

SOUTH AFRICA / JUDGMENT

Bouwer v Attorneys Fidelity Fund and Another (88030/2018) [2020] ZAGPPHC 79 (29 January 2020)

[2020] ZAGPPHC 79

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

88030/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

O INTEREST TO

OTHER JUDGES: YES

Case No: 88030/2018

29/1/2020

In the matter

between:

LOUIS

ADRIAAN BOUWER

Applicant

and

ATTORNEYS

FIDELITY

FUND

First Respondent

LEGAL PRACTICE

COUNCIL

Second Respondent

JUDGMENT

KUBUSHI J,

INTRODUCTION

- [1] The purpose of this application is to procure an order for the payment of the amount of R1 000 000 (one million rand) from the first respondent, the Attorneys Fidelity Fund, in respect of a claim arising from the theft of money entrusted to Gerard Jacques Du Plessis Attorneys.
- [2] Only the first respondent is opposing the application. No relief is sought against the second respondent, the Legal Practice Council, and is said to be cited in the papers for purposes of taking notice of this application.

THE FIRST RESPONDENT'S INTERLOCUTORY APPLICATION

- [3] The first respondent brought an interlocutory application to file a further affidavit and for the condonation for the lateness of that application. The sole purpose of the application was to bring a letter alleged to have been sent to the applicant dated 13 December 2018, which the first respondent omitted to attach to its answering affidavit. The interlocutory application was not opposed and the relief the first respondent sought therein was granted.

FACTUAL MATRIX

- [4] The facts of this case are mostly common cause between the applicant and the first respondent ("the parties"). Where, however, the parties are not in agreement is in regard to the events subsequent to the lodgement of the applicant's notice of claim to the first respondent as will more fully appear hereunder.
- [5] The claim, as already stated, is premised on the theft of trust money in the amount of R1 000 000 (one million rand) by Gerard Jacques Du Plessis Attorneys. The said amount was in respect of the purchase price of immovable property known as the Blancheplek, which the applicant wanted to purchase from the Trustees of the DEE Terblanche Trust ("the seller"). The seller nominated Mr Gerard Jacques; Du Plessis of the firm Jacques Du Plessis Attorneys, as the transferring attorney.
- [6] The purchase price for the Blancheplek property was to be derived from the proceeds of the sale of a property which the applicant had previously sold in Mafikeng ("the Mafikeng property"). Steenkamp Attorneys attended to the registration and transfer of the Mafikeng property to the purchaser thereof. Pursuant to the said sale, Steenkamp Attorneys transferred the amount of R1 000 000 (one million rand), into the trust account of Jacques Du Plessis Attorneys as security for the payment of the purchase price of the Blancheplek property for Jacques Du Plessis Attorneys to proceed with registration of transfer of the Blancheplek property to the applicant.

- [7] It later transpired that attorney Gerard Jacques Du Plessis was implicated in an elaborate fraudulent scheme in terms of which funds from home owners destined to be paid to the local authority had been misappropriated. Consequently, the estate of attorney Gerard Jacques Du Plessis was sequestered on 23 May 2018. This led to the closure of the practice of Jacques Du Plessis Attorneys.
- [8] In terms of the information received from the Law Society for the Northern Provinces, the applicant lodged a claim with the first respondent in accordance with section 26 of the Attorneys Act 53 of 1979 for the recovery of the amount of R1 000 000 (one million rand) misappropriated by attorney Gerard Jacques Du Plessis.
- [9] As earlier stated, the parties differ as to what happened after the applicant submitted his claim to the first respondent. According to the applicant, an official of the first respondent, Mr Losper, who was charged with dealing with the claim, telephoned the applicant's attorneys of record on 12 June 2018 and confirmed that he had approved the applicant's claim and that he (Mr Losper) had already given instruction for the payment to be made to applicant's attorneys of record. However, despite repeated reminders to the first respondent and/or Mr Losper to make the payment as undertaken, same was not done and this led to the applicant launching the present application.
- [10] The first respondent on the other hand, whilst conceding that Mr Losper did inform the applicant that the claim has been investigated and found to be a valid claim and that the first respondent would pay the amount claimed, argues that the applicant was further informed that the amount could only be paid if it could not be recovered from the insolvent estate of Gerard Jacques Du Plessis. The contention by the first respondent's counsel is that as a fund of last resort, the first respondent expected the applicant to excuss the estate of Gerard Jacques Du Plessis and other persons in law before it could make payment as undertaken. Thus, payment was withheld pending the finalisation of the excussion process, which included, but was not

limited to the sequestration proceedings against the insolvent estate of Gerard Jacques Du Plessis, in person. In support of this argument, the first respondent attached a letter dated 13 December 2018.

