SOUTH AFRICA / JUDGMENT

Dendy v Duminy (2016/05432) [2017] ZAGPJHC 456 (29 September 2017)

[2017] ZAGPJHC 456

COURT
South Gauteng High Court, Johannesburg

BEFORE
L Windell

CASE / FILE NUMBER
2016/05432

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NUMBER: 2016/05432
In

the matter between:

MERVYN
DENDY APPLICANT
And
RUSSEL
KENNETH
DUMINY RESPONDENT

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application for an order directing the Respondent to pay the Applicant the sum of R340 453.42 together with interest at the rate of 9% per annum.

[2] The relief sought is in terms of a written acknowledgement of debt and consent to judgment signed by the Respondent in favour of the Applicant on 11 September 2015 for an amount of R307 490.90, and for additional professional services rendered to the Respondent during January and February 2016, in an amount of R126 597.65.

[3] It is common cause that the Respondent paid an amount of R100 000 on 18 September 2015 in terms of the acknowledgement of debt, which left an outstanding balance of R207 490.90. It is further common cause that the Respondent has given numerous undertakings to the Applicant to pay the outstanding amount. The Respondent has failed to make payment and raised several defences.

[4] The Respondent is unrepresented.

CONDONATION

[5] The Respondent's answering affidavit had been delivered several months out of time. The Respondent has set out reasons in his answering affidavit explaining why the relevant affidavit had only been delivered on 9 June 2016.

[6] The condonation aspect was fully canvassed during oral argument at the hearing of the application. All the papers are before court and the matter is ready to be dealt with. There is no allegation of prejudice to the Applicant nor was I referred to any such prejudice were the matter to be disposed of on its merits, despite the late filing of the answering affidavit. It is in the interests of justice that this matter be finalised and to deal with the real issues between the parties. In my discretion, the late filing of the answering affidavit is condoned.

THE ACKNOWLEDGEMENT OF DEBT

[7] The Respondent opposed the application and contended, inter alia, that the Applicant should be directed to prepare and tax a bill of costs for assessment by a fees committee of the Law Society of the Northern Provinces.

[8] In Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd[1], Makume J held that a client is not entitled to demand that an attorney's fees and disbursements be taxed by the Taxing Master

(who would be the relevant official – a fees assessment committee of the Law Society has no jurisdiction to tax or assess an attorney's fees in a litigious matter) after those fees and disbursements have already been paid to the attorney by the client. Makume J upheld the applicant attorneys' argument that they should not be compelled to tax bills which had already been paid. In the Werksmans matter, the only basis raised by the client in demanding that all paid bills and accounts be taxed was that, according to the client,

the fees charged were not fair and reasonable. There was, as Makume J pointed out, no affidavit by a costs consultant pointing specifically to items charged by the attorneys which the client said were not fair and reasonable. Makume J held that the complaint 'was a bald general statement unsubstantiated by any real evidence'. The situation in the present matter is analogous to the one in the Werksmans case.

[9] In the founding affidavit the Applicant sets out the details of all the numerous promises made by the Respondent to make payment, as well as requests made by the Respondent for an extension of the time period within which to effect payment. It is not necessary to repeat the date, time and content of all the correspondence that was exchanged between the parties, as it is set out comprehensively by Mr Dendy, and the Respondent does not dispute it.

[10] The Respondent signed an acknowledgement of debt wherein he acknowledges that he owes the Applicant an amount of R307 490.90

for professional services rendered on his behalf. He has received an account from the Applicant and has part-paid the account (by paying R100 000 on 18 September 2015). He has repeatedly admitted liability in writing to pay the balance claimed by the Applicant and has consented to judgment being granted against him. The Respondent conceded during the hearing of the application that he has no defence on the outstanding amount claimed in the acknowledgement of debt. I am satisfied that there is no valid defence on this part of the Applicant's claim, and in the circumstances judgment ought to be granted against the Respondent for the outstanding amount of R207 490.90 plus interest.

