

SOUTH AFRICA / JUDGMENT

Badenhorst v Diale Mogashoa Incorporated Attorneys and Others (2022-017825) [2025] ZAGPPHC 518 (23 May 2025)

[2025] ZAGPPHC 518

COURT

North Gauteng High Court, Pretoria

BEFORE

HF Oosthuizen

CASE / FILE NUMBER

2022-017825

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 2022-017826

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

DATE:

23 May 2025

SIGNATURE

OF JUDGE:

In the matter between:

CASPER
HENDRIK BADENHORST
Plaintiff
and
DIALE
MOGASHOA INCORPORATED ATTORNEYS
First
Defendant
MOTSHEPE
DONALD DIALE
Second Defendant
GEORGINA
MOLEBOGENG MAAKOE
Third
Defendant
NTHANDO ANDREW
MAKUYANA
Fourth
Defendant
MADIMPE
THABO JOSIAS MOGASHOA
Fifth
Defendant
MARI
WILSNACH
Sixth
Defendant
THE
ROAD ACCIDENT FUND
Third Party

JUDGMENT

HF OOSTHUIZEN AJ

[1.] The plaintiff, a practising advocate and member of the Pretoria Society of Advocates, claims summary judgement against the first defendant, a firm of attorneys and a personal liability company, and the second to sixth defendants, the directors of the first defendant, in respect of outstanding invoices for legal work.

[2.] Approximately fifty years ago, Corbett JA (as he then was) indicated clearly and succinctly under what circumstances summary judgement should be refused:

“[O]ne of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in a summons, or combined summons, are disputed or new facts alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party

or the other. All that the Court inquires into is: (a) whether the defendant has “fully” disclose the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclose the defendant appears to have ... a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgement... The word “fully” ... connotes, in my view, that, while the defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them, 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 decide whether the affidavit discloses a bona fide defence.”

[3.] Notwithstanding the amendment of rule 32, this dictum, which has been quoted countless times over the years, is still good law.

[4.] It is common cause that the defendants engaged the services of the plaintiff on behalf of the Road Accident Fund (“the RAF”), who has been joined as a third party.

[5.] The particulars of claim and the plea reflect the following disputes between the plaintiff and the defendants:

[5.1.] The plaintiff pleads that it was a term of the agreements between the plaintiff and the defendants that he would perform the instructions from the defendants at an agreed, alternatively his usual hourly rate and day fee whilst the defendants plead that the plaintiff’s fees would be computed strictly in accordance

with the tariff of the RAF as communicated from time to time.

[5.2.] The plaintiff pleads that payment of his invoices to the plaintiff would be effected within a reasonable period of time whilst the defendants plead that the plaintiff would only be entitled to payment of his fees when the defendants have received payment from the RAF and that the defendants undertook to submit its accounts, including the plaintiff’s invoices, timeously to the RAF.

[5.3.] The plaintiff pleads that his invoices, which were submitted to the defendants between 21 May 2015 and 28 May 2020, are due and payable due to the fact that a reasonable period has passed in which payment of the invoices ought to have been made whilst the defendants plead that they have not received payment from the RAF and that the plaintiff’s claim is not yet due and payable.

[5.4.] The defendants attach samples of letters of engagement to the plea and plead that the plaintiff accepted and agreed to the express terms contained therein.

[5.5.] Although the letters of engagement are not identical, they all contain the following provisions:

“1.1 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:

1.1.1 That your fees will be computed strictly in accordance with the RAF Tariff as communicated to us by the Fund from time to time. A copy of the applicable tariff is available on request;

1.1.2. 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.

1.1.3. That you will be entitled to such fees as allowed by the Fund. If the Fund allows lesser fees than what was submitted, we will endeavour to provide you with an explanation for such deductions, if requested. You will accordingly not be entitled to claim from our firm, the difference between your invoice and what has been allowed by the Fund.”

