show the amounts invoiced in that period.
21. The contract states in clause 2 that it commences on the date of final signature, will continue for twelve months, and would automatically
renew for another twelve months on the first day after completion of the initial term, unless cancelled by the client. Ms Engelbrecht
stated in cross-examination that she was aware of this, and that the letter cancelling the contract referred specifically to clause 2 of the contract.
22. Ms Engelbrecht had to invoice 10 days before the end of the month in order to get paid. She was supposed to invoice for the extra minutes every three months but prepared an invoice in January 2015 for 1 October 2013 to 30 September 2014. According to her this was simply to “show” Ms McCarthy, who took over as PR manager in October 2014 after Ms Khanyile had left. However, later in her evidence in chief Ms Engelbrecht stated that this was the actual invoice that she thought had been paid.
23. Ms Khanyile left in about August 2014 but the plaintiff still produced its “minutes” of video footage. At the time there was a lot of upheaval in the defendant company. The CEO resigned because of differences with the CFO who had been appointed in
2011. The CEO was popular and the employees did a petition.

24. Ms Engelbrecht says she was left to her own devices after Ms Khanyile left. Because of the upheaval in the company she went to ask Mr Tomes what is going to happen now. She also asked for an increase because it was a year later and costs had increased and so on. Ms Engelbrecht testified that Mr Tomes told her everything would continue as normal and “we must continue for another year” but that there would be no increase. Mr Tomes left at the end of October 2014 before his replacement arrived.
25. Ms McCarthy started in November. Ms Engelbrecht testified that there was much uncertainty and they did not meet. They set meetings which did not happen. On 8 December Ms McCarthy asked Ms Engelbrecht for the contract. They met on 11 December and Ms McCarthy asked Ms Engelbrecht to bring the footage for archival purposes. Ms Engelbrecht’s father just before that had a heart issue, and he passed away in March. While her father was ill Ms Engelbrecht rushed back from Bloemfontein to do a shoot that Ms McCarthy had asked her to do. However nobody was there for the shoot and Ms McCarthy told her it had been moved to the next day but nobody had told Ms Engelbrecht.
26. On 17 December 2014 the defendant sent Ms Engelbrecht a letter informing her that her contract would be terminated in February 2015 when it expires, and that the contract would be put out to tender. The plaintiff sent a letter in reply, saying that the contract was renewed in October 2014 “after a year”.
27. The defendant responded on 7 January 2015 relying on the date of signature of the contract. Ms Engelbrecht was shocked but continued doing the work. She tried to go and see “them” but nobody was interested.
28. Ms Engelbrecht then went to an attorney who caused a letter to be sent to the defendant stating that the purported termination was not accepted, that the contract runs from September to October, and that McCarthy was probably “unaware of various meetings which have been held” with “various role-players” at the defendant.
29. Ms Engelbrecht testified that she had informal meetings with the CEO when she saw him for shoots and events.
30. In her view she had received the go-ahead for another year from October 2014 and had extended all her contracts. She did not produce any documentary evidence of those extensions. She conceded that the parties had not in writing extended or amended the contract for an October renewal date. It was not included in the original contract because “the contract was between friends”.
31. Mr Tomes did not say he was amending the written agreement because there was a lot of chaos. It wasn’t an issue, they had never had a formal thing and he was the most senior person there, and he and she were together all the time. Ms Engelbrecht did not give any details of how they were “together all the time”.

32. In re-examination Ms Engelbrecht testified that payments were mostly late. None of her monthly invoices during the contract period were produced, nor proof of late payments.
33. Ms Engelbrecht also testified that it was a contract between friends because after the October 2013 meeting Mr Tomes told her because of everything going on at the defendant at that time they had to put something together to protect or safeguard her. However, in her evidence-in-chief, Ms Engelbrecht testified that she had requested the contract for continuity or regularity of payment, and that the upheaval at the defendant had occurred in 2014.

