

SOUTH AFRICA / JUDGMENT

Cwati and Another v Nompozolo (CA33/2016) [2016] ZAECGHC 44 (14 June 2016)

[2016] ZAECGHC 44

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering, Stretch

CASE / FILE NUMBER

CA33/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA33/2016

DATE: 14 JUNE 2016

NOT REPORTABLE

In the matter between

LINDILE PERCY CWATI.....First Appellant

BABALWA URSULA MALGAS.....Second Appellant

V

LINDILE BRIAN NOMPOZOLO.....Respondent

JUDGMENT

Date heard: 3 June 2016

Date delivered: 14 June 2016

PICKERING J:

- [1] This is an appeal against the judgment of the additional magistrate, East London, granting summary judgment in favour of the respondent against the two appellants. There are four other appeals involving the same parties and based on identical causes of action save in respect of the amounts involved in each case. The fate of those appeals depends in the circumstances on the fate of this appeal.
- [2] For the sake of convenience I shall refer hereinafter to the appellants and respondent as defendants and plaintiff respectively.

Plaintiff issued summons against the defendants, both of whom are attorneys, out of the East London magistrate's court, alleging

that until October 2010 he was the sole shareholder and sole director of Nompozolo and Gabelana Incorporated. On 21 October 2010 he was struck off the roll of attorneys of this court.

- [3] Plaintiff alleges in his particulars of claim that he was given permission by the Cape Law Society to claim all monies due to him "for work done by the plaintiff during the time he was practicing." In support of this averment he annexes to the particulars of claim a letter addressed to him by the Cape Law Society in which the following is stated:

"We refer to your request for a letter from the Society regarding your entitlement to fees generated prior to you being interdicted and subsequently struck from the roll of attorneys."

We advise that in terms of the attached orders you are entitled to the fees for work which was done prior to the interdict order."

- [4] Plaintiff alleged further in his particulars of claim that during the time that he was practicing he rendered services to the Road Accident Fund during the period 29 January 2009 to 28 June 2009 in a particular case. He avers that, unbeknown to him, the defendants submitted to the Road Accident Fund a Bill of Costs in the amount of R4 454,63 in respect of which he avers he is entitled to an amount of R1 658,00, being the amount payable for services rendered by him to the Road Accident Fund and paid by the Fund to the defendants during December 2013.
- [5] Defendants' entry of appearance to defend the action was met by an application for summary judgment.
- [6] In opposing the application the defendants raised a number of defences. It is not necessary to deal with each and every one of these defences as in my view one of them is determinative of the appeal.
- [7] Defendants aver that the fees in question were not due to plaintiff but that, should any amount be found to be due in due course, it would be due to Nompozolo and Gabelana Incorporated, being the company which generated the fees. The defendants alleged that as at July 2015 the Nompozolo and Gabelana Incorporated Trust account was still valid and operational and accordingly that Nompozolo and Gabelana Incorporated is the true creditor of the Fund. In support of these averments defendants annexed to the opposing affidavit a

so-called “Account Confirmation Letter” dated 14 July 2015 from First National Bank confirming that “Nompozolo and Gabelana Inc. Trust – 2000/17/109/21 hold the following account with FNB: Attorneys Trust, Account No 62239961130, Vincent Park, opened 23092009.” In the circumstances, so it is alleged, the company should have been joined and the failure to do so is fatal to plaintiff’s claim for summary judgment.

[8] In her judgment the magistrate dealt with this averment as follows:

“[6] The respondents’ point in limine is that “the actions (in question) (are) defective by virtue of the fact that the applicant has failed to cite the company known as Nompozolo & Gabelana Incorporated as a party to the action. This entity is an essential part to the present dispute and should have been cited as a respondent in these proceedings. The said company has a substantial interest in these proceedings.” (See par 7 of the 2nd respondent’s affidavit which is confirmed by the 1st respondent)

[7] In paragraph 13 of its Heads of Argument, the applicant/plaintiff submits that the company in question, Nompozolo and Gabelana Incorporated is no longer operating, and that is common cause. This was confirmed by the Cape Law Society who indicated that according to their records, Nompozolo & Gabelana Incorporated is no longer in existence as it was closed on 08 February 2013 and its Trust Account should be closed as well.

[8] If that is the case, then a non-existing company cannot be a party to legal proceedings. (See *McKersie v SDD Developments (Western Cape)(Pty) Ltd* 23013 JDR 0406 (WCC)).

[9] Therefore, the respondents point in limine is dismissed in all five applications.”

[9] With regard to this Mr. Cole, who appeared for the defendants, submitted that the magistrate had unfortunately failed to confine

herself to the facts appearing from the papers before her and instead took into account allegations apparently made in plaintiff’s

heads of argument in support of his summary judgment application, namely, that Nompozolo & Gabelana Inc. was no longer operating

and that this had been confirmed by the Cape Law Society. It appears that it was because of these allegations that the defendant’s

averments as to the Trust account had been rejected.

