REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

IN HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENGDIVISION: PRETORIA)

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

5/8/14
DATE

SIGNATURE

Case No: A171/13

5/8/2015

In the matter between:

KAYA FM (PTY)LTD — Appellant

and

GATS TOUR OPERATORS (PTY)LTD
t/a GATS LEISURE — Respondent

JUDGMENT

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1. This is an appeal against the judgement and order of Tlhapi J dismissing the respondent's urgent application for mandatory and interdictory relief. With the leave of the court *a quo* the appellant, to whom I shall refer as "Kaya FM", appealed against the whole judgement and order granted against it. The

respondent, to whom I shall refer as "Gats" failed in a counter application but no appeal lies against that order.

2. Kaya FM Is a private commercial radio station. Gats Is a travel and tour agency. During April 2012 Kaya FM and Gats discussed the possibility of arranging a cruise aboard a luxury liner from Durban to Mozambique and back during the 2012 December holidays. The idea was to promote the cruise as a jazz musical event under the name of "Kaya FM Jazz Cruise". The whole liner would be chartered and listeners of Kaya FM would be targeted to buy tickets for the cruise. Jazz artists would be contracted to provide music events during the cruise.

3. Initially everybody was in high spirits and very positive that the venture would be a success. The ship was chartered by Gats and Kaya FM started to market the cruise during their daily radio programs. Initially the response from the listeners was good but tapered down as time went by. This went hand-in-hand with the inability of Gats to make the required payments to the owners of the ship. By the middle of July the owners of the ship had given Gats notice of their intention to cancel the charter agreement. Meetings were held between the parties and according to Kaya FM, Gats remained, despite numerous requests and queries, consistently vague about the bookings actually received and the funds they had received from the public and the funds that were still due. By then Kaya FM had also expended large amounts on promoting the cruise and securing the artists who would perform during the cruise.

4. During August and September 2012 the tension between the parties had mounted and accusations were made from all sides. Kaya FM suggested possible financial irregularities on the part of Gats. Kaya FM was of the view that Gats had to account to it but failed to do so. Gats, on the other hand, did provide certain information and initially held the view that same were sufficient accounting to Kaya FM. Eventually it became clear that Gats regarded itself as the principal of the venture and that Kaya FM was merely the primary marketer and the promoter of the cruise. Gats Also held the view that it was to receive all rewards from the venture and would incur all the risks and that Kaya FM's reward would only have been in the form of publicity and the promotion of its brand.

5. By the middle of September 2012 the parties were openly hostile towards each other and accusations of, *inter alia*, *mala fides*, were made from both sides. Gats started to mistrust the Kaya FM's request for information and took the view, as it was expressed in the answering affidavit, that it is highly irregular for a tour operator like Gats "to give full accounting to a party that is not involved in the implementation of the bookings". By October attorneys had become involved and it appears that at that stage Gats insisted that Kaya FM had no right in law to insist on accounting on the part of Gats.

6. An urgent application was launched 4 October 2012 by Kaya FM and came before the court on 23 October 2012. Judgement was reserved and on 23 November 2012 judgement was handed down dismissing Kaya FM's application with costs. In regard to the counter application by Gats the learned Judge noted that since it would appear that Kaya FM and the owners

of the ship had by then concluded a replacement agreement and that Kaya FM was at that stage marketing and selling packages for the cruise, it was not necessary to make any pronouncement in respect of the counter application.

7. The relief claimed by Kaya FM was, firstly, for an order directing Gats to provide Kaya FM with a full and complete up-to-date accounting of all its records relating to the cruise. The type of information sought was set out in the Notice of Motion. Secondly, an order was sought interdicting Gats and its employees and representatives from representing that they are in any way associated with the cruise or represented Kaya FM in any way related to the cruise; from marketing and/or publicising the cruise to any parties in any way; and from taking reservations for the cruise from any party. Costs were also claimed on an attorney and client scale.

8. In the appeal before this court counsel on behalf of Kaya FM indicated that since time had overtaken the relief sought in respect of the interdict, Kaya FM's only interest on appeal lies in respect of the relief relating to the issue of accounting and the issue of costs.

