

SOUTH AFRICA / JUDGMENT

Blumberg v Legal Practitioners' Fidelity Fund (36192/2020) [2021] ZAGPPHC 589 (14 September 2021) [2021] ZAGPPHC 589

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhoba

CASE / FILE NUMBER

36192/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: NO/YES

(2)

OF INTEREST TO OTHER

JUDGES: NO/YES

(3)

REVISED. NO/YES

14

SEPTEMBER 2021

Case Number: 36192/2020

In

the matter between:

NATHAN

ABRAHAM

BLUMBERG

Applicant

And

LEGAL

PRACTITIONERS'FIDELITY

FUND

Respondent

JUDGMENT**MAKHOB A J**

1. The Applicant has been a shareholder and director of the company called Dornay which owned an immovable property hereinafter referred to in this judgment as the “the Property”.
2. Dornay represented by the applicant entered into a written agreement of sale of the “the property” to Hatfield Property Holdings (Pty) Ltd hereinafter referred to in this judgment as the “purchaser. The parties agreed to a purchase price of R 30 (thirty) million.
3. David Kahn and Associates were appointed as the seller’s (applicants) attorney. In terms of the agreement of sale of the property, the purchaser was required to make payment of a deposit of 3 (three) million to Kahn as an attorney to be held by him pending registration of transfer of the property into the name of the purchaser. This deposit was paid into David Kahn and Associates trust account.
4. The property was transferred to the purchaser on the 4th September 2014 on which date Kahn was accordingly required to release payment of the deposit of 3 (three) million.
5. On or about 26 September 2014 Kahn orally acknowledged to the applicant that he had misappropriated the sum of R3 (three) million which was required to have been held in trust for the applicant and on his behalf representing Dornay. He told the applicant that he was not in a financial position to make payment of the money and requested that the applicant afford him time within which to make the payment. This was the first time that the applicant became aware that Kahn had misappropriated the funds.
6. On 29 October 2014 Kahn paid the applicant an amount of R1 (one)million, leaving a balance of R2 (two) million due to the applicant.
7. On the 10 October 2014 Kahn, in writing acknowledged his indebtedness to the applicant in the capital sum of R2 (two) million together with interest thereon at prime plus 2% per annum charged by First National Bank (“FNB”) to its prime customers on the reducing balance from 1 October 2014 to date of payment, both days inclusive.
8. Kahn failed to effect payment of the instalments as undertaken by him and on 3 November 2015 the applicant and Kahn orally agreed to afford Kahn a further indulgence in respect of his payment obligations. Kahn however once again failed to honour his undertakings.
9. The city of Johannesburg had in the meantime paid R105 468, 36 to Kahn in trust in connection with the adjustment and rebate of interest due to the applicant in regard to the property. Kahn had similarly failed to pay over this amount to the applicant as required.

10. On the 23 October 2017 the applicant instituted an application against Kahn for payment of R 1,382,815.62 and payment of R 105,468.36. The applicant alleges that the funds held in trust by Kahn were stolen by him.
11. One day prior to the application being heard that is 29th November 2017, Kahn signed settlement agreement with the applicant. This settlement agreement was made an order of court on the 30th November 2017. Once again Kahn failed to honour his undertaking in terms of the settlement agreement and court order. Subsequently the applicant claimed these monies from the respondent being the Legal Practitioners' Fidelity Fund.
12. In its letter dated 18 February 2020 the respondent rejected applicant's claim on the ground that the claim does not comply with section 55 of the Attorneys Act committed by the attorney David Kahn in that there was no theft.
13. On 27 February 2018 the applicant caused to be served on the respondent, a juristic person as provided for in section 53(1) of the LPA an application in terms of section 26 of the Attorneys Act 53 of 1979, as amended.

COMMON CAUSE FACTS

14. The facts and in relation to the funds entrusted to David Kahn and which Kahn failed to account for and to pay over to the applicant are common cause between the parties. The applicant and David Kahn had a long standing friendship spanning over approximately twenty years during which period Kahn acted as the applicant's attorney.

THE ISSUE

15. The issue to be determined is whether, applicant has indeed established that he is entitled to the relief that he seeks.

THE RESPONDENT RAISED THE FOLLOWING PRELIMINARY POINTS

16.1 Failure by the applicant to use Rule 53 of the Uniform Rules of court to set aside the resolution of the respondent of 18 February 2020 rejecting the applicant's claim.[1]. In response to this preliminary point counsel for the applicant submits that the rejection of the claim is an issue and not the

review of administrative action or other process.

16.2 The second preliminary point is that in terms section 48 (1) of the Attorneys Acts and section 78 (1) of the LPA written notice of the claim was to have been given to the respondent within three months after the applicant became aware of the fact. The applicant referred his claim to the respondent three years and five months late.[2] Thus the applicant referred his claim outside the three months period contemplated in the mentioned provisions responding to this

preliminary point it is submitted on behalf of the applicant that the applicant's founding affidavit addresses the issue fully and motivates the facts and circumstances supporting an extension to the respondent delayed in its decision until 18 February 2020.

16.3 The respondent did not pursue the third preliminary point

16.4 The fourth preliminary point is that there was no theft being a requirement for a claim in terms of section 55 of the LPA[3]. In response counsel for the applicant in his heads of argument says that there is no factual dispute in rebuttal of Kahn having

perpetrated theft and that his own version (Kahn) demonstrates a theft.

16.5 Preliminary point 5, that there is an alleged material non-joinder in that Kahn ought to have been joined as a respondent.[4]. On this point the applicant's reply is that there is no legal interest of Kahn that is impacted by these proceedings and by any decision on the relief sought.

16.6 In regard to the 6th preliminary point the respondent submitted that this point will not be pursued since the court is principally seized with the matter and would have spent valuable time considering the matter.

THE LAW

17. The rule 53 of the Uniform Rules of Court reads as follows:

“Reviews

- (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administration functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or the officer, as the case may be, and to all other parties affected-
 - (a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
 - (b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the register the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so”
18. In *Blacker v University of Cape Town* the court said “there is no reason why the meaning of the word ‘review’ should be restricted and the words “any tribunal” are obviously wide enough to include a domestic tribunal of contracted origin”.
19. Taking into account the case law I have referred to above in my view the applicants should have taken the decision of the tribunal on review.

20. Furthermore, in my view the applicant failed to comply with the three-month time period which is embodied in section 48(1) of the Attorneys Act and section 78 (1) of the LPA. The applicant failed to give any cogent reasons why he failed to do so. Therefore, the respondent's preliminary point must succeed.
21. Mr Kahn denies theft, in my view without hearing Mr Kahn's evidence it is difficult if not impossible to determine whether the offence of theft was committed or not.
22. In my respectful view it was a grave omission for the applicant not to join Mr Kahn this was material non-joinder because Mr Kahn played a significant role in this matter and should have been given an opportunity to answer for himself.
23. I am therefore of the view that the applicant succeeds in all the preliminary points raised. I make the following order:
 1. The applicant's application is dismissed.
 2. Applicant to pay the costs of this application.

D MAKHOBHA

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the appellant: Advocate LW de Beer

Instructed by:

B Bezuidenhout Inc

For the respondents: Advocate SF Fisher-Klein

Instructed by:

Velilo Tinto & Associates Inc

Date heard:

10 August 2021

Date of Judgment: 14 September 2021

- [1] Respondent's heads of argument paragraph 27 page 8
- [2] Respondent's heads of argument page 10
- [3] Respondents heads of argument page 12
- [4] Respondents heads of argument page 13

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