PRELIMINARY

ISSUES

- [11] In opposing the application, the first respondent raised three preliminary issues. The first two points were raised in its answering affidavit, namely failure to excuss and misjoinder. A third point in limine that of a dispute of fact was raised in the heads of argument. The said points are dealt hereunder in tum.

Misjoinder

- [12] The question of misjoinder was resolved and no longer had to be determined. The in limine point on misjoinder was raised by the first respondent against the name used by the applicant when citing the first respondent. The point fell away when the applicant filed a notice of amendment of the Notice of Motion, which was not opposed, rectifying the name of the first respondent.

Dispute of Fact

- [13] The key dispute of fact, according to the first respondent, is whether or not Mr Losper informed the applicant, and/or the applicant's attorney of record that the first respondent is a fund of last resort and that the claimant was expected first to excuss Gerard Jacques Du Plessis and all other persons liable in law and that he (Mr Losper) would withhold payment pending finalisation of the final excussion process, which included, but was not limited to the sequestration proceedings against the insolvent estate of Gerard Jacques Du Plessis. This is denied by the applicant.
- [14] The submission by the first respondent's counsel is that the dispute of fact can be resolved in favour of the first respondent by the application of the rule formulated in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd.[1]
- [15] In terms of the said rule, where there is a dispute as to the facts in motion proceedings, a final interdict, as is sought in this instance, should be granted only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such order, or where it is clear that the facts, although not formally admitted, cannot be denied and must be regarded as admitted.
- [16] I do not think that there is a dispute of fact on the papers as they stand. It is the applicant's case, as set out in the founding affidavit, that on 12 June 2018 Mr Losper, on behalf of the first respondent, telephoned Ms De Beer of the applicant's attorneys' office, and confirmed to her that he (Mr Losper) had instructed for the amount to be paid out to the applicant's attorneys of record's office already on 30 May 2018, thus, admitting liability on behalf of the first respondent. It is clear from what is stated herein that Mr Losper never informed Ms De Beer that payment was conditional upon excussion. Ms De Beer confirms this telephone conversation in a confirmatory affidavit attached to the founding affidavit.
- [17] These allegations are not pertinently disputed by the first respondent in its answering affidavit. Except to mention in the answering affidavit that Mr Losper informed the applicant in a letter dated 13 December 2018, that the first respondent admitted the applicant's claim on condition that the insolvent estate of Gerard Jacques Du Plessis is first excussed and that payment was withheld pending the finalisation of the excussion process. The first respondent says nothing about the other events that happened subsequent to the lodgement of the applicant's claim before the letter of 13 December 2018, which the first respondent refers to in his papers.

[18] In essence, the conversation of 12 June 2018 between Mr Losper and Ms De Beer is not denied. The letter of 13 December 2018 happened long after the fact, when the applicant had already issued the application. This letter, in my view, does not create a dispute of fact as it does not dispute the occurrence of 12 June 2018, but only introduces the first respondent's defence of non-compliance with the provisions of section 49 of the Attorneys Act. There is, therefore, no dispute of fact and this preliminary point ought to be dismissed.

Failure to Excuss

[19] The first respondent raised as a point in limine non-compliance with the provisions of sections 49 (1) of the Attorneys Act and 79

(1) of the Legal Practice Act 28 of 2014, which it maintained are mandatory provisions in that the applicant had not first taken steps to excuss the insolvent estate of Gerard Jacques Du Plessis.

[20] It is the first respondent's case that the applicant is not properly before court in that:

20.1 In terms of section 49 (1) of the Attorneys Act, no person shall without leave of the respondent institute a claim against the Fund unless the claimant has exhausted all legal remedies against the practitioner in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by the claimant; alternatively

20.2 Section 79 (1) of the Legal Practice Act does not apply since the claim was lodged with the Fund before 1 November 2018. According to the first respondent, the Legal Practice Act has no retrospective application and, since the facts that gave rise to this application arose before 1 November 2018, the claim on

which it is based must be determined in accordance with the applicable provisions of the Attorneys Act, namely section 49 (1) thereof.

[21] In this regard, to the argument that section 79 (1) of the Legal Practice Act does not apply in this case, counsel for the first respondent relied on the provisions of section 12 (2) (b) of the Interpretation Act 33 of 1957 ("the Interpretation Act") which provides that a new law does not have retrospective application. Accordingly, so counsel argued, the repeal of section 49 (1) of the Attorneys Act did not affect its application to this matter after 1 November 2018.

[22] The applicant's case, on the other hand, is that since the application in this instance was issued on or about 6 December 2018, and served on the first respondent on 25 January 2019 which are dates that fell after the repeal of the Attorneys Act and the coming into operation of the Legal Practice Act, the provisions of the Legal Practice Act, and not the Attorneys Act, apply.