9. The appeal, as did the initial application, consequently turns on the crisp issue as to whether the agreement between the parties was such that there was a duty on Gats to account to Kaya FM. The court *a quo* also approached the matter in this fashion and, with reference to certain aspects of the agreement between the parties, came to the conclusion that no partnership relationship existed between them, nor a relationship of agency,

and that Kaya FM consequently had no right to insist on Gats accounting to it.

10. On behalf of Kaya FM it was submitted that the relationship between the parties was either that of agency or mandate or partnership and that whichever it was, Gats was under an obligation to account to Kaya FM.

11. It is not necessary to refer to all the facts of the matter nor to the detail of the disputes and the allegations and counter allegations made by the parties at the time leading up to the application before the court *a quo*. The parties embarked upon a very complicated and multifaceted endeavour. Yet, as is unfortunately so often the case, they failed to draft a proper document setting out all the terms and conditions of their agreement.

12. A further fact which complicated the matter was that as time went by, and the demands of the venture became more detailed and intricate, the parties had to deal with issues which they had not originally envisaged or which had simply not been discussed between them.

13. On Kaya FM's version Gats was merely the booking agent for the cruise. As indicated before, it was submitted on behalf of Gats that Kaya FM's role was merely to do the marketing for the cruise. In coming to her conclusion, the Judge in the court *a quo* found that according to the agreement between the parties, Gats carried the sole financial responsibility and risk insofar as sales and payment for the cruise was concerned and that in the end it was also the one who expected to solely benefit from the profits of the venture. She also found that Gats would be solely responsible to the ship owners for all

payments of the cruise and not Kaya FM. The court *a quo* also found that the advantage to be gained by both parties from the exposure cannot be understood to qualify as profit-sharing in a partnership. It was found that without an agreement either expressly or impliedly, allowing for the sharing of liabilities and profits and losses, it could hardly be said that a partnership relationship existed between them. It was found that such an agreement was not proven by Kaya FM and the fact that they secured an agreement with the ship owners later on in an endeavour to save something of the venture, did not entitle them to information and accounting in respect of what Gats had done before. The court also found that Kaya FM was not involved at all in the original agreement between Gats and the ship owners and no rights thus emanated from that agreement. Consequently, so the court found, there was also no agency agreement between the parties.

14. I respectfully disagree with the aforesaid findings by the court *a quo*. In the original document, annexure LR1, which was held out to be the agreement between the parties, certain of the terms do support the contentions of Kaya FM. It is not necessary to refer to all the obligations of the respective parties and only certain thereof may be emphasised. In respect of Kaya FM's responsibilities it was stated in paragraph 4 of that section of the written agreement as follows (my emphasis):

> "Accept responsibility with Gats for reaching the minimum sales target of 1 300 passengers (which equates to 650 cabins sharing). Should sales fall short of 1 300 fully paid clients by final date (31 August), <u>half of the shortfall shall be paid by Kaya FM to Gats</u> in order to help facilitate final payment to MSC no later than 2 weeks from the final date in full."

15. Kaya FM also had to cover the costs of all branding on board the ship and costs of broadcasting and promotions. Kaya FM also had to pay all artists and the band members directly. This included the costs of their flights and transfers as well as any additional accommodation required outside of the cruise.

16. The agreement between Gats and the ship owners was attached as annexure LR3. In an addendum to that agreement signed by the ship owners and Gats, who, under their signature warranted that they were duly allowed to do so, agreed to the following in the second paragraph (my emphasis):

> "It is acknowledged by both parties that MSC Starlight act as agents on behalf of the disponent owner of the MCS Opera and that Gats Leisure act as agents on behalf of a third party."

17. From the aforesaid it is clear, firstly, that Gats did not carry the sole financial responsibility and risk insofar as sales and payment for the cruise was concerned. Kaya FM would, *inter alia*, have been responsible for marketing, the direct costs of the transport, housing and performance of the artists, and would also have been liable for half of the loss if all the tickets or bookings were not taken up. It was mentioned in the founding affidavit that at one stage Kaya FM had spent close to R10 million promoting the cruise through various forms of media.