THE DEFENDANT'S CASE

34. The defendant called three witnesses, Ms Khanyile, Mr Tomes and Ms McCarthy.
35. Ms Khanyile testified that she was the PR manager from 2007 until June 2014 when she left. She reported to Mr Tomes from 2008 until about 2012 when he was promoted. She confirmed the manner in which the work was done by the plaintiff and the interaction between her office and the plaintiff. She would sometimes have to get approval from her seniors for work but most of the time would approve it herself.
36. Ms Khanyile confirmed the written contract, and her signature. She testified that it was entered into because they didn't have one, needed to iron out new service level agreements, and they needed to standardize the amounts for the newsreels. This would help both the defendant and the plaintiff.
37. Ms Engelbrecht and Ms Khanyile consulted about the contract, then Ms Engelbrecht brought the contract to Ms Khanyile, who had it approved by the legal department. She does not know about any amendment of the contract because she had left.
38. Ms Khanyile could not remember the date of the first meeting which Ms Engelbrecht testified was in April 2013, but remembered that there was a meeting. This was the first time it was suggested that the plaintiff should be placed on a retainer. She could not remember that there was any agreement that it would be re-evaluated at the end of the financial year.
39. Ms Khanyile did not recall another meeting in October 2013, as it had been a long time. It was put to Ms Khanyile that at that meeting it was agreed that the retainer system was working and that the monthly retainer was increased from 165 000 excluding VAT to 193 000 excluding VAT. She could not remember that. She could not remember if the retainer was increased.
40. Ms Khanyile did remember that there was a meeting where a service level agreement was discussed. Ms Engelbrecht was asked to go and prepare the agreement, which she did and presented the agreement to Ms Khanyile. She does not remember any other meeting. She sent the agreement to the legal department to get "the green light". She does not know about the agreement going back and forth.

41. Eventually the agreement was signed on 28 February 2014. Ms Khanyile cannot remember the retainer having been implemented before the agreement had been signed.

42. Ms Khanyile agreed that there had been a lot of movement in the defendant company, but testified that she had been happy there. She left for an opportunity to work in a multinational company.

43. Mr Tomes testified that he had been employed at the defendant from 1998 until 2014. He moved his way up from being a technical consultant,

then technical manager, sales manager, general manager of sales, sales and marketing executive, and lastly joint managing director of South African operations. As sales and marketing executive he had responsibility for the entire brand, not just in South Africa.

44. He did not see the written contract until preparing for court proceedings but he was familiar with the content because they had

discussed it. The plaintiff had had a verbal arrangement with Ms Harris, Ms Khanyile's predecessor. Ms Engelbrecht at some point expressed concern about being paid late and they decided they would both benefit from more structure and certainty. Mr Odendaal, Ms Khanyile and Mr Tomes met and agreed on it, and left it to Ms Khanyile to put in place.

45. Mr Tomes knew Ms Engelbrecht through social engagements at the defendant and they became friends and had a close working relationship.

46. In September 2014 the CEO was leaving and Mr Tomes and some of his colleagues were engaging the board about some issues and he decided

to leave. A number of people approached him including Ms Engelbrecht, he doesn't remember when and how, asking him what will happen now that he was leaving.

47. He said they should carry on as they are doing because it is a big listed company, "do what you are doing", he was sure

everything would be fine. He does not recall any specific meetings and contracts. He did not recall discussing Ms Engelbrecht's

contract, only the initial meeting setting up the basis of the contract. Most contracts have a timeline and roll over if not cancelled.

48. Mr Tomes had not started working with Ms McCarthy although he was on the panel that interviewed her, and he had no reason to believe there would be a problem. He just said to her that there is a contract, there is no reason to worry, carry on with what you are doing.

49. The governance process at the defendant did not permit verbal amendments to the contract. If they amended it they would go to the legal team to put the amendment in. He did not have any intention to verbally amend the contract nor did he tell anyone that he had done so.