[5.6.] The defendants moreover plead that 21 of the alleged outstanding invoices have been paid to the plaintiff.

[6.] The defendants claim indemnification from the RAF in respect of the plaintiff’s claim and plead in their third party notice that the RAF is liable to effect payment to the first defendant of all the plaintiff’s outstanding invoices.

[7.] The plaintiff contends that the defence as pleaded does not raise any issue for trial, as provided for in rule 32(2)(b), and he accordingly applies for summary judgement.

[8.] The plaintiff’s affidavit in support of summary judgement contains the following submissions which are proffered in support of his contention that the defence as pleaded does not raise any issue for trial:

“22. [T]he period which has elapsed since I rendered my invoices to the defendants has since become unreasonable. As is trite in our law, when the performance date, in this case the due date for payment is not specifically fixed and/or determinable, the due date for performance (payment) will be deemed to be the date on which payment was demanded by plaintiff, even in the event of demand by way of summons...”

24. As such and due to the unreasonable period of time that has since lapsed, my invoices became due, owing, and payable upon demand.”

[9.] The defendants delivered an affidavit which in my view fully discloses the nature and grounds of the defence (as set out in the plea) and the material facts relied upon therefor. The dispute is whether the defence is good in law.

[10.] The plaintiff correctly argues that clause 1.1.2 of the letters of engagement is a time clause and not a suspensive condition, as pleaded by the defendants.

[11.] Roman law drew a clear distinction between a stipulation sub condicione and one sub die. An agreement which is subject to a future uncertain event may or may not become enforceable, but an agreement which is subject to an event that is certain to happen is enforceable, whether the dies could be fixed in advance or not.[1]

[12.] The same distinction is recognised in our modern law and is illustrated by Venter Agentskappe (Edms) Bpk v De Sousa,[2] in which a contract of sale of a farm provided that the estate agent's commission was to be paid by the seller "from the first available cash paid in terms of the agreement". The buyer died before any cash had been paid and his executor cancelled the contract. The Appellate Division interpreted the clause relating to payment from the first available cash as a time clause, not a condition. The estate agent had earned his commission and the clause simply fixed the time of payment. When it became clear that the time would never arrive, it was trite law that the debt became immediately payable.

[13.] In Van Heerden v Hermann[3] the contract between the parties provided that estate agent commission would be due when a motor-car is sold. Ramsbottom J held

on the following basis that such provision was a time clause:

"The provision that the commission was to be paid when the motor-car had been sold clearly does not import a condition of indebtedness; the debt is owed by the appellant whether the car has been sold or not... The provision that the commission will be paid when the car has been sold is not a condition pending fulfilment of which there is no contract to pay; it is a term of the contract by which the time for payment has been agreed and is analogous to a "term" or time clause (dies)... If it becomes clear that the motor-car will not be delivered, the commission becomes payable."

[14.] The doctrine of fictional fulfilment applies to a time clause where the debtor intentionally defeats the arrival of the day for performance in which case the event on which payment is to be made is deemed to have taken place.[4]

[15.] It accordingly follows that insofar as the date of performance is concerned, the defendants will be liable to make payment to the plaintiff of a specific invoice if the first defendant receives payment from the RAF alternatively if it becomes clear that the first defendant will not receive payment from the RAF (due, for instance, to the failure of the first

defendant to comply with the terms of its agreement with the RAF, as alleged by the RAF) further alternatively upon proof that the first defendant intentionally made performance by the RAF impossible (by, for instance, failing to present the invoice to the RAF).

[16.] The plaintiff's main argument is that it is an implied term of the time clause that payment will be due after the expiration of a reasonable period of time notwithstanding the fact that the event upon which payment is to be made has not yet arrived. Mr Badenhorst (who appeared in person) argues that he is entitled to payment of the outstanding invoices notwithstanding the fact that the first defendant has not yet received payment from the RAF merely because a reasonable period of time has expired since he rendered the relevant invoices.

