

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2021/04239

In the matter between:

TRINITY TRANSACTION ADVISORY CC

PLAINTIFF

and

LAZARUS GAZZA SHIIMI

1st DEFENDANT

GAZZA MUSIC PRODUCTION CC

2nd DEFENDANT

Neutral citation: *Trinity Transaction Advisory CC v Shiimi* (HC-MD-CIV-ACT-CON-2021/04239) [2024] NAHCMD 89 (7 March 2024)

Coram: USIKU J

Heard: 14 – 17 August 2023 and 12 September 2023

Delivered: 7 March 2024

Flynote: Contract – Interpretation of – Contract for provision of commercial and legal advisory services providing that plaintiff shall be entitled to 20 per cent of the value of commercial agreement secured by the plaintiff on behalf of the defendants – Contract further providing that the plaintiff is entitled to N\$45 000 per month for services rendered – Whether on the proper interpretation of the contract, plaintiff is entitled to 20 per cent of the commercial agreement or N\$45 000 per month for services rendered – Court finding that the plaintiff is not entitled to 20 per cent of the commercial value of the agreement.

Summary: The plaintiff and the defendants entered into a written agreement for provision of commercial and legal advisory services by the plaintiff to the defendants. The contract provides that the plaintiff shall be entitled to 20 per cent of the value of a commercial agreement secured by the plaintiff on behalf of the defendants. The contract also provided that the plaintiff shall be entitled to a fee of N\$45 000 per month for services rendered. The plaintiff instituted action against the defendants for payment of 20 per cent of the value of the agreement. The defendants deny that the plaintiff secured the agreement in question.

Held that, the defendants and Namibia Breweries Ltd ('NBL') or KFC were not brought together through the wisdom or business acumen of the plaintiff. It cannot be said that the plaintiff secured the NBL or KFC agreement and therefore the plaintiff is not entitled to 20 per cent of the value of the value of the agreement.

ORDER

1. The plaintiff's claim is dismissed.
 2. The plaintiff is ordered to pay the costs of the first and second defendants on attorney and own client scale, as agreed by the parties.
 3. The matter is regarded as finalised and removed from the roll.
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JUDGMENT

USIKU J:

Introduction

[1] In this matter, the plaintiff claims payment in the amount of N\$408 791,50 from the defendants, together with interest and costs of suit. The amount claimed is allegedly due and owing to the plaintiff by the defendants pursuant to a written agreement entered into by the parties on or about 31 May 2021.

The parties

[2] The plaintiff is Trinity Transaction Advisory CC, with Gokulan Thambapilai ('Mr Thambapilai') as the sole member. Mr Thambapilai is also an admitted legal practitioner of this court. The plaintiff provides transaction advisory services pertaining to commercial, legal and limited technical aspects of commercial projects.

[3] The first defendant is Lazarus Gazza Shiimi, a businessman and musician since 2003. The second defendant is Gazza Music Productions ('GMP'), which was founded in 2001. The first defendant is the sole member of the second defendant.

Background

[4] The first defendant had a long standing relationship with Namibia Breweries Ltd ('NBL'), as their brand ambassador. According to the first defendant, such relationship dates back to 2006.

[5] In January 2021, the first defendant approached Mr Thambapilai and requested him to provide professional help with his commercial and contractual arrangements. According to Mr Thambapilai, the first defendant was not satisfied with the remuneration he was receiving from NBL for his services.

[6] Mr Thambapilai also learned that the first defendant had discussions with the fast food franchise, KFC. Later, Mr Thambapilai came to understand that although KFC and the first defendant had been in discussions, there was no firm understanding on how to structure a commercial agreement.

[7] It was against the foregoing brief background that on 31 May 2021, the parties entered into a written agreement for the provision of commercial and/or legal advisory services by the plaintiff to the defendants.

[8] Clause 3 of the agreement deals with 'services' or 'scope of work' and provides as follows:

'The Client requires certain commercial and/or legal advisory services from time to time. The specific scope of work shall be confirmed in writing with the Client as each

mandate to provide services is instructed by the Client. For ease of reference the current scope of work that has been mandated as of January 2021 till present is:

1. Conclude commercial terms with Namibia Breweries Limited;
2. Conclude commercial terms with KFC Baobab (Pty) Ltd;
3. Conclude development, production, and commercial agreements for Gazza Eau de Toilette;
4. Separate brand Gazza from MP and ring-fence income for respective entities and develop business plans and commercial initiatives;
5. Structure sustainable operations of GMP;
6. Engage with potential sponsors for other projects;
7. Assist Gazza with restructuring creditors commitments and implement sustainable budgets for Gazza and GMP;
8. Engage with service providers for various engagements to enhance brand Gazza and/or GMP.'

[9] Clause 6 deals with 'fees' and provides as follows:

'1. The general principle agreed between the Parties at the commencement of their engagement is for 20 per cent (twenty percent) of the gross value of all commercial agreements that the Consultant secures on behalf of the Client.