18. I also respectfully disagree with the finding that Gats would have been the only party who would have benefited financially from the venture. This issue was not specifically addressed in the written part of the agreement but in my view it has to be presumed that Kaya FM would also have benefited from the

income derived from the bookings and the profits of the venture. It may very well be that a successful cruise would have enhanced the name and reputation of Kaya FM but it remained a once off enterprise and the income surely would have been used to defray the costs thereof - also that of Kaya FM and not only that of Gats. Furthermore, to suggest that Gats would have been the only party to benefit from any profits, also seems highly improbable. There was never a dispute that Gats became entitled to their normal fees as tour operators. Those costs would have been paid from the income. It is not clear on what basis it can be said that they would have been entitled to all the profits, if that had been the case. This is especially so if regard is had to the provisions of the same Addendum to the Agreement referred to above. The third and fourth paragraphs of that addendum reads as follows:

"it is agreed that the price quoted to Gats in terms of the contract include a payment of a third party commission in the amount of R 739, 000 (Seven hundred and thirty nine thousand Rand).

On receipt of all the payments referred to in the main agreement, MSC Starlight undertake to pay Gats leisure the commission agreed no later than 4 (four days) after the cruise undertaken by their client has returned. The date of payment is agreed to be by no later than 18th December 2012."

19. From the above it is clear that Gats would, over and above the remuneration for their services, have received a commission of R739 000,00. To suggest, therefore, that they would over and above their fees and the said commission also have been entitled to receive all the profits of the venture, seems, on the probabilities, to be highly unlikely.

20. Consequently, in my view, both parties had obligations to make a success of the venture. Both had to expend effort and time but also money. Both

would have benefited, if the venture had been a success, in the enhancement of their good name and reputation. But both also would have shared in the income and the profit of the venture. Gats had its own fees plus expenses. Kaya FM had its expenses to cover. Furthermore Kaya FM became entitled, in terms of the written agreement, to a number of cabins on the ship free of charge. The costs of these cabins could only have been paid from the profits of the venture. On the probabilities both would have been entitled not only to defray such fees and expenses from the income of the venture, but also to share in the profits. To what degree they would have been entitled to share in the profits is not clear but it does not matter for present purposes.

21. It was submitted on behalf of Kaya FM that the relationship between the parties was either that of agency or of mandate or of partnership, all of which would entitle Kaya FM to the relief sought. According to Professor JC de Wet (LAWSA Volume 1) under the title "Agency and Representation" the expression "agency" is used in such a wide variety of meanings that it cannot be regarded as a term of art denoting a specific branch of the law. He then continues as follows:

"One of the meanings in which the expression is employed is that of an agreement in terms of which one person, styled the agent, performs some task for another, called the principal, in connection with the conclusion of a juristic act by or for the principal. In this meaning "agency" is simply a contract by which the principal and the agent create rights and obligations *inter se*. As such it belongs to the category of contracts known as mandate or mandatum in Roman-Dutch law. Even if the task to be performed by the agent is the conclusion of a juristic act on behalf of or in the name of the principal the contract remains a contract of mandate governed by the rules applicable to contracts of mandate in general. "Agency" is also used to denote the phenomenon of one person, called the agent, concluding a juristic act on behalf of or in the name of another, called the principal. In this meaning "agency" is an instance of representation. It has been suggested that "agency" in

the meaning of representation is confined to representation of a person who is competent to act for himself."

22. An agent consequently creates a legal relationship not for himself but for another. A contract of mandate can take the form of an undertaking to perform a task for another for reward. In this form it generally relates to an undertaking to complete a particular task, project or function without the mandatary being subject to the directions of the mandator as to the time, place or manner of carrying out the mandate. Although the mandatary is not necessarily under the control of the mandator, he would be bound to follow the instructions given by the mandator at the time the contract is concluded. (See DJ Joubert and DH van Zyl in LAWSA, second edition, volume 17, Part 5, page 6). A mandatory must carry out his mandate and not exceed the terms of his mandate. He must act in good faith and with reasonable care and the mandator is entitled to be informed as to the progress of the mandatory and can from time to time call upon him to furnish the relevant information.