SERVICES RENDERED AFTER THE ACKNOWLEDGEMENT OF DEBT

[11] The Applicant represented the Respondent in a trial action against Paragon Medical Distributors CC ("Paragon") since March

2014. The Respondent alleged that the Applicant represented to him that the costs of defending the trial action, inclusive of all fees and disbursements, would amount to no more than R250 000.

[12] The Applicant avers that after the acknowledgement of debt was signed in September 2015, additional amounts in the sum of R126 597, 65 had been debited to the account of the Respondent by the Applicant in respect of fees for work done after September 2015. The Respondent inter alia disputes that the Applicant was instructed or had a mandate to act on behalf of the Respondent for certain of the services rendered after September 2015, and contends that he is prepared to make payment of what is found to be fair and reasonable.

[13] It is necessary to extract the relevant portion from the founding affidavit deposed to by Mr Dendy setting out how the amount of R126 597,65 was arrived at:

Tax invoice 3/2016 dated 6 January 2016 (annexure 'MD2' hereto)

R 12 996,00

Debit note 3/2016 dated 6 January 2016 (annexure ‘MD3’ hereto)

R 10 260,00

Tax invoice 8/2016 dated 12 February 2016 (annexure ‘MD4’ hereto)

R 84 288,75

Debit note 7/2016 dated 12 February 2016 (annexure ‘MD5’ hereto)

R 19 052,90

Total

R126 597,65

Annexure “MD2”

To professional fees for perusal of fresh notice of intention to amend; attending to draft fresh notice of objection in terms of uniform rule 28(3), and attending to serve same; consultation with counsel on 3 November 2015; drafting and perusal of correspondence and e-mail messages

Annexure “MD3”

To fees due to counsel (November 2015 account)

Annexure “MD4”

To professional fees for perusal of court order granted on 27 October 2015; attending to forward same to counsel; attending to peruse application by Paragon Medical Distributors CC for leave to amend particulars of claim and to compel production of documentation; attending to draft notice of motion and founding affidavit in rescission application; attending to settle same; attending to photocopy and mark annexure thereto; attending to paginate and index application for rescission; attending to draw and photocopy draft order of court; attending to draft notice of set down of rescission application; attending to arrange photocopying of application for rescission; attending to arrange service and filing of application for rescission, and of notice of set down thereof; perusal of notice of intention to oppose rescission application; attending thereafter to arrange photocopying of papers for duplicate court file after the original court file lost by Registrar of the Gauteng Local Division, Johannesburg; attending to paginate and index papers for duplicate court file; attending to draft affidavit for Registrar to secure opening of duplicate court file; drafting of filing sheet therefor; attending to serve lost-file affidavit; attending to peruse answering affidavit and annexures thereto in opposition to rescission application; attending to remit same to counsel; attending to draft replying affidavit; attending to

settle replying affidavit; attending to draft and settle affidavits for signature by yourself and by Gail Dendy in support of rescission

application; attending to photocopy and mark annexures to replying affidavit; attending to paginate replying affidavit and annexures

thereto; attending to index replying affidavit and annexures thereto; attending to draft practice note (including heads of argument) in rescission application, and legal research pertaining thereto; attending to amend draft order in rescission application and to photocopy amended draft order; attending to prepare two volume covers for rescission application; attending to prepare list of authorities and to photocopy authorities for bundle of authorities; attending to prepare a list of authorities and to photocopy authorities for bundle of authorities; attending photocopy same for counsel, for own use and for service on Paragon Medical Distributor CC; drafting and perusal of correspondence and e-mail messages; telephone calls

Annexure "MD5"

To fees due to counsel (January 2016 account)

To cost of photocopying papers for duplicate court file

[14] The Applicant avers that all the work described in the tax invoices set out in paragraph 13 has been done, and all of the disbursements

described in the debit notes referred to have been made by him, and are due and payable to him. He avers that the tax invoices accurately record the nature of the work done by him as well as the amount of time spent by him in executing the work and his hourly charge out rate applicable at the time when the relevant work was done.