However, given the amount of work and time spent at risk, the Fee arrangement can vary and is subject to annual review and agreement. The Client and Consultant shall agree on each mandate as to the fee structuring and payments thereof.

2. The Fees for the Services shall be **NAD45 000/month** for a period of 12 months commencing on the 1st of June 2021.

3. The Fees shall be paid from the monthly payments received by the Client from its Brand Ambassadorship contract with Namibia Breweries Limited commencing on 1 June 2021.'

[10] Clause 13 deals with 'legal costs' and provides as follows:

'A party who is the unsuccessful party in any litigation or arbitration matter arising from this agreement shall be liable to the successful Party for the total legal costs taxed on an attorney and own client basis and inclusive all counsels' expenses that may arise from such legal action.'

[11] On 2 June 2021, the defendants concluded a brand ambassador agreement to the value of N\$1 440 000 with NBL.

[12] On 2 June 2021, the plaintiff furnished the defendants an invoice for payment. The description of services rendered in respect of which payment is demanded is set out as 'monthly retainer, NBL and Gazza brand ambassador agreement, brand Gazza business development and GMP business development.' The amount for the services is set out as N\$45 000 plus VAT at 15 per cent amounting to N\$6750. The total amount payable is N\$51 750.

[13] On 19 July 2021, the defendants concluded a sponsorship and product promotion agreement with KFC consisting of a sponsorship amount of N\$250 000 excluding VAT and a revenue amount comprised of the sales of individual music tracks as provided by the defendants via a bespoke streaming platform.

[14] On 29 July 2021, the plaintiff furnished the defendants an invoice for payment. The description of the services rendered in respect of which payment was demanded is set out as 'Monthly retainer, NBL and Gazza Brand Ambassador agreement, Brand Gazza Business Development, GMP business development, KFC contract negotiation and conclusion, media subcontractor's contracts and Africentric Development Contract.' The amount for the services is set out as N\$45 000 plus VAT amount of N\$6 750. The total amount payable is N\$51 750.

[15] Furthermore, on 31 July 2021, the plaintiff furnished the defendants an invoice for payment. The description of services rendered in respect of which payment was demanded is set out as 'KFC contract negotiations, Africentric Platform Development, Subcontractors' contracts and client and KFC meetings.' The amount

for the services is set out as N\$21 739,13 plus VAT of N\$3 260,87. The total amount payable is N\$25 000.

[16] In September 2021, the defendants paid the plaintiff a total amount of N\$51 750. The parties agree that the defendants have paid the plaintiff a total amount of N\$180 250 as fees in terms of the agreement.

[17] The relationship between the two parties became stormy on or about 18 August 2021. The plaintiff alleges that the defendants repudiated the agreement. The defendants allege that the plaintiff cancelled the agreement.

[18] The plaintiff instituted the present action claiming that it is entitled to 20 per cent of the gross value of the NBL and KFC agreements which amounts to N\$589 041,50 minus N\$180 250 already paid by the defendants. The plaintiff now claims payment in the amount of N\$408 791.50.

[19] The defendants defend the action and plead that the plaintiff is not entitled to any payment.

[20] The principal issue for determination is whether plaintiff 'secured' the NBL and KFC agreements in terms of claims 6.1. of the agreement and was therefore entitled to be paid 20 per cent of the gross value of the two agreements, or whether the plaintiff 'concluded' the NBL and KFC agreements in terms of clauses 3.1 and 3.1 of the agreement and was entitled and was entitled to be paid N\$45 000 per month for its services.

[21] At trial, only two witnesses gave evidence, namely; Mr Thambapilai for the plaintiff and the first defendant for the defendants.

The plaintiff's case

[22] Mr Thambapilai testified that he offered to work on 'at risk' basis, subject to a 20 per cent success fee on the value of each commercial deal that he successfully contracted on behalf of the defendants.

[23] In regard to the NBL agreement, Mr Thambapilai testified that following a meeting that the first defendant had with NBL on 10 February 2021, he received information from the first defendant that NBL has approved a one year contract for the role of Windhoek Draught brand ambassador and that the remuneration will remain at N\$700 000 as it was in 2020, payable quarterly. According to Mr Thambapilai, he successfully negotiated for an amount of N\$120 000 per month for a period of 12 months for the first defendant's image rights alone in his role as brand ambassador for NBL's Windhoek Draught product.

[24] Mr Thambapilai testified further that the commercial value of the NBL agreement is N\$1 656 000 and that 20 per cent of that value amounts to N\$331 200. According to Mr Thambapilai, he had agreed with the first defendant to invoice at N\$45 000 per month from the N\$120 000 which the defendants were to receive from NBL.

[25] The first defendant made two payments to the plaintiff contractually for June 2021 and July 2021. In August 2021, states Mr Thambapilai, the situation came to a head and he then informed NBL that he no longer held a mandate to represent the defendants.

[26] In regard to the KFC agreement, Mr Thambapilai testified that, on 2 March 2021, he engaged KFC regarding the discussions he had been instructed had been held between the defendants and KFC for a commercial agreement between the parties. He asserts that, although KFC and the first defendant had been in discussions prior to his involvement, there was no firm understanding on how to structure a commercial agreement.

