

SOUTH AFRICA / JUDGMENT

Cloete v Mathekga and Others

(62664/2013)

[2015] ZAGPPHC 771 (2 September 2015)

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COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

62664/2013

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH GAUTENG DIVISION,
PRETORIA
CASE NO: 62664/2013
DATE: 2 SEPTEMBER 2015

In the matter between:

G.J.
CLOETE.....PLAIN
TIFF
And
S.T.
MATHEKGA.....FIRST
DEFENDANT
J.G.S.
MINNAAR.....SECOND
DEFENDANT
G.M.
NEGOTA.....THIRD
DEFENDANT
D.
PIENAAR.....FOURTH
DEFENDANT
NEGOTA SSH (GAUTENG) INC
alternatively
NEGOTA SCHWELLNUS HAASBROEK(GAUTENG)
INC.....FIFTH
DEFENDANT

JUDGEMENT

1. The plaintiff claimed payment of the amount of R 270 399. 30 plus interest and costs from the five defendants arising from a contact between the plaintiff and the fifth defendant. The first, second, third and fourth defendants are the directors of the fifth defendant which is an attorneys firm. The fifth defendant has since been liquidated and the action proceeded against the first to fourth defendants. The second and fourth defendants were not represented at the trial. Adv Botes appeared for the plaintiff and Adv Smit for the first and third defendants.
2. No verbal evidence was presented at the trial and both parties argued the matter on the pleadings, on what they regarded as common cause facts and on the admissions made on behalf of the first and third defendants.
3. The background to the plaintiffs claim is briefly the following: On 28 March 2008 the plaintiff instituted action against the fifth defendant, as defendant, under case number 15976/2008. I shall refer to the fifth defendant (and the defendant in case number 15976/2008) as "the firm". The claim was for the recovery of contractual damages suffered as a result of the breach by the firm of its contractual obligations in terms of a number of contracts between the plaintiff and the firm as well as for the payment of agreed remuneration and for interest and costs of suit. The firm defended the action and filed a plea. Both the plaintiff and the firm were represented by an attorneys firm and by counsel. The action was enrolled for hearing on 10 February 2012.
4. On 9 February 2012, the day before the trial, the plaintiff, represented by his advocate as instructed by his attorneys, made an offer of settlement to the firm by e-

mail. Attached to the e-mail was a draft order which contained the terms offered to the defendant. Apart from two typographical errors which were corrected, the firm, as represented by the advocate as instructed by the attorneys, accepted the offer in writing. The agreement which came into being between the parties was thus an agreement settling the action between the parties on the terms set out in a draft order attached to the e-mails.

5. The total amount originally claimed from the firm in terms of the particulars of claim under case number 15976/2008 was the amount of R 2 417 867,12 which consisted of 6 separate contractual claims making up the aforesaid amount. According to the agreement between the parties claims 5 and 6, which amounted to R108 090,23, were not proceeded with and the balance of the claims were settled in the round figure of R1 500 000,00. It was further agreed that amounts which the firm had paid to the plaintiff prior to the date of the settlement agreement, had been paid in respect of claims 5 and 6 as set out in the particulars of claim and that it shall not form part of the amounts payable as set out in the draft order.