[15] The Respondent contends that it is important to note that globular amounts are allocated in respect of a wide range of tasks and work undertaken by the Applicant. An itemised account is not utilised to set out the exact fee in relation to a particular task. For instance, the amount of kilometres driven by the Applicant or his or her messenger is not stated and the number of telephone calls made by the Applicant in executing his professional services are not listed. The Applicant also omits to mention whether or not he received instructions from the Respondent but debited the relevant account with a fee in respect thereof.

[16] The Respondent is of the opinion that that invoices attached to the founding affidavit as annexure "MD2", "MD3",

"MD4" and "MD5" relate to the unauthorised opposition of the Notices, the application which resulted in a default judgment and the rescission application.

[17] In his answering affidavit, the Respondent expressed his dismay with the Applicant in that a significant amount of work purported to have been done by the Applicant was done without his knowledge and a without a mandate. The Respondent specifically mentions a notice by Paragon to amend its particulars of claim and a second notice in terms of Rule 35(3) calling for the discovery of additional

documents. The Respondent confirms that he was aware of the notices and had no difficulty in complying with them. He contends that for some inexplicable reason, the Applicant opposed each of the notices without his knowledge or consent. An application was subsequently

issued by Paragon compelling the Respondent to comply with the relevant notices of which the Respondent also had no knowledge of at the time. The Respondent furthermore states that, despite the fact that the Applicant had opposed the application, the Applicant failed to attend court due to his own administrative negligence and a default judgment was obtained against the Respondent on 25 October 2015 which included a costs order against him.

[18] The Respondent further alleges that the Applicant took a unilateral decision to set aside the default judgment. According to the Respondent, the Applicant deposed to the founding affidavit and the replying affidavit himself and seemingly consulted alone with Advocate R.G. Cohen regarding the rescission application that was launched on 20 January 2016. The Respondent persists in his averments that he had no knowledge of the application for rescission and was unaware of the fact that the applicant had deposed to affidavits personally on behalf of the Respondent and was unaware of the fact that the Applicant had consulted with Advocate Cohen.

[19] The application for the rescission of judgment was heard on 14 March 2016 and judgment was delivered by Weiner J on 31 March

2016. The learned Judge refused the application for rescission with costs.

[20] The Respondent states that after he had the opportunity to peruse the written judgment by Weiner J, it became apparent to him that Mr Dendy, after vigorously opposing Paragon's proposed amendment, simply abandoned this opposition during the hearing of the application. It is the Respondent's view that Mr Dendy's opposition to the proposed amendment was misguided and wasteful.

[21] According to the Respondent, the Applicant prepared an affidavit in which the following paragraph was included – "I have been made aware by my attorney of record, Mervyn Dendy, of the existence of the aforesaid application for rescission since prior to launching of the rescission application on 20 January 2016". The Respondent alleges that the affidavit was provided to him to sign in the context that Paragon had obtained a default judgment

against him and that to rescind the judgment it was necessary and urgent that the Respondent sign the affidavit which he signed on 12 February 2016. It subsequently became apparent to the Respondent that the purpose of the affidavit was not to assist him but rather to assist Mr Dendy in extricating himself from possible censure by Weiner J in her pending judgment.

[22] It is the Respondent's version that when the Applicant vaguely explained the need for the affidavit to be signed, he was also assured that none of the costs associated with the original default judgment or the rescission application would be for his account. To compound matters, the Respondent received a bill of costs from Paragon pursuant to the costs orders awarded against him in each of the aforementioned applications, the total of which, before taxation amounts to R67 192.50.

[23] The Respondent contends that he was not aware of the fact that he was entitled to insist upon the Applicant having his fees taxed and assessed by a fees committee of the Law Society. He tendered to pay the Applicant such amounts as may be determined by a fees committee of the Law Society, subject to a right to challenge the Applicant's claim to be paid for attendances which were not a part of his mandate including, inter alia, his opposition to the Notices and his unilateral launch of a rescission application. A confirmation of the tender dated 18 May 2016 made to the Applicant was attached to the Respondent's answering affidavit. A reply was received from the Applicant's attorney indicating that Mr Dendy had no interest in agreeing to an assessment of his fees.