[17.] Mr Badenhorst refers to this alleged implied term as "the principle of reasonableness", and contends that Broderick Properties Ltd v Road[5] supports his argument.

[18.] Where a contract does not fix a time for performance, the general rule is that a demand by the creditor is necessary in order to place the debtor in mora. Broderick dealt with one of the exceptions to this rule, in which it was held that a creditor, who made no demand for performance, was entitled to damages for the debtor's delay in performance beyond a reasonable time after the conclusion of the contract. Roberts AJ explained this exception by saying "it seems to me that the principle to be applied was in all cases the same, viz. whether in the absence of a specific date for performance,

there has been such unreasonable delay as to constitute a breach of an essential term of the contract"[6] (which is the dictum on which Mr Badenhorst relies).

[19.] Broderick is no authority for the imposition of the alleged implied term in the time clause.

[20.] The reliance on Broderick demonstrates a confusion between mora ex re (where the contract fixes the time for performance) and mora ex persona (when the contract does not fix a time for performance and where demand by the creditor is necessary in order to place the debtor in mora. Where the future event in the time clause which determines the time for performance arrives, the debtor is automatically in mora and no demand for performance is required.

[21.] It accordingly follows that it was not an implied term of the letters of engagement that payment would be due after the expiration of a reasonable period of time notwithstanding the fact that the first defendant had not yet received payment from the RAF.

[22.] The plaintiff argues in the alternative that I should find that the substantial delay since the rendering of the invoices implies that the first defendant will not receive payment from the RAF alternatively that the first defendant intentionally made performance by the RAF impossible which implies that the defendants are obliged to make payment to the plaintiff at this stage.

[23.] The problem with this argument is firstly that this is not the plaintiff's cause of action and secondly that the Court hearing an application for summary judgement is not called upon to determine whether or not there is a balance of probabilities in favour of the one party or the other. It would be improper to speculate why the invoices, which have been outstanding for a substantial period of time, have not been paid.

[24.] I am accordingly of the view that the defendants are entitled to defend the action.

[25.] Rule 32(9)(a) provides that the court may at the hearing of an application for summary judgement make such order as to costs as to it may seem just: provided that if the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle them to leave to defend, the court may order that costs be taxed as between attorney and client.

[26.] Notwithstanding the joinder of the RAF as a third party (which implies that the trial court will be in a position to determine all possible disputes between the plaintiff, the defendants and the RAF) and notwithstanding correspondence from the defendants indicating that summary judgement proceedings are no longer appropriate, the plaintiff insisted on proceeding with the application for summary

judgement.

[27.] I am of the view that the plaintiff's stance was unreasonable, especially in view of the fact that the defendants' plea clearly set out a defence which entitles them to leave to defend. It should moreover be noted that the defendants delivered their plea on 7 March 2023, which implies that the plaintiff's conduct delayed the finalisation of the action for more than two years.

[28.] I am accordingly of the view that the plaintiff should be ordered to pay the defendants' costs to oppose the application for summary judgement.

ORDER

[29.] I accordingly grant the following order:

[29.1.] Leave is granted to the first to sixth defendants to defend the action.

[29.2.] The plaintiff is ordered to pay the first to sixth defendants' costs of opposing the application for summary judgement, including the costs of counsel on scale B.

HF OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 23 May 2025.

Appearances

The plaintiff appeared in person.

Adv MD Sekwakweng, instructed by the first defendant, appeared on behalf of the first to sixth defendants.

Date of Hearing: 8 May 2025

Date of Judgment: 23 May 2025

[1] Bradfield Christie's Law of Contract in South Africa Seventh Edition p 157

[2] 1990 (3) SA 103 (A)

[3] 1953 (3) 180 (T) at 186A-D

[4] Ferndale Investments (Pty) Ltd v D.I.C.K Trust (Pty) Ltd 1968 (1) SA 392 (A) at 394G-395D

[5] 1962 (4) SA 447 (T)

[6] At 452G

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