[10] Obviously the magistrate could not take into account any averments not contained in the papers before her. As stated in Magistrate’s Court Rule 14(4):

“No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in Rule 14(2).”

[11] Plaintiff, who represented himself at the hearing of this appeal, contended, however, that defendants’ attorney had conceded at the hearing that Nompozolo & Gabelana Inc. were in fact not operating and that the reliance by defendants on the issue of

non-joinder was therefore not only misplaced but unethical. For his part Mr. Cole assured the Court that, on his instructions from his attorneys no such concession had been made and that the point had been argued before the magistrate.

[12] We of course are bound by the four corners of the record. In my view the magistrate's reasons as set out above indicate clearly that, whatever plaintiff's impression as to defendants' attitude may have been, no such concession could in fact have been made. It is apparent from her reasons that the magistrate dealt with what she obviously considered to be a live issue. Had the issue been conceded there would have been no reason for her to have dealt therewith other than to record the fact of that concession.

Furthermore, one of the grounds in the defendants' Notice of Appeal is that the magistrate erred in dismissing this point in limine. Clearly therefore the issue had not been conceded.

[13] In the circumstances it is clear that the magistrate did indeed misdirect herself as was submitted by Mr. Cole. On the papers, before her without reference to any extraneous allegations or documents, the magistrate could not, properly applying her mind, have come to the decision that she did, especially in light of the "Account Confirmation Letter." Accordingly on this ground alone the appeal must succeed.

[14] It is also necessary to point out that the magistrate's approach to the summary judgment application was flawed. The magistrate stated that the defendants were "expected to rebut plaintiff's claims by documentary proof or any proof to the satisfaction of the Court, but not just mere averments." In doing so she misdirected herself. The defendants were not at this stage required to persuade the court of the correctness of the facts stated by them. What the court had to consider was whether the facts alleged by the defendants, if proved at the trial, would constitute a good defence in law and whether that defence appeared to be bona fide. The allegations in the opposing affidavits cannot be dismissed as being "mere averments." They raise an issue which can only be determined at trial.

[15] It is necessary to deal briefly with a further point raised by Mr. Cole. As set out above the plaintiff, in substantiation of his claim, referred to the fact that the Cape Law Society had granted him permission to claim all monies due to him for work done by him during the time that he was practicing. In support thereof he annexed as Annexure B to his particulars of claim the aforementioned letter from the Cape Law Society. It is common cause that plaintiff was struck off the roll of attorneys on 21 October 2010. On the face of it therefore the fees with which this matter is concerned would appear to have been generated before that date. The Cape Law Society letter, however, referred to such fees as were generated prior to plaintiff having been interdicted, and not prior to his having been struck off. Mr. Cole submitted that the particulars of claim were entirely silent as to when plaintiff was interdicted from practice. He submitted that one may take judicial notice of the fact that there is very often a considerable lapse of time after an attorney has been interdicted from practicing before the application for his striking off is heard and finally determined. In these circumstances, so he submitted, there was nothing before the

magistrate to establish that the fees in question were generated prior to the interdict order and an essential element of plaintiff's

cause of action was therefore lacking.

[16] In my view, however, plaintiff is correct in his submission that it can be inferred from the particulars of claim that the fees claimed by him were in respect of services rendered to the Road Accident Fund during the time that he was still practising which, obviously, must have been prior to the date of the interdict order. Be that as it may, the appeal must succeed as set out above and the magistrate's order granting summary judgment must be set aside.

[17] Plaintiff submitted that no order should be made in respect of the costs of the appeal as he had acted in good faith and without malice "in applying for summary judgment". Unfortunately for plaintiff, however, this does not constitute a basis upon which the issue of costs can be determined in a matter such as this. The application for summary judgment was, in my view, doomed to failure from the outset and plaintiff should have appreciated this and agreed to defendants being granted leave to defend the action. Accordingly the costs must follow the result.

[18] Mr. Cole fairly and correctly submitted, however, that in view of the fact that the other four appeals were identical in nature the five appeals should be regarded as one for purposes of costs. I will therefore make no order as to the costs of the appeal in the other four appeals.

[19] The following order will therefore issue:

1. The appeal is upheld with costs.
2. The magistrate's order is set aside and substituted with the following order:

"(a) Summary judgment is hereby refused.

(b) The defendants are given leave to defend the action.

(c) The costs of the summary judgment application are to be costs in the cause."

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

I.T. STRETCH

Appearing on behalf of the Applicants: Adv. S. Cole

Instructed by: Messrs Borman & Botha, Mr. Powers

Appearing on behalf of the Respondent: In person

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