

SOUTH AFRICA / JUDGMENT

Siyandisa Music (Pty) Ltd v Gallo Music Publishers (Pty) Ltd (2016/75684) [2018] ZAGPPHC 530 (17 April 2018) [2018] ZAGPPHC 530

COURT

North Gauteng High Court, Pretoria

BEFORE

S S Mphahlele

CASE / FILE NUMBER

2016/75684

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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO.:

2016/75684

17/4/2018

In

the matter between:

**SIYANDISA
MUSIC (PTY)
LTD
Applicant
versus
GALLO
MUSIC PUBLISHERS (PTY)
LTD
Respondent**

JUDGMENT**MPHAHLELE J**

- [1] This is an application to amend the notice of motion in the main application dated 23 September 2016 . The respondent raised an objection to the intended amendment.
- [2] The applicant issued an application for a declaratory relief pertaining to an agreement between the applicant and the respondent and one Sandford Ross dated 26 September 2006 ("the tripartite agreement") which relates to the right on the works of the late music icon Miriam Makeba.
- [3] The notice of intention to amend in essence seeks to introduce additional relief. The respondent objected complaining that the intended additional relief is not foreshadowed in the founding papers.
- [4] The additional relief that the applicant seeks to introduce is for a statement and abatement of accounts. The amendment seeks to introduce an additional prayer, which reads as follows :

"that the respondent is ordered to deliver an account within (30) thirty days from the date of this order, accounting for all collection of royalties on the Sandford Ross works, and more specifically:

the period between 20 January 2012 up and until 28 November 2016, including but not limited to all monies collected by the respondent and its affiliates, administrators , sub-publishers and licensees throughout the world in respect of the Sanford Ross works, and any monies paid over to Sanford R Ross, with the inclusion of a full account of any and all amounts held back by the respondent as commission.

An order for the debatement of the account referred to in 2.1 (supra) within 30 (thirty) days from the date of delivery of that order and for payment of any amounts found to be due owing and payable by the respondent to the applicant."

APPLICANT'S VERSION

- [5] The applicant submits that the newly introduced claim would be for statement and the debatement of accounts.
- [6] The applicant contends that the essentialia of a claim for an account and the debatement thereof is the basis of the right to receive an account. The duty to render an account depends on one of the following: a fiduciary relationship between the parties which obliges the person in a fiduciary position to provide an account; a contractual obligation to render an account; or; a statutory duty to render an account. The applicant further contends that the second leg of the enquiry is whether the defendant has failed to render an account.

- [7] The applicant summarises the background to the main application as follows: On or about 26 September 2006, the late Miriam Makeba, the respondent and Sanford R Ross (a United States of America citizen and attorney in the USA) entered into a tripartite agreement ("the agreement") to put to rest a long standing dispute between the late Miriam Makeba and Ross concerning certain musical works and literary works ("Sanford Ross works") authored and co-authored by the late Miriam Makeba, that Ross claimed rights in.
- [8] The agreement provided, inter alia, the following: Ross assigned all his rights in Makeba's Sanford Ross works to the respondent; the respondent pursuant to the assignment, paid Ross an amount of \$220 000-00; the respondent, would, where agreed by Ross, procure the collection of all past monies relating to the musical works and remit same to Ross a er deducting a 15% collection commission; the respondent assigned all works, acquired by it from Ross, to the ZM Makeba Trust which in turn appointed the applicant and the respondent to administer the collection of all royalties; all such collections will be accounted for by the respondent and paid to Ross in satisfaction of the amount of \$423 000-00 or for 15 years, whichever is the earliest .
- [9] In or during January 2012, the respondent's administration rights in respect of the Sanford Ross works were terminated. This termination of the administration rights was accepted by @Velocity Limited, the then parent company of the respondent on 20 January 2012. All rights to report and make payment henceforth vested in the ZM Makeba Trust. The applicant subsequently communicated with Ross to confirm its obligations to report, which Ross acknowledged .
- [10] Further the applicant exercised the right to audit all of the musical works and literary works authored and co-authored by the late Miriam Makeba (" the Makeba catalogue ") which included the Sanford Ross works and all of which were under the administration of the respondent.
- [11] The right to audit was accepted by the respondent and accordingly the applicant was granted access at the respondent's premises and books of accounts for the applicant along with its registered auditor, to audit the respondent's books in respect of the Makeba catalogue including the Sanford Ross works.
- [12] Ross, who had enquired of the applicant for statements in respect of the Sanford Ross works was informed by the applicant of the audit of the respondent and agreed to await the outcome. Ross was unhappy about the allegations contained in the audit report. The applicant and Ross contemplated a joint action against the respondent in respect of the findings contained in the audit report. The respondent entered into an agreement with the Ross to the exclusion of the applicant. This is the pivot around which the main application centres. The cancellation of the right to administer the works appears not to be disputed.

- [13] The applicant maintains that it clearly set up a case that there was a pre-existing contractual obligation to account to the applicant and make payment thereon. Therefore, the applicant submits that the factual background which would accordingly entitle the applicant on the basis of a fiduciary duty to account is properly foreshadowed in the papers.

