

SOUTH AFRICA / JUDGMENT

Advocatye Nemutandani v Diale Mogashoa Incorporated and Another (7222/2021) [2021] ZAGPPHC 627 (14 September 2021) [2021] ZAGPPHC 627

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo MP

CASE / FILE NUMBER

7222/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 7222/2021

In

the matter

between:

ADVOCATE

MASALA REGINETT NEMUTANDANI

Plaintiff

and

DIALE

MOGASHOA INCORPORATED

First Defendant

ROAD

ACCIDENT

FUND

Second

Defendant

(This

judgment is handed down electronically by circulation
to the parties' legal
representatives

by email

and by uploading it to the electronic file of this matter
on Caseli nes.

The date for hand-down is

deemed to be 14 September 2021.)

JUDGMENT

Khumalo AJ:

[1]. The Plaintiff seeks a summary judgment against the First and Second Defendants in the amount of R605,000.00 (Six Hundred and Five Thousand Rand Only).

[2]. The Plaintiffs claim is based on what she termed in her particulars of claim, a written agreement entered into between herself and the First Defendant to render certain professional services for and on behalf of the Second Defendant, the Road Accident Fund.

[3]. For the sake of consistency, I shall refer to the parties as plaintiff and/or defendant/s as in the original particulars of claim even though this is a motion application.

[4]. The First Defendant is a firm of attorneys, which was acting on behalf of the Second Defendant the Road Accident Fund ("RAF") when it instructed the plaintiff to represent the RAF in certain matters in this Court.

[5]. Plaintiff alleges that during the period between 2017 and 2020, she and the First Defendant entered into a written agreement in the form of brief covers/instruction letters in terms of which the Plaintiff was instructed to represent the Second Defendant in this Court on third party claims instituted by various victims of motor vehicle accidents.

[6]. It is clear from the engagement letters attached that the First Defendant would timeously submit all invoices to the Second Defendant for payment and would pay the Plaintiff after receipt of the money from the Second Defendant.

[7]. It is perhaps apposite to quote verbatim the passages that I believe are most relevant to the issue at hand and taking into account the litigants pleadings.

[8]. The content of the brief annexed to the Plaintiff's particulars of claim states as follows;

"8.1 By accepting this instruction, and given that we are instructed by the RAF to brief you, we confirm that you have agreed to the following terms:

8.2 That your fees will be computed strictly in accordance with the RAF tariff as communicated to us by the Fund from time to time.

8.3 That you will be entitled to payment of your fees only when we have received payment from the Fund. We undertake to ensure that we submit our accounts (which would include your invoice) to the fund timeously."

[9]. The Second Defendant neither filed a notice to defend nor a plea. First Defendant on the other hand filed a notice to defend and a plea albeit after it was served with a notice to bar.

[10]. First Defendant notably admitted the contents of paragraphs 1-4 of the Plaintiff's particulars of claim and sought to deny the content of paragraph 5 on the basis that it was void for vagueness in that the Plaintiff alleged that the parties entered into a written agreement but does not deny that Plaintiff did render professional services for and on behalf of the Second Defendant at its behest.

[11]. In short, the First Defendant denies that there was any written agreement between the parties and further alleges that the brief and engagement letters Plaintiff sought to rely upon do not constitute a written agreement.

[12]. Nothing can be far from the truth than this assertion. It is standard practice in the legal profession that counsel's professional services are engaged by giving a brief, which brief as in this case, normally contains the instructions to counsel, the terms and conditions of the engagement of the parties.

[13]. There is therefore no merit to First Defendant's assertion that there was no written agreement between them. To further compound issues for the First Defendant, the second leg of its defence is based on the very instruction/engagement letter that it seeks to deny namely that the engagement letter provided specifically that payment will only be effected upon receipt of payment from the RAF.

[14]. The First Defendant cannot approbate and reprobate the instrument it seeks to rely on for its defence.

[15]. In any event, and in so far as the First Defendant sought to rely on the vagueness of the "written agreement", the correct procedure would have been for it to except and call upon the Plaintiff to remove the source of embarrassment. This it did not do but opted to plead on it.

[16]. The above is however not conclusive of the dispute between the parties. First Defendant pleaded that Plaintiff accepted the brief with a clear understanding that she would be entitled to payment of her fees only when it has received payment from the RAF and to date, it has not received any payment.

[17]. The quest for summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual

issues

are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action. The purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action[1].

[18]. Having been served with an appearance to defend and First Defendant's plea, the plaintiff launched the application at hand. The application is premised on the fact that the first Defendant does not have a bona fide defence to the plaintiff's claim and that the notice to defend and plea have been filed solely for the purpose of delay.

[19]. The application is opposed by the First Defendant and in support thereof the First Defendant filed an opposing affidavit. As already stated above, Second Defendant neither served or filed a notice to defend or a plea. This court is petitioned to determine whether on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment in favour of the plaintiff or whether the facts contained in the First Defendant's opposing affidavit disclose a bona fide defence which may persuade the court to refuse summary judgment. To make such a determination, it is apposite to critically examine the facts alleged by the plaintiff in her particulars of claim as against the defence raised by the First Defendant in the opposing affidavit.

[20]. I have already highlighted above the basis of plaintiff's claim and the gravamen of First Defendant's plea. I will not inundate this Judgment by regurgitating verbatim all such 'express terms' save to highlight only such terms as are relevant for the purpose of this Judgment and to the extent necessary to arrive at a fair and just determination of the current dispute.