[23] In support of his argument, counsel for the applicant relied on the interpretation afforded to the provisions of section 12 (2)

- (c) of the Interpretation Act in the judgment in *Minister of Public Works v Haffejee NO*,^[2] wherein that court dealing with matters of the retrospectivity or not of legislation, interpreted section 12 (2) (c) of the Interpretation Act as drawing a distinction between matters that are purely procedural in nature and those giving rise to vested rights on the part of parties. Consequently, the court, in that judgment, held that statutory retrospectively does not apply to procedural provisions.
- [24] Counsel, on behalf of the applicant, argued that since the provisions of sections 49 and 79 of the respective Acts deal with the procedure that regulate the institution of action against the first respondent and do not affect the substantive rights and obligations of the applicant which arose in terms of the Attorneys Act, the procedural aspect of the applicant's application, being instituted post the commencement of the Legal Practice Act stands, therefore, to be regulated by the provisions of section 79 of the Legal Practice Act.

THE ISSUE

- [25] The question, at this stage is, which Act, whether the Attorneys Act or the Legal Practice Act, applies to the proceedings instituted by the applicant having regard that (a) the loss of money occurred before 1 November 2018, that is, on 30 November 2017; (b) the claim was submitted to the Fund before 1 November 2018; (c) the Legal Practice Act came into operation on 1 November 2018; (d) the application was launched on 6 December 2018 - after the coming into operation of the Legal Practice Act.
- [26] The salient provisions of the Interpretation Act read as follows:
- "12 Effect of repeal of a law*
- (1)
- (2)
- (a) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not ... affect the previous operation of any law so repealed ... ;
- (b)
- (c) Where a law repeals any other law, then unless the contrary intention appears. the repeal shall not affect any right. privilege, obligation or liability acquired, accrued or incurred under any law so repealed."
- [27] Sub-section 12 (2) (c) of the Interpretation Act was given the following interpretation in *Haffejee*:

"I now turn to the question whether, on an application of common law principles of interpretation or such provisions of the Interpretation Act 33 of 1957 as may be relevant, the changes brought about by the amending Act apply to a right of compensation which had arisen prior to the coming into operation of that Act. but had not yet been invoked by the lodging of an application for compensation in a compensation court.

In contending that the question should be answered in the affirmative, counsel for the appellant laid great stress on the procedural nature of the amendments. Now, although it has often been said that the presumption against statutory retrospectively does not apply to procedural provisions, the realisation has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation . Thus, in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All E R 833 (PC) 836b Lord Brightman said:

"A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed. But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre- statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."

And at p 839 d to f:

"Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive... Their Lordships consider that the proper approach to the construction of... [an Act]... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations."

The first passage was quoted with apparent approval in *Euromarine International of Mauren v The Ship Berp and Others* 1986 (2) SA 700 (A) 709 - 710, and was referred to in *Transnet Ltd v Ngcezula* 1995 (3) S A 538 (A) 549 H. In the latter case Botha JA also commented on the following passage in the judgment of Innes CJ in *Curlis v Johannesburg Municipality* 1906 T S 308, 312:

"Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective."

Botha J A commented thus (at p 549 C-0):

"Of even greater significance, for present purposes, is his statement that, to the extent which the law must regulate the procedure even though the cause of action arose before the date of promulgation, 'but to no greater extent', the law is said to be retrospective. It is implicit in the words I have emphasised that in a situation where more is involved than the straightforward application of the new procedure to a cause of action which arose before promulgation, the convenient way of saying that the law is retrospective is no longer appropriate, and that other considerations must come into play."

In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted

as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not"

[28] The argument by the first respondent's counsel that section 79 (1) of the Legal Practice Act, and his reliance on section 12 (2) (b) of the Interpretation Act, misses the point. It is not in dispute that, as provided for in section 12 (2) (b) of the Interpretation Act, a law that repeals another law, unless the contrary intention appears, shall not in any way affect the previous operation of the law so repealed.

[29] However, that is not the end of the matter, section 12 (2) (c) must also be taken into the equation, in that the presumption against statutory retrospectively does not apply to procedural provisions.

[30] The interpretation afforded to section 12 (2) (c) in Haffejee, is therefore, pertinent. Haffejee held that the new procedure provided for in the new legislation would apply only where the issue is procedural in nature to the extent that it does not affect the vested rights and interests that accrued in terms of the repealed provision. It follows therefore that if a new procedure introduced in the new legislation is found 'not to affect the substantive right and obligations which vested and/or accrued in terms of the repealed legislation, then in that regard the new procedure will apply.