RESPONDENT'S VERSION

- [14] The respondent maintains that the applicant seeks leave to amend its notice of motion to introduce several prayers neither anticipated in the original notice of motion nor supported, in any way, by allegations in the founding affidavit, which contemplate onerous obligations being imposed upon the respondent. On the contrary, what appears from the founding affidavit establishes that the applicant is not entitled to the relief it intends to seek; there is not even a basis laid in regard to the mandatory orders; there is no fiduciary relationship between the parties, nor a contractual relationship; the respondent is not a party to the agreement centrally relied upon by the applicant.
- [15] I now turn to the merits of the application, whether the amendment should be granted or not. Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the court, this discretion must be exercised with due regard to certain basic principles. "The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is ma/a fide or such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed." [See *Moolman v Estate Moolman* 1927 CPD 27 at 29]
- [16] The tripartite agreement was entered into by Sanford Ross, Gallo Africa Limited and the late Miriam Makeba.
- [17] In terms of annexure D to the notice of motion (a letter dated 20 January 2012 addressed to Sanford Ross by At Velocity) Gallo Africa Limited is known as At Velocity Logistics Limited ("At Velocity"). At Velocity accepted the ZM Makeba Trust termination of At Velocity's mandate to administer the Miriam Makeba catalogue through its division, Gallo Music Publishers. "consequently all obligations of At Velocity including but not limited to reporting and making payments to you in accordance with the terms of the above-mentioned agreement have also been terminated. All rights to this catalogue and obligations to report and make payment to you are now with the ZM Makeba Trust Gallo Music Publishers will be available to assist in the smooth handover, where necessary."
- [18] The applicant maintains that, pursuant to clause 4 read with clause 8 of the agreement, it exercised the right to audit all of the musical works and literary works authored and co-authored by the late Miriam Makeba ("the Makeba catalogue"), which included the Sanford Ross works and all of which were under the administration of the respondent.

- [19] Clause 4 of the agreement provides that: "Gallo shall, where agreed by Ross, procure the collection of all past monies relating to the works and shall remit these to Ross, without deduction except for a 15% collection commission to Gallo, subject to a full accounting. Gallo shall account to Ross on a basis, within 60 days after June 30, and December 31 of each year. Ross shall have the reasonable right to audit the books and records of Gallo pertaining to such monies, and Gallo shall, when requested by Ross, furnish copies of all statements received by Gallo pertaining to such monies. The above audit provisions shall also apply to the terms of paragraph B below". Clause 8 of the agreement provides that: "All future royalties in respect of the works referred to in 7, after deduction of Ga/lo's collection commission, shall be accounted for by Gallo and remitted to Ross in satisfaction of the amount of \$423 000-00 or for 15 years, whichever is the earlier".
- [20] The applicant alleges that Ross and the Sanford Ross works has not been dealt with in any manner by the respondent that represented compliance on the part of the respondent with the agreement.
- [21] There is no evidence before court that Gallo is a holding company of the respondent. The applicant in its founding papers alleges that the respondent has its own registration numbers which is stated to be 1970/008423/07. In annexure 'B' to the tripartite agreement, the registration number of Gallo is stated as 1926/008507/ 06. At one stage in its founding affidavit, the applicant referred to Gallo as the respondent's sister company. As previously stated Gallo is now known as At Velocity. In its letter dated 23 June 2016 addressed to the applicant's attorneys, the respondent stated that it is a division of Times Media (Pty) Ltd. It is noteworthy that Times Media is not before court. The founding papers show Galo and/or at Velocity and the respondent to be two separate entities. Clearly the respondent is not a party to the the tripartite agreement. The applicant has failed to show why Gallo's duty to account as set out in the tripartite agreement is ultimately resting with the respondent.
- [22] The sale and assignment agreement was entered into between Times Media (Pty) Ltd and Sanford Ross. The agreement is not signed by Ross, only signed by a representative of Times Media (Pty) Ltd. The applicant alleges that this agreement was concluded between Ross and the respondent. There is no evidence why Ross did not sign the agreement.
- [23] In terms of clause 7 of the tripartite agreement, Gallo assigned all the works acquired by it from Ross to the Z Makeba Trust which in turn appointed Siyandisa (Pty) Ltd and Gallo to administer the collection of all royalties attributable to such works. There is no evidence before court that the applicant and Siyandisa (Pty) Ltd is one and the same entity, or at the least evidence of the relationship between the two entities. Clearly as it stands the applicant is not a party to the tripartite agreement and it failed to properly plead its right to claim the relief sought in the application before me.
- [24] In *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641 A, the court stated that:-

"Having already made his case in his pleadings , if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence, where evidence is required or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

and at 639B the court further stated that:-

"Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect."

[25] The applicant is not a party to the tripartite agreement and it has not properly pleaded its right to claim the relief it seeks as it has failed to show that the respondent has a duty to render the account. The notice of intention to amend introduces additional relief not foreshadowed in the founding papers. To allow the amendment would cause prejudice and injustice to the respondent which cannot be compensated by an award for costs. The applicant not entitled to the relief sought. It would not be just under the circumstances to allow such an amendment.

[26] The application is accordingly dismissed with costs.

S S MPHABLELE

JUDGE OF THE HIGH COURT,

PRETORIA

FOR THE PLAINTIFF: Adv P Lourens

INSTRUCTED BY: Mthembu Attorneys

FOR THE DEFENDANT: Adv O Salmon SC

INSTRUCTED BY: J Boulton Attorneys

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