6. According to the settlement agreement, as set out in the draft order, interest would accrue on the amount of R1 500 000,00 at the rate of 10% nominal annual compounded monthly, which amount and interest was referred to as "the outstanding balance". It was further agreed that the outstanding balance shall be paid as follows: the amount of R30 000,00 on or before 17 February 2012; the amount of R70 000,00 on or before 29 February 2012; and the outstanding balance in equal monthly instalments of R 38 888, 89, the first instalment payable on or before 31 March 2012 and thereafter on or before the last day of every successive month until the full outstanding balance has been paid in full.
7. The parties further agreed that in the event that the firm fails to pay any amount or installment on or before its due date, the full outstanding balance at the time shall immediately become due and payable and interest shall accrue thereon at the rate of 15,5% nominal annual compounded monthly. The firm shall also be liable to pay for all costs incurred to collect such outstanding amounts, on a scale is between Attorney and Client.
8. It is clear that the parties couched the operative terms of their agreement in the form of a draft order. In fact, paragraph 6 thereof records that "prior to the date of this Settlement Agreement" the defendant had paid certain amounts to the Plaintiff. The draft order was made an order of court on 10 February 2012.
9. Subsequent to 10 February 2012 certain payments were made in terms of the order. They were the following: on 17 February 2012 the amount of R 30,000,00; on 29 February 2012 the amount of R 70,000,00; on 31 March 2012 the amount of R 38 888,89; and on 30 April 2012 the amount of R 38 888,89. It is common cause that on 31 May 2012 the outstanding capital balance amounted to R1 322 222.22, which amount became due and payable on 1 June 2012.
10. The plaintiff instituted the present action during October 2013. By then the firm had paid another amount of R 72,000,00 and the plaintiff had received the amount of R979 822,92 from the Attorneys Fidelity Fund leaving a balance of R270 399,30 which he claimed from the defendants in the present action. Interest was claimed on the outstanding balance from 10 February 2012 to 31 May 2012 at the rate of 10% nominal annual compounded monthly and at a rate of 15, 5% nominal annual compounded monthly on the outstanding balance from time to time, calculated from 1 June 2012 to date of payment.
11. It is common cause that the Memorandum of Association of the firm provides that section 53(b) of the Attorneys Act, 53 of 1979, applies to the firm and that, consequently, all the directors, past and present, are jointly and severally with the firm liable for the debts of the firm contracted during their periods of office.
12. A number of defences were pleaded against the plaintiffs claim. However, all seem to have been abandoned and according to the submission on behalf of the first and third defendants the only issue which this court has to decide is whether or not the agreement to the judgement of 10 February 2012 constitutes a contractual debt as envisaged in section 53 (b) of the Attorneys Act. It was submitted that it was not and that the defendants are consequently not liable. It was also submitted that the first and third respondents can also

not be held liable if the original contract which gave rise to the claims under case number 15976/2008 are to be regarded as the debt upon which the claim is based, since the plaintiff did not allege in his particulars of claim that the first and third defendants were directors of the firm during that time.

13.1 do not agree with the submissions on behalf of the first and third defendants. The plaintiff pleaded an agreement between himself and the firm, which was made an order of court on 10 February 2012, which the firm breached by its non-payment of the amounts due in terms thereof. It was common cause between the parties that the aforesaid agreement was concluded and that the first to the fourth defendants were directors at the time of the conclusion of this agreement. It was also common cause that the defendants failed to honour the terms of that agreement. The averment in the particulars of claim that the agreement constituted a debt and/or a liability of the firm during the period of office of the other defendants as directors of the firm, was also admitted in the plea. Accordingly, the aforesaid argument does not seem to be supported by the pleadings.

14. But it goes further. It is clear, in my view, that the liability of the defendants arises from the contract entered into between the plaintiff and the firm on 9 February 2012. The purpose of the judgment obtained on the next day was not merely to enable the plaintiff to enforce existing rights by means of execution if need be, without in any way affecting other rights arising out of the previous contracts upon which the claims were based. The enforceable rights which the plaintiff had, did not remain the same.
15. In fact, the plaintiff had six separate monetary claims against the firm based on the original agreements between the plaintiff and the firm. The so-called settlement agreement concluded on 9 February 2012 was something completely different. So, for example, the disputed amount due, was agreed to be settled on the round figure of R1 500 000,00, which was clearly not arrived at by exact mathematical calculation. From the defendants' point of view the acceptance of liability for that amount and for the other obligations, was obviously an acceptable way of removing the larger threat against them. The manner in which this amount had to be paid was also not with reference to the previous agreements upon which the original claims were based. The same can in all probability be said of the acceleration clause and the agreement in respect of interest and costs. Furthermore, the original claims 5 and 6 were excluded from the calculation as well as the payments in respect thereof.
16. By entering into the settlement agreement on 9 February 2012 the firm thus accepted that it was indebted to the plaintiff and was prepared to enter into the aforesaid agreement with the plaintiff for the payment of the amount the parties agreed upon and for ancillary obligations. The agreement gave rise to debts and liabilities to the firm for which the first to the fourth defendants became jointly and severally liable together with the firm in terms of section 53(b) of the Attorneys Act.
17. The interest and costs claimed by the plaintiff are provided for by the provisions of the settlement agreement and the plaintiff is entitled to an order in that regard.

18. In the result the following order is made jointly and severally against the first, second, third and fourth defendants:

18.1. Payment to the plaintiff of the amount of R270 399,30;

18.2. Payment to the plaintiff of interest on the outstanding balance from 10 February 2012 to 31 May 2012 at a rate of 10%, nominal annual compounded monthly;

18.3. Payment to the plaintiff of interest calculated at a rate of 15, 5%, nominal annual compounded monthly on the outstanding balance from time to time, calculated from one June 2012 to date of payment;

18.4. Payment to the plaintiff of costs of suit as between attorney and client.

C.P. RABIE

JUDGE OF THE HIGH COURT

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