REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2012/9332

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

17 SEPTEMBER 2012

FHD VAN OOSTEN

In the matter between

SOUTHERN SUN HOTELS INTERESTS (PTY) LTD **PLAINTIFF**

and

MORRISJONES & CO (PTY) LTD **DEFENDANT**

Practice-Exception-by defendant against plaintiff's particulars of claim-based on two grounds-firstly that addendum agreement pleaded not containing sufficient allegations-secondly that no completed cause of action pleaded-interpretation of written agreement between parties-exception upheld.

J U D G M E N T

VAN OOSTEN J:

[1] This is an exception noted by the defendant against certain paragraphs of the plaintiff's particulars of claim.

[2] The plaintiff's cause of action is based on a written agency agreement, concluded between the parties in terms of which the plaintiff appointed the defendant as an advertising agency exclusively for the plaintiff's "Garden Court Southern Sun Premier and Corporate Above the Line" brands for a specified period. The defendant in terms of the agreement undertook to perform certain specified services in respect of which it became entitled to remuneration and commission amounting to 16.5% of media cost. In pleading the agreement the plaintiff relies on a written alternatively partly written and partly oral further alternatively tacit agreement, on the terms as contained in a written document, a copy of which is annexed to the particulars of claim (the agency agreement).

[3] It is convenient at this juncture to deal with the first ground of the exception. It attacks the plaintiff's allegations in regard to an "addendum agreement", which are set out as follows:

"9. Pursuant to the conclusion of the agency agreement, the plaintiff and the defendant agreed to a reduction of the defendant's remuneration in respect of the commission in relation to media cost from 16,5% to 13% ("the addendum agreement").

10. The plaintiff is unable at this stage to furnish any further particularity regarding the addendum agreement, but infers its conclusion by virtue of a recordal as to the percentage commission to which the defendant was entitled to in a letter addressed by the defendant to the plaintiff on 30 September 2011, a copy of which is attached marked "POC2"."

The allegations, it hardly needs to be stated, clearly fall short of showing that an addendum agreement was concluded. It furthermore does not comply with the non-variation clause contained in clause 20 of the agency agreement. Counsel for the plaintiff readily conceded as much. Counsel submitted however that the allegations in regard to the addendum agreement were merely superfluous, that they formed part of the *facta probantia,* and in any event were pleaded by way of background to the plaintiff's cause of action. I am unable to agree. Had the addendum agreement been irrelevant, as counsel would have it, the referral to it in the particulars of claim is improper. The defendant cannot be expected to plead to irrelevant matter or on allegations that are insufficient to establish an agreement. But it goes further: a plain

reading of the plaintiff's particulars of claim, as will soon become apparent, reveals that the addendum indeed is relevant to the plaintiff's cause of action as well as the amount claimed. It follows that he first ground of the exception must be upheld.

[4] This brings me to the second ground of the exception. It attacks the plaintiff's claim A on the basis that no completed cause of action has been pleaded. The claim is for the reimbursement by the defendant to the plaintiff of the sum of R894 863-00 and relates to the plaintiff's "Four Star Brand Campaign". A summary of the allegations pleaded in support of the claim is the following: the defendant, pursuant to the provisions of the agency agreement, rendered a cost estimate/or invoice to the plaintiff in respect of the campaign, the plaintiff "made payment" to the defendant "including making payment of a commission representing 13% of the proposed media cost" but the plaintiff cancelled the campaign prior to any media cost being incurred and prior to any media space being booked by the defendant. The plaintiff claims "by virtue of the agency agreement and the addendum thereto," that the defendant is liable to reimburse the plaintiff the amount of R894 863-00.

[5] The agency agreement specifically provides for a refund to the plaintiff of monies it had paid upfront to the defendant in respect of a particular campaign. In this regard clause 8 of the agency agreement applies. It reads as follows:

"[The plaintiff] may during progress of any work hereunder, by written order to [the defendant] require additions, modifications, suspension or termination of such assigned work. If [the defendant] notifies [the plaintiff] that additional costs or cancellation fees are required for additions, modifications, suspension or termination of assigned work as directed by [the plaintiff], then provided [the plaintiff] approved such costs in terms of clause 1.3 above, [the plaintiff] shall be responsible for such additional costs. If no approval is received by [the defendant] with respect to these, [the defendant] will not be obligated to perform such additions, modifications, suspensions or terminations."

The provisions are clear: a cancellation by the plaintiff must be made by way of a "written order" and the defendant is then entitled to notify the plaintiff of additional costs which, if approved in terms of clause 3.1, will be for the plaintiff's account. The plaintiff has failed to plead whether a written order was issued which would have triggered the

defendant's entitlement to additional costs. The cancellation relied on by the plaintiff clearly resorts under the provisions of clause 8. It cannot, as it is now pleaded, simply claim a reimbursement of the full amount paid to the defendant. I accordingly agree with the defendant's attorney that the issuing of a written order of cancellation by the plaintiff was a condition precedent for a claim for reimbursement. It follows that the second ground of the exception must similarly be upheld.

[6] One last observation: the plaintiff pleads that the amount of R894 863-00, which I have already referred to, is "calculated as set out in annexure "POC 3" hereto. The reference is to a letter by the plaintiff to the defendant, dated 27 October 2011. It does not contain a computation of the amount claimed as alleged by the plaintiff. Indeed the amount is contradicted by another letter which is attached to the particulars of claim. I have been informed that this apparent inconsistency forms the subject matter of another exception which has recently been served on the plaintiff's attorneys. Counsel for the plaintiff refrained from advancing any arguments on this aspect as this ground of exception was not before me. I do however consider a word of caution to be appropriate: the plaintiff, in the order I propose to make, will be given the opportunity to revisit the formulation of its claim. This may well present the opportune time for the plaintiff to also consider the new exception.

[7] In the result the following order is made:

1. The exception is upheld.
2. Paragraphs 9, 10 and 12 of the plaintiff's particulars of claim are struck out.
3. The plaintiff is granted leave to amend its particulars of claim within 15 days of the date of this order.
4. The plaintiff is ordered to pay the costs of the exception.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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PLAINTIFF'S ATTORNEYS	*MOTLATSI SELEKE ATT*
DEFENDANT'S ATTORNEY	*MR A CHRISTOPHOROU*
DEFENDANT'S ATTORNEYS	*BICCARI BOLLO MARIANO INC*
DATE OF HEARING	*14 SEPTEMBER 2012*
DATE OF JUDGMENT	*17 SEPTEMBER 2012*