[24] The Applicant vehemently denied all the allegations made by the Respondent in his answering affidavit.

DISPUTE OF FACT

[25] The Respondent avers that there are material disputes of fact in relation to the professional services rendered by the Applicant after the signing of the acknowledgement of debt. The Respondent submits that the disputes of fact were already known to the Applicant before he launched the application in the present matter. Those disputes of fact that may not have been known at the time that he launched the application were brought to the Applicant's attention prior to the filing of the Respondent's answering affidavit by means of correspondence addressed to the Applicant on 16 May 2016 and 18 May

2016. Given all the disputes of fact, the Respondent submitted that the matter is not capable of being determined by way of application and that the Applicant should have prosecuted his claim by way of summons.

[26] In reply to the averments made by the Respondent, the Applicant states that the Respondent has perjured himself in his answering

affidavit on numerous occasions for several purposes which can be summarised as follows:

26.1 To limit or evade the Respondent's liability to the Applicant for the outstanding legal fees;

26.2 To manufacture a dispute of fact in an attempt to have the present application dismissed or referred to trial so as to further delay the resolution of this matter;

26.3 To intimidate the Applicant with threats to hold the Applicant personally liable for the costs which the court has ordered the Respondent to pay in the unsuccessful rescission application;

26.4 The Applicant contends that the Respondent prima facie commits the crime of statutory perjury in addition to (common law) perjury in his attempt to free himself from his admitted liability to the Applicant. “Unscrupulous”, “dishonest” and “unconscionable” are terms used by the Applicant to describe the conduct of the Respondent;

[27] The Applicant avers that a partly oral and partly tacit mandate was conferred on him by the Respondent at the start of the action in the Paragon matter. The ambit of the mandate was to take whatever steps where reasonably necessary to contest the action including the bringing of interlocutory applications the Applicant considered necessary and appropriate.

[28] The Applicant stated that the application by Paragon was not opposed by the Applicant as the application was e-mailed to his e-mail address at the time and that the default judgment did not come to his attention until the day after a default judgment was granted in favour of Paragon owing to a failure of the e-mail to reach the Applicant. The Applicant denies negligence on his part. Mr Dendy states that he could not oppose an interlocutory application brought against his erstwhile client in a trial action if he didn’t know of the interlocutory application’s existence owing to the failure of the application to reach him by means of the method used in order to serve it on him on behalf of the Respondent.

[29] The Applicant admits that he consulted with counsel on his own without the Respondent present as, in his view, the Respondent could not have contributed anything to the consultation or the content of the application for rescission of judgment which was within the personal knowledge of the Applicant.

[30] The Applicant denies that he “took a unilateral decision” to apply for the rescission of the default judgment. In doing so, the Applicant validates his conduct in stating that the decision was taken in consultation with Advocate Cohen. Furthermore, the Applicant confirms that he was not present at the hearing of the rescission application as he was in transit to Bloemfontein on 14 March 2016.

[31] Mr Dendy strongly denies that the judgment of Weiner J was critical of him in relation to how the default occurred. In fact, the Applicant points out that the learned Judge criticised the Respondent for failing to simply state that he did not have in his possession the documents there were requested and that the Respondent had failed to show good cause as to why the order of court made by default judgment on 25 October 2015 should be rescinded.

[32] The Applicant further denies that he was on a “frolic of his own” and that the Respondent became aware of the existence of the application for the rescission of judgment on 3 November 2015. Mr Dendy disputes the fact that the Respondent was under the impression that the interlocutory application would bear no financial consequences on the Respondent.