[21]. I have already intimated above that the First Defendant's assertion that there was no written agreement but only brief covers and letters of engagement is unsustainable. Those brief covers and engagement letters are the agreement between the parties.

[22]. The second leg of the First Defendant's plea pivots around the allegation that it is a term of the 'engagement letters' that the Plaintiff will only be entitled to payment of her fees only when the First Defendant has received payment from the Fund and further undertook to submit its accounts (which would include Plaintiffs invoice) to the fund timeously.

[23]. The above is a classical suspensive time clause. Over and above the issue of the suspensive time clause, the First Defendant alluded in its opposing affidavit that it is considering the issue of raising a special plea of prescription " against some of the Plaintiff's invoices. I do not intend to deal with this aspect as it was not pleaded and appears to be a mere consideration at this stage and was not raised specifically as a defence to be considered by this court.

[24]. For the plaintiff to be successful in its application, he has to satisfy the requirements set out in Rule 32 (1) of the Uniform Rules of court. Rule 32 (1) provides:

" 32 (1) The Plaintiff may, after the defendant has delivered a plea, may apply to the court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;
- (b) for liquidated amount in money;
- (c) for delivery of specified movable property;
- (d) for ejectment; together with any claim for interest and costs."

[25]. A defendant wishing to oppose summary judgment has to invoke the procedure set out in Rule 32 (3) which provides it with the following steps to follow, namely; that: (a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given[2] or (b) he may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence) that he has a bona fide defence to the claim on which summary

judgment

is sought or he has a bona fide counterclaim against the plaintiff[3].

[26] . The affidavit must disclose the nature of defence and the material facts relied upon[4]. The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence or not.

[27]. The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary

judgment

have not been met.[5] Referring to the extraordinary and drastic nature of the summary

judgment

remedy in *Maharaj v Barclays National Bank Limited*[6], Corbett JA reasoned as follows:

"The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law"[7].

(28). The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by this court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a bona fide defence that it should refuse summary judgment.

(29). As may be gleaned from the above authorities, courts are extremely loath to grant summary judgment unless satisfied that the plaintiff has an unanswerable case. This is because summary judgment is an extra ordinary and very stringent remedy in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant.[8] It is only when there is no doubt that the plaintiff has an unanswerable case that it should be granted.[9] In such cases then the court can revisit its leniency and grant summary judgment.[10] In *Shepstone v Shepstone*[11].

Miller J said:

"The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that... "a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial".

[30]. In this case I have no reason to deviate from the above well-established legal principles. Instead, I have a duty to follow the principles as they are binding on this court.

[31]. Whilst the First Defendant does not deny that services of the Plaintiff had been utilised, it however denies that her fees are due and payable on the basis of the suspensive time clause referred to above in paragraph 16 and 22.

[32]. It may well be that the First Defendant may be able sustain this defence in the trial of the matter and it would seem to me that the most appropriate forum to adjudicate on this matter is the trial court. For this reason, the summary judgment application must fail against the First Defendant.

[33]. I need to address one other issue raised by the Plaintiff namely that this Court if is unable to grant judgment against the First Defendant, it ought to consider granting such against the Second Defendant since it failed to serve and file a notice to defend and or its plea.

[34]. I believe this would be inappropriate for the simple reason that the matter before this court was a summary judgment application against the First Defendant. It further transpired on the documents that the Second Defendant was not served with the summary judgment application and I guess that is because it did not file any plea. The Plaintiff is not without a remedy and could easily apply to this court for a default judgment against the RAF.

[35]. With regard to costs, I propose not to award any cost order in the light of the fact that First Defendant failed to make any appearance without giving any valid explanation

[36]. In the result, I grant the following order:

Summary Judgment is refused.

The defendant is granted leave to defend the summons.

Each party shall pay its own costs.

KHUMALO MP

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. A Myeko

Counsel for the First Defendant: Mari Wilsnach

Instructed by Diale Mogashoa Inc.

[1] See *Meek v Kruger* 1958 (3) SA 154 (T) at 156 and 158; *Joob Joob Investments (Pty) Ltd v Stock MavundlaZek Joint Venture* 2009 (5) SA 1 SCA 11C-G; Also *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 A SCA at 232 F-G

[2] Rule 32 (3) (a)

[3] Rule 32 (3) (b)

[4] *Oos Rande Bantoesakke Adminstrasie Raad v Santam Versekeringsmaatskappy Bpk en andere* 1978 (1) SA 164 0N}; *Slabert v Volkskas Bpk* 1985 (1) SA 141 (T)

[5] *Mahomed Essop (Pty) Ltd v Sekhukhulu and sons* 1967 (3) SA 728 D.First National Bank of South West AfricaLtd v Graap 1990 NR 9 (HC)

[6] 1976 (1) SA 418 (A)

[7] 1976 (1) SA 418 (A) at 423G

[8]

See *Evelyn Haddon & Co Ltd v LeoJanko (Pty) Ltd* SA 662 OPD at 666A. In this case the court quoted Marais J in *Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 0N) at 366 regarding the proper approach to be adopted in dealing with similar matters.

[9] Vide *Breitenbrach v Fiat S.A. (EDMS) Bpk* 1976 (2) SA 226 AT 229

[10] Per Cobertt Jin Arend & another v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304F

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[11] 1974 (2) SA 462 E-H

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