[27] Pursuant to various engagements between Mr Thambapilai and KFC on 29 June 2021, KFC agreed to pay a lump sum of N\$250 000 for the image and voice rights of the first defendant, to cover an album production costs and software development. On 19 July 2021, an agreement was concluded between the parties consisting of a sponsorship amount of N\$250 000 and a revenue amount comprised of the sales of music tracks as provided by the defendants via a bespoke streaming platform.

[28] The plaintiff submits that it secured the contracts with NBL and KFC and is entitled to 20 per cent of the total commercial value of the two agreements.

The defendants' case

[29] The defendants admit that the plaintiff reviewed and assisted in renegotiating the NBL agreement. The agreement has existed since 2006. The defendants were negotiating with NBL for an increase in the monetary amount when the plaintiff came on board, only that the negotiations were not yet concluded.

[30] The defendants contend that the plaintiff is claiming amounts inclusive of Value Added Tax ('VAT'). The defendants have paid VAT to the plaintiff in the amounts already, whilst the plaintiff is not a VAT registered vendor and is, therefore, not entitled to VAT.

[31] The defendants submit that the agreement between the parties states that the plaintiff was to 'conclude' the NBL and KFC agreements. It did not say that the plaintiff was to 'secure' the NBL and KFC agreements. The defendants therefore contend that the plaintiff is not entitled to 20 per cent of the value of the agreements as plaintiff has not secured any agreement.

Analysis

[32] The crux of the present matter is one of interpretation. The court is called upon to determine the intention of the parties. Such intention is to be gathered from the language used in the agreement entered into by the parties.

[33] The Supreme Court has summarised the approach to interpretation as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its

production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'¹

[34] The primary issue to be determined is whether the plaintiff had 'secured' the NBL and KFC agreements and is therefore entitled to 20 per cent of the value of those agreements.

[35] From the evidence on record, the NBL agreement has been in existence since 2006 and has been renewed on annual basis. In terms of clause 3.1. of the agreement entered into between the plaintiff and the defendants, the plaintiff was mandated to 'conclude' commercial terms with NBL.

[36] It is crucial to note that the agreement did not mandate the plaintiff to 'secure' the NBL agreement. It is also important to note that clause 6.1. sets out that plaintiff is entitled to 20 per cent of the value of an agreement that the plaintiff 'secures' on behalf of the defendants.

[37] In regard to the KFC agreement, the evidence on record shows that the defendants had been in discussion with KFC prior to the involvement of the plaintiff. Similarly, clause 3.2. of the agreement between the plaintiff and the defendants mandates the plaintiff to 'conclude' the commercial terms with KFC.

[38] It appears to me that in respect of the services rendered as set out in clause 3 of the agreement, the plaintiff is entitled to a fee of N\$45 000 per month as set out in clause 6.2. Whereas, in respect of an agreement 'secured' by the plaintiff on behalf of the defendants, the plaintiff is entitled to 20 per cent of the value of the agreement concerned.

[39] Applying the principles relating to interpretation as set out above, I am of the view that where the wisdom and business acumen of the plaintiff brought the defendants and another commercial entity together, resulting into a conclusion of a

¹ *Total Namibia (Pty) Ltd v OBM Engineering And Petroleum Distributors* (SA 9/2013) [2015] NASC 10 (30 April 2015) para 18.

commercial agreement, the plaintiff has 'secured' such an agreement and is therefore entitled to 20 per cent of the value of that agreement.

[40] In the present matter, NBL and KFC were not brought together with the defendants by the plaintiff. The defendants, NBL and KFC had already been in discussions prior to the plaintiff's involvement.

[41] In addition, it appears from the invoices furnished by the plaintiff to the defendants for payment that the parties appreciated that the plaintiff was being remunerated for services rendered in terms of clause 3 of the agreement. There is no indication that payment already paid to the plaintiff was in respect of 20 per cent of the value of the NBL or KFC agreement.

[42] In the circumstances, I am of the opinion that the plaintiff has not established that it is entitled to 20 per cent of the value of the NBL and KFC agreements. The plaintiff's claim therefore, stands to be dismissed.

[43] In regard to the issue of costs, the general rule is that the successful party is entitled to costs. There is no reason to deprive the defendants who are successful in this matter, of their costs. Furthermore, clause 13 of the agreement between the parties provided that the unsuccessful party in any litigation arising from that agreement shall be liable to the successful party for taxed costs on an attorney and own client basis. I shall therefore grant an order to that effect.

[44] In the result, I make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of the first and second defendants on attorney and own client scale, as agreed by the parties.
3. The matter is regarded as finalised and removed from the roll.

B USIKU
Judge

APPEARANCES:

PLAINTIFF : N Marcus
Of Nixon Marcus Public Law Office, Windhoek

1st & 2nd

DEFENDANTS: A Shimakeleni
Of Appolos Shimakeleni Lawyers, Windhoek