



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 6656/2012

In the matter between:

INNSTAFF (PTY) LIMITED

Plaintiff

and

MA-AFRIKA HOTELS (PTY) LIMITED

Defendant

JUDGMENT DELIVERED ON 15 JUNE 2012

ZONDI, J:

[1] This is a summary judgment application in which the plaintiff seeks the following relief against the defendant:

1. Payment of the sum of R261 521.31;
2. Interest on the said sum at the rate of 15.5% per annum calculated from 18 November 2011 to date of payment; and
3. costs.

[2] The amount claimed by the plaintiff is for the services rendered by the plaintiff to the defendant in terms of the outsourcing agreements concluded by the parties on 11 March 2009 and 6 April 2011 respectively. These agreements were partly in writing and partly oral. In terms of these agreements the plaintiff outsourced staffing to the defendant for deployment at the defendant's Best Western Cape Suites Hotel and

charged the defendant for each temp at the agreed hourly rate.

[3] There does not seem to be a dispute between the parties that the plaintiff provided temporary employees (temps) to the defendant in the manner and at the price as alleged by the plaintiff. What is in dispute is whether the agreements in terms of which the temps were provided to the defendant incorporated a tacit term which imposed an obligation on the plaintiff to ensure that the temporary staff it made available to the defendant would be trustworthy and reliable to perform housekeeping duties and would not steal valuables and money belonging to the defendant's guests. The defendant contends that the agreement had such a tacit term and that in breach thereof the plaintiff provided to the defendant dishonest temps who stole valuables and money belonging to its guests from their hotel rooms. This obligation, the defendant contends, entailed the duty by the plaintiff to screen the temps before making them available to the defendant. It is this breach which the defendant alleges entitles it to raise the defence of *exceptio adimpleti non contractus* and to withhold payment for defective services provided by the plaintiff.

[4] In support of the contention that the plaintiff breached a tacit term of the contract by providing to it employees who were not screened at all or not adequately screened the defendant refers to various incidents of thefts which were allegedly perpetrated on its guests by the employees supplied by the plaintiff. These thefts occurred between 30 July to late October 2011, so the defendant alleges. The defendant says it had to reimburse its guests for the losses they had suffered in order to protect its reputation.

[5] The alternative defence pleaded by the defendant is one of negligent

misrepresentation made to the defendant by a certain Mlilo of the plaintiff during negotiations of the contract. The defendant alleges that Mlilo failed to establish whether the plaintiff in fact screened its temporary staff. It contends that had Mlilo made enquiries, he would have established that the plaintiff does not screen its staff, alternatively if it does, the screening process is wholly inadequate. The defendant alleges that the negligent misrepresentation has caused it the loss which is in the amount in excess of the plaintiff's claim. It says it will institute a counterclaim for damages.

[6] In argument before me Mr **Janisch**, who appeared for the plaintiff, submitted that the defendant's defences are unsustainable in law, have no factual basis and are very sketchy which he submitted was indicative of mala fide on the part of the defendant. He argued that the defendant's suggestion that clause 14 of the standard terms constitutes a warranty was opportunistic. He pointed out clause 14 merely records that plaintiff makes a substantial investment in advertising, screening and selecting suitably qualified temps for assignments. He advanced similar arguments in relation to the defendant's contention that the agreement incorporated a tacit term that all temporary employees assigned are trustworthy and reliable. He argued that in law, a tacit term cannot be imported into a contract where it would be inconsistent with the express terms. He submitted that the tacit term contended for by the defendant is inconsistent with the express terms of the contract.

[7] As regards the defendant's counterclaim defence, Mr **Janisch** submitted that there is no factual basis for the contention that Mlilo made a misrepresentation at all. He argued that there are no facts at all put up to support the contention that the plaintiff did not screen its employees.

[8] The purpose of the procedure for summary judgment is to prevent a defendant who has no defence to a claim from delaying the matter unnecessarily by abusing the Court's process and to enable it to grant a final judgment without a trial despite the fact that a defendant has entered an appearance to defend. (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)).

[9] A defendant who wishes to defeat a claim for summary judgment must satisfy the Court that he has a *bona fide* defence to the action which it may do by way of an affidavit. The defendant must at least disclose a defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

[10] In the present case the defendant has explained the reasons for it not paying the plaintiff. It says inter alia the plaintiff has breached a tacit term of the agreement in terms of which the plaintiff is obliged to supply to it employees who are honest and trustworthy. It sets out the facts upon which its defence is based.

[11] It is true that the defendant may not have formulated its defences and the facts upon which they are based with precision and elegance. However, this is not the test at the summary judgment stage. The rule does not require a convincing defence but a *bona fide* defence which is good in law. The fact that the defendant's defences may at this stage look improbable does not mean that they are untrue. In my view even though the facts underpinning the defendant's defences are not properly set out they are nevertheless sufficient to raise a doubt as to whether the plaintiff's case can be characterised as "*unanswerable*". (*Gilinsky and Another v Superb Launderers & Dry*

Cleaners Pty Ltd 1978 (3) SA 807 (C) at 811 E – G).

[12] In the circumstances, I will refuse the summary judgment and grant the defendant leave to defend.

[13] In the result I make the following order:

1. summary judgment is refused.
2. defendant is granted leave to defend.
3. Costs to be costs in the cause.



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