50. Mr Tomes remembered the meeting in April 2013 although he did not remember the exact date. He had no recollection about a trial period of six months and a review thereafter. He said it was possible but he did not remember. He confirmed that at the time the financial year end was in September.
51. He does not recall a second meeting in October 2013, or any meeting at which Ms Engelbrecht reported back about how the retainer trial was working. He was not aware of the amount of the retainer nor of it having increased. According to him the first meeting was the one that triggered the drafting of the contract. He only recalls one meeting and he then asked Ms Khanyile to get the contract drafted and signed.
52. He responded to an email regarding the contract, saying that he was happy with it, as far as he was concerned it reflected the arrangement made at the meeting and as long as legal approved it could be signed.
53. There were “stormy times” in the defendant around September
2014. But not at the time Ms Khanyile resigned which was July 2014.
54. It was put to Mr Tomes that Ms Engelbrecht testified that the agreement had been renewed in October 2013 (which she did not testify) and that therefore in September 2014 she wanted amongst other things an increase, so she set up a meeting with him. He did not recall that or a meeting. He did not recall any scheduled meeting. He does know people asked him about the state of things in passing.
55. According to Mr Tomes the period was turbulent only for the board, not the company as a whole.
56. He may have had some discussion with Ms Engelbrecht in passing but he would never make amendments without the legal team. As far as he was concerned nobody changed the terms of the signed agreement.
57. He did not recall making any commitments about another year, nor would he have done, and nor was he empowered to do so. The way that he operated was never to do a verbal commitment without getting legal to confirm it and put it in writing. If there was a verbal agreement before that (from 1998) it was nothing to do with him. He told everyone it was business as usual.
58. He currently works for a competitor of the defendant. He did not want to testify but when told he would be subpoenaed realized he’d have no choice.
59. He would not have made a verbal agreement which had binding effect on the company, whether amendment or renewal. The circumstances made no difference to this. Mr Tomes was quite vociferous in this regard.

60. Ms McCarthy testified that she had join the defendant a few months after Ms Khanyile left. The plaintiff was doing work for the defendant in terms of a contract. In December 2014 just after she started reviewing all the contracts and that is why she asked for the plaintiff's contract. In mid-December she took the decision not to renew the contract with the plaintiff and notified Ms Engelbrecht. Although she only had to give one month's notice she thought she should do it as soon as possible, it would be in the plaintiff's interest.
61. Ms McCarthy was reviewing all contracts and the communications strategy. She was deciding whether the contracts were aligned to the business requirements, and also they had to cut down expenditure. There was a new procurement policy and they had to comply with it where possible. She reviewed about 5 contracts. She also looked at how the budget could be reallocated.
62. Ms McCarthy had no conversation with Mr Tomes about the contract so he did not tell her anything about it being renewed or amended.
63. Ms McCarthy knew nothing about any renewal in September 2014. She went according to the written contract. In cross examination the schedule to the contract was put to her, it ran from 1 October 2013 to 30 September 2014. This was not testified about by Ms Engelbrecht nor was it put to Mr Tomes. Ms McCarthy stated that she relied on clause 2 of the contract which says the date of the final signature of the contract, and that supersedes schedule A.
64. She did not have a quarterly meeting with the plaintiff because her first quarter would have been in January and because of the cancellation there was no need to plan the next quarter.
65. She paid all invoices on 30 days, because that was how the system worked.

ANALYSIS

66. The plaintiff's contention is that, despite the contract stating that it would run from the date of final signature, which was 28 February 2014, it ran from October 2013, and that Mr Tomes renewed it in September 2014. This is the primary dispute to be determined.
67. Mr Venter argued that agreement was renewed either by the automatic effluxion of time or by Mr Tomes and Ms Engelbrecht.
68. Ms Engelbrecht did not testify that, as far as she was concerned, she went to Mr Tomes because the agreement was expiring. She went to him because she was worried about the upheaval in the company, and because she wanted more money.
69. On Ms Engelbrecht's own version, she did not get paid the "increased" contract amount from October 2013, because

the contract was not yet finalized. This means that the contract did not in fact commence in October 2013.