23. A partnership is a legal relationship arising from contract between two or more persons each contributing to a business or undertaking carried on in common, with the object of making and sharing profits. The requirements of the partnership is therefore, firstly, that each of the partners bring something into the partnership, or bind himself to bring something into it, whether it be money or his labour or skill. Secondly, the business should be carried on for the joint benefit of both parties. Thirdly, the object should be to make a profit. Finally, the contract between the parties should be a legitimate contract. Where all these essentials are present, in the absence of something showing

that the contract between the parties is not an agreement of partnership, the court must come to the conclusion that it is a partnership. Each partner who is entrusted with the management of partnership affairs is obliged to render an account of his administration of the partnership business. See LAWSA second edition, volume 19, page 197-247.

24. Having regard to the aforesaid the relationship between the parties can in my view fit into either of the aforesaid two types of contract. But I agree with the submissions on behalf of Kaya FM that it is not necessary for present purposes to finally decide this issue. There can be no doubt that wherever the idea for the cruise originated, both parties agreed that it should sail under the banner of Kaya FM. It was Kaya FM which drove the project in its own name as far as the outside world was concerned. There is much to be said for its view that Gats merely had to arrange the chartering of the ship and to handle the bookings. This may not have been an easy feat but Gats would have been well remunerated for its services.

25. In my view, especially later on in the venture, as more and more issues had to be dealt with, it may be argued that the relationship between the parties changed somewhat in the sense that Gats took on more responsibilities which may not necessarily have derived from the initial agreement. It may thus very well be said, in my view, that at some point the contract of mandate evolved into that of partnership. Both parties contributed to their undertaking. Both expended time, effort and money and the facilities available to them. The venture was also carried out for the joint benefit of both parties. Both would have increased their reputation and goodwill with their clients and

prospective clients. Both would have shared in the gains and the profits. After all, as I have found above, they would have defrayed their fees and/or expenses from the income of the venture and as far as any possible profits were concerned, such would have been used in respect of expenses for cabins free of charge or for any other purpose. It is not a requirement that the shares in the profits have to be equal in value. Furthermore, the venture had as its object the making of gain or profits. This in fact seems to be common cause between the parties. The venture was clearly capable of making profits. It is not a requirement that it should be distinctly clear that profits will actually ensue.

26. On the papers before me it might be said to be debatable whether the contract between the parties was one of mandate or one of partnership. What is clear, however, is that it would be either one of the two or, as I have indicated, the one evolving into the other. But whatever the case may be, Kaya FM at all times had the right to insist on Gats accounting to it in respect of its part in the arranging of the business of the venture.

27. Consequently Kaya FM has shown a clear right in respect of the relief claimed. I am also satisfied that Kaya FM complied with all the other requirements of a final order against Gats. Since the ship has proverbially and literally sailed, it is not necessary to refer to the relief prayed for in paragraph 3 of the notice of motion and neither is it necessary to make any ordered in that regard.

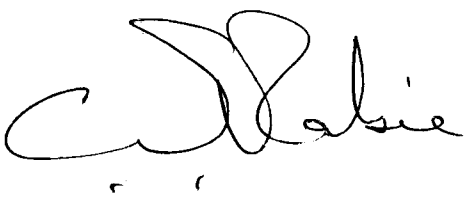
28. As far as costs are concerned, there is no reason why costs should not follow the event. I am satisfied that in the circumstances of this case a special order of costs should not be made.

29. In the result the following order is made:

    1. The appeal succeeds and the Respondent is ordered to pay the costs of the appeal.

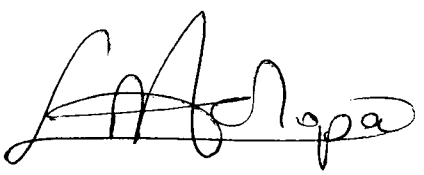
    2. The order of the court *a quo* is set aside and replaced with the following order:

       "An order is made in terms of paragraph 2 of the notice of motion and the Respondent is further ordered to pay the costs of the application."



C.P. RABIE
JUDGE OF THE HIGH COURT

I agree:



L.M. MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree:

K.E. MATOJANE

JUDGE OF THE HIGH COURT

5 AUGUST 2014