

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

7/2/2014

CASE NO: 33149/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO.	
(2) OF INTEREST TO OTHER JUDGES: YES NO.	
(3) REVISED.	
7/02/2014 DATE	<i>Malindi</i> SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2014 -02- 07
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

DOCNO TRAVEL AGENTS AND TOURS (PTY) LTD

Plaintiff

and

MEC OF HEALTH, MPUMALANGA PROVINCE

1ST Defendant

DEPARTMENT OF HEALTH, MPUMALANGA PROVINCE

2ND Defendant

JUDGMENT

MALINDI AJ

INTRODUCTION

[1.] The Plaintiff issued a summons for provisional sentence against the defendant for R2 700 000,00 with interest thereon at 15.5% per annum as from February 2013.

- [2.] It is common cause that the Plaintiff was appointed to arrange and pay for the accommodation and travelling expenses of the 1st Defendant and the VIP Protection team during the relevant period. The Plaintiff would then invoice the 2nd Defendant for the reimbursements. The memorandum from the Office of the MEC to the Acting Head of Department in this regard is annexed to the summons.
- [3.] The Plaintiff relies on a document dated 8 June 2012 to establish the Defendant's acknowledgment of indebtedness to the Plaintiff. The document reads as follows:
- "This serves to confirm that Docno Travel Agent and Tours had outstanding payments (of R2 700 000.00) from 2009 to 2011. The Department could not make such payment timeously due to the fact that there was an investigation that was conducted by Internal Audit for validation of the outstanding payments as required by Public Finance Management Act, 1999 (Act no.1 of 1999 as amended)".*
- [4.] In general, the Plaintiff's title and the Defendant's liability must appear ex facie the summons and the document upon which the claim is founded, without resort to extrinsic evidence. (Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller 1982 (2) SA 759 (c) at 762 G)
- [5.] The Defendants do not rely purely on a defence that appears ex facie the summons and the documents relied on. They proffer further evidence in the form of a denial of the authority of the person who wrote annexure "DOC2". This person's designation is Director: Internal Audit. In his answering affidavit he states:

"Furthermore, in my capacity as the Director: Internal Audit I do not have the authority to bind the Department in any contractual relationship to sign acknowledgements of debt on behalf of the Department."

- [6.] The Defendants dispute that annexure "DOC2" is a liquid document " since it does not amount to an admission of liability by the department or a duly authorised representative of the department but merely seeks to confirm that the Plaintiff "had outstanding payments from the department in respect of travel agency services rendered on behalf of the office of the MEC from 2009-2011." which could not be made timeously due to investigations for validity in terms of the Public Finance Management Act." (Defendants' underlining)
- [7.] On the face of annexure "DOC2", the following is clear:
- 7.1 The Plaintiff had outstanding payments of R 2 700.000,00 for the period from 2009/2011.
- 7.2 Payments could not be made timeously *"due to the fact that there was an investigation"* that was conducted by the deponent to the Defendants' affidavit for validation of the outstanding payments.
- [8.] The message conveyed in this document is that the claim could not be paid when it was requested because there was an investigation being conducted at the time. *Ex Facie* this document it is clear that a claim of R 2 700 000.00 was received by the

Defendants and that it was not paid for the stated reasons. The director: Internal Audit acknowledges this is the amount owed to the Plaintiff.

- [9.] As to the question whether the Director had authority to acknowledge the defendants' liability it is significant that the documents was addressed "TO WHOM IT MAY CONCERN." He placed himself in a position to speak to whomever it may concern regarding the status of this claim. That is equal to assuming authority to speak on this money-related enquiry. He had been tasked with investigating the validity of the claim.
- [10.] The Plaintiff has therefore discharged its onus of proving on a balance of probabilities that the director had authority to acknowlegde the defendant's liability. See *Scala Café v Rand Advance (Pty) Ltd* 1975(1) SA 28(N) at 31H-32A
- [11.] The Defendants have not sought to show that on a balance of probabilities they are likely to succeed in the principal case on the merits. They bear the onus in this regard (*Sonfred (Pty) Ltd v Papert* 1962(2) SA 140(W) at 143H and *Dickinson v SA General Electric Co (Pty) Ltd* 1973 (2)SA 620 (A) at 630F. The only attack is on the Director's lack of authority. The Plaintiff's case in this regard outweighs that of the Defendants.
- [12.] Furthermore, even if the document is not as clear as I suggest on the Defendant's acknowledgement of indebtedness, and that the Director's authority is in doubt, the scales will not tilt in favour of the Defendants. Instead it would be equally balanced. In the event I am still required to grant provisional sentence, unless special circumstances exist. (*Allied Holdings Ltd v Myerson* 1948(2) SA 961(W) at 966-967).

[13.] In the circumstances I find that the Plaintiff has made a case for provisional sentence to be granted against the Defendants.

[14.] I therefore make the following order:

- 14.1 Provisional sentence is granted in terms of the summons dated 20 May 2013 under case number 33149/2013;
- 14.2 The Defendants are to pay to the Plaintiff the amount of R2 700 000,00;
- 14.3 Interest on the said amount at the rate of 15.5% per annum *a tempore mora*;
- 14.4 The Defendants are to pay the costs, jointly and severally, the one paying the other to be absolved, on a party-and-party scale;
- 14.5 Upon compliance with paragraphs 14.2, 14.3 and 14.4 above, the Defendants will be entitled to demand security for the restitution thereof if this order should be reversed.

SIGNED AT PRETORIA ON THIS 14th DAY OF FEBRUARY 2014.





Malindi, AJ

Acting Judge of the High Court of South Africa