70. Ms Engelbrecht's evidence was somewhat contradictory, as pointed out above. However, she did not testify that the contract should have specified 1 October, and that it was an oversight that it did not, as Mr Venter argued.
71. Ms Engelbrecht was unclear on the contract, and it appears that she was happy to accept that there were some ambiguities, as it was a contract "between friends". She therefore assumed that any ambiguities would be resolved in her favour. This was clearly incorrect. The contract was a commercial contract between juristic parties. It was very clear. It had been drafted primarily by Ms Engelbrecht and the heading makes it clear that it is the plaintiff's contract, not the defendant's. Ms Engelbrecht did not point to any changes to her draft that the defendant may have made, or that she did not agree with.
72. Mr Venter's contention, put to Mr Tomes in cross examination, that the defendant had previously had oral or verbal agreements with the plaintiff, and it was not foreign to the defendant to do so, is not supported by the evidence, since the evidence is that, before the contract at issue in this case, Ms Engelbrecht had to quote before doing a work, would do the work when the quote was accepted, and then would invoice and be paid after invoicing. There was no evidence of an oral contract.
73. In my view, even without the evidence of the defendant, Ms Engelbrecht did not prove that the contract ran from October 2013, nor did she prove that, if it ran from February, Mr Tomes had renewed or amended it to run for another twelve months from October 2014. Had she truly believed the contract ran from October she would have had no reason to approach Mr Tomes, as it would simply automatically renew. Had Mr Tomes amended the contract, or "given her another year", I am satisfied that this would have been put in writing, either by the plaintiff or the defendant.
74. The evidence of Mr Tomes and Ms Khanyile was clear and convincing. Neither of them could recollect a trial period and a second meeting.

Neither of them confirmed that the contract ran from October. Both were of the view that the signing of the contract on 28 February 2014 signalled the commencement of the contract. Neither had anything to gain from testifying for the plaintiff, as neither are employed by the plaintiff any more. The schedule to the contract was not put to either of them. Nor did Ms Engelbrecht testify about it.

75. Mr Tomes was emphatic that he would never have bound his company by making a verbal agreement, and that he did not have the power to do so. I consider it inherently unlikely that he did so.
76. In view of the plaintiff's many contradictions in her evidence, taken in conjunction with the evidence of the defendant's

witnesses, I find her version to be inherently improbable.

77. As far as the contract is concerned, it is perfectly clear. It also states in clause 8 that the contract contains the entire agreement

between the parties to the exclusion of all previous negotiations and understandings. I am satisfied that the contract was intended to and did run from February 2014, and that it could not therefore have been automatically renewed in September or October 2014.

78. I am also satisfied that Mr Tomes neither amended nor renewed the contract in September 2014.

79. Ms McCarthy was also an impressive witness but her evidence was not relevant for purposes of determining the date on which the contract

commenced, and whether there was any renewal, save that she confirmed that she had not been informed by anyone within the defendant of any renewal or amendment.

80. In view of the conclusion I have reached, I do not need to decide whether the amount claimed is a penalty in which a court ought to interfere, or what amount has been proven by the plaintiff.

THE COUNTERCLAIM

81. The counterclaim was for return of the defendant's footage, which the defendant was the owner of in terms of the contract. It was clear on the evidence of Ms Engelbrecht and Ms McCarthy that at the time of the termination the defendant had paid for the equipment on which it was being stored. Although the plaintiff tendered the return of the footage there was some difficulty about actually returning the footage.

82. In my view the defendant did not act frivolously in bringing the counterclaim because there was difficulty between the parties regarding the return of the footage. Therefore it is appropriate that each party bears its own costs.

CONCLUSION

83. For these reasons I find that the version of the plaintiff is inherently improbable, and that the plaintiff has not made out a case for the payment claimed in claim 1.

84. I make the following order:

84.1. Claim 1 is dismissed with costs.

84.2. Each party is to bear its own costs associated with the counterclaim.

S. YACOOBJUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Plaintiffs

: AJ Venter

Instructing Attorneys

: JNS Attorneys

Counsel for the Defendant

: C Louis (Ms)

Instructing Attorneys

: TGR Attorneys

Date of hearing

: 13, 14 & 22 February 2019

Date of judgment

: 16 August 2019

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