[31] In this instance, it is common cause that, the provisions of section 49 of the Attorneys Act and 79 of the Legal Practice Act deal, undoubtedly, with the procedure that applies in instituting action against the fund - they are, therefore, procedural provisions. It is also not

in dispute that in this instance, the rights and/or interests of the applicant had become vested and/or accrued in terms of the repealed provision of the Attorneys Act. It follows, therefore, that even in this instance, as in Haffejee, the substantive rights and obligations which arose for the applicant in terms of the Attorneys Act, and the first respondent's obligation to make payment thereof continue to enjoy force and are clearly capable of enforcement in terms of the procedure provided for in the provisions of section 79 of the Legal Practice Act. There is no reason to conclude that the new procedure was not intended to apply to those rights and obligations. As a result, I have to rule that section 79 of the Legal Practice Act applies to the facts of these proceedings.

- [32] However, the first respondent's counsel contends in the heads of argument that even if the requirements of section 49 (1) of the Attorneys Act had fallen away on 1 November 2018, the provisions of section 79 (1) of the Legal Practice Act would still have entailed that the applicant should have stated under oath that there is no portion of the claim which could reasonably be recovered from the person liable and this was not stated in the applicant's papers.
- [33] The applicant's counsel submits that on a proper reading of section 79 (1) of the Legal Practice Act, failure to first excuss against the responsible party is no bar to the institution of proceedings against the first respondent. The submission is that section 79 (1) of the Legal Practice Act does not contain any mandatory provision in this regard - unlike as was the position under section 49 (1) of the Attorneys Act, which determined that no action shall be instituted without leave of the board of control until all legal remedies have been exhausted against the practitioner.
- [34] In my opinion, except that it is no longer a requirement that the applicant seek and obtain leave of the first respondent to institute a claim against it, the legislative bar that applied to legal proceedings before the commencement of the Legal Practice Act, that is, that the applicant must first exhaust all legal remedies against the practitioner, has been retained in the new Act.
- [35] Section 79 (1) of the Legal Practice Act stipulates that the first respondent is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.
- [36] It is my view that in order for the complainant to prove her/his claim in terms of section 79 (1) of the Legal Practice Act, she/he must allege and prove that she/he could not reasonably recover any portion of the claim from any other person liable. Without such allegation and proof, the first respondent is not obliged to pay the claim. As these are motion proceedings it was for the applicant to state in his founding affidavit that there is no portion of the claim which could reasonably be recovered from the estate of the practitioner concerned.

- [37] It is common cause that, in this instance, the applicant has not complied with the requirements of section 79 (1) of the Legal Practice Act, in that he has not alleged in his papers that there is no portion of the claim which could reasonably be recovered from the estate of Gerard Jacques Du Plessis, or any other person liable, as such, the claim should ordinarily not succeed.
- [38] However, the proposition for the applicant's counsel is that Mr Losper, on behalf of the first respondent, had already before coming into effect of the new legislation, made an unconditional undertaking to pay the amount claimed by the applicant. I have already ruled earlier in this judgment that the unconditional undertaking by the first respondent was not denied by the first respondent and stands as an admission. The undertaking by the first respondent to pay the applicant's claim is, in my view, a right that had accrued for the applicant, already at the time the Legal Practice Act came into operation. I have ruled, as well, that the substantive rights and obligations which arose for the applicant in terms of the Attorneys Act, and the first respondent's obligation to make payment thereof continue to enjoy force and are clearly capable of enforcement in terms of the procedure provided for in the provisions of section 79 of the Legal Practice Act. There was no need, in the circumstances of this case, for the applicant to first exhaust the legal requirements of section 79 (1) of the Legal Practice Act before claiming payment of the amount misappropriated by attorney Gerard Jacques Du Plessis, because the first respondent had already admitted liability and undertaken to pay the amount claimed.
- [39] The relief requested by the applicant in the notice of motion should consequently be granted with costs.

ORDER

[40] As a result, I make the following order:

1. The first respondent is ordered to make payment to the applicant in the amount of R1 000 000 (one million rand) together with the costs of the application.
2. The first respondent is ordered to pay interest on the amount of R1 000 000 (one million rand) from the date of this order to date of payment at the rate of 10, 25% per annum.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel

: Adv Jan Moller

Applicant's Attorneys

: Van Rensburg Attorneys

c/o Anton Rudman Attorneys

First Respondent's Counsel

: Adv Gary Oliver

First Respondent's Attorneys : Brendan Muller Inc

Date of hearing

: 22 October 2019

Date of

judgment

: 29 January 2020

[1] 1957 (4) SA 234 (C) at 235E-G.

[2]

[1996] ZASCA 17; 1996 (3) SA 745 AD at p755

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