[33] In his answering affidavit, the Respondent states that the fees charged to him are not fair and reasonable. He obtained a commitment

from the Applicant that the entire fee of defending the Paragon matter would not exceed R250 000. By charging him R304 000

prior to the commencement of the trial in the Paragon matter, and an additional amount of R130 000 for an unnecessary and

unauthorised set of interlocutory disputes which appeared by Weiner J to be motivated by animosity between attorneys rather than in the pursuit of the Respondent's best interest, he is of the opinion that the fair and reasonable fee estimated by the Applicant has been substantially exceeded and would indicate at the very least a possibility of over-reaching which would justify the withholding of payment.

[34] In Administrator, Transvaal & Others v Theletsane & Others[2], Botha JA said the following:

> *"For my purpose it is enough to say that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits."*

[35] After consideration of all material facts and the allegations made by both parties, I am of the considerate view that there is a material dispute of fact as far as the additional services rendered by the Applicant to the Respondent during January and February 2016, which cannot be determined on the papers.

[36] Both parties should be granted the opportunity to properly ventilate their disputes during a trial.

COSTS

[37] The Applicant seeks a punitive cost order against the Respondent. The acknowledgement of debt and consent to judgment which the Respondent admits having signed, and by whose terms the Respondent admits he is bound, provides for the payment by the Respondent for costs "on the High Court attorney-and-own-client scale".

[38] Costs are in the discretion of the Court. After careful consideration of all the material issues, costs are awarded against the Respondent on a party and party scale.

[39] I deem it necessary to comment on the prolixity of the heads of argument in this matter. The applicant's heads are unnecessary

long (64 pages) and contains numerous repetitions and irrelevant material. In Cateram Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another [3], the court held as follows:

> *"There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are 'main', 'heads' and 'argument'. 'Main' refers to the most important part of the argument. 'Heads' means 'points', not a dissertation. Lastly, 'argument' involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument. By way of a reminder I wish to quote from Van der Westhuizen NO v United Democratic Front 1989 (2) Sa 242 (A) at 252B--G:*

'There is a growing tendency in this Court for counsel to incorporate quotations from the evidence, from the Court a quo's judgment and from the authorities on which they rely, in their heads of argument. I have no doubt that these quotations are intended for the convenience of the Court but they seldom serve that purpose and usually only add to the Court's burden. What is more important is the effect which this practice has on the costs in civil cases. . . . Superfluous matter should therefore be omitted and, although all quotations can obviously not be eliminated, they should be kept within reasonable bounds. Counsel will be well advised to bear in mind that Rule 8 of the Rules of this Court requires no more that the main heads of argument. . . . The heads abound with unnecessary quotations from the record and from the authorities. They reveal, moreover, another disturbing feature which is that the typing on many pages does not cover the full page. . . . Had the heads been properly drawn and typed I do not think more than 20 pages would have been required. The costs cannot be permitted to be increased in this manner and an order will therefore be made to ensure that the respondent does not become liable for more than what was reasonably necessary.'

[40] In the result the following order is made:

40.1 The Respondent is ordered to pay the Applicant the sum of R207 490.90 together with interest at the rate of 9% per annum from 1 February 2016 to date of payment.

40.2 The remainder of the Claim in the amount of R126 597.65, is referred to trial with an order that the notice of motion shall stand as a simple summons and the plaintiff is ordered to deliver a declaration within 20 days.

40.3 The costs of the application to be paid by the Respondent on a party and party scale which shall be taxed on the basis that the heads of argument prepared by Mr Dendy comprise 10 pages.

L WINDELL

JUDGE OF THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

Attorney for applicant: Glynnis Cohen

Counsel for applicant: Mr M. Dendy

Attorney for respondent: Not applicable

Counsel for respondent: Respondent appeared in person

Date matter heard: 18 August 2017

Judgment

date: 29 September 2017

[1]

[2015] 4 All SA 525 (GJ).

[2]

[1990] ZASCA 156; 1991 (2) SA 192 (A) at 197A-B

[3]

[1998] ZASCA 44; 1998

(3) SA 938 SCA at [37] – [38]

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