

SOUTH AFRICA / JUDGMENT

Erasmus v Williams (248/2020)

[2021] ZAECHGHC 6 (19 January 2021)

[2021] ZAECHGHC 6**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Beshe

CASE / FILE NUMBER

248/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GRAHAMSTOWN)****Case****No: 248/2020****In**

the matter between:

JOHANNES

MATHYS ERASMUS

Applicant

And

MARK

WILLIAMS

Respondent

JUDGMENT**BESHE J:**

[1] The applicant approached this court for an order in the following terms:

“(a) The respondent is to pay to the applicant the amount of R798,612.18, alternatively R346,416.71 being the amount due to applicant as at the 31st of January 2020;

(b) Interest on the aforesaid amount at the legal rate of 10.5% as from the 1st of February 2020;

(c) Respondent to pay the applicant’s costs on the scale as between attorney and client, and

(d) Further and/or alternative relief.”

[2] The applicant is an adult male person who resides in Sunnyridge, East London. Following a motor vehicle accident in which he was involved during 2013, and with the assistance of his wife Ms Belinda Marionete Erasmus, he sought respondent’s legal services for purposes of suing the Road Accident Fund. Applicant’s wife concluded a contingency fee agreement with the respondent on applicant’s behalf. Applicant subsequently also signed a contingency fee agreement similar to the one that was signed by his wife.

[3] The respondent is an adult male attorney, practising under the name and style Mark Williams Attorneys with his registered offices in Quigney, East London.

[4] Clause 5 of the Contingency Fee Agreement in question reads as follows:

“6. The parties agree that if the Client is successful in the aforementioned proceedings an amount shall be payable to the Attorney, calculated according to the following method:

Twenty Five Percent of the amount of damages / compensation awarded in favour of the client.

Nota bene: If the success fee is higher than the Attorney’s normal fees, such higher fee may-

- not exceed the Attorney’s normal fees by more than 100 per cent; and
- in the case of a claim sounding in money, not exceed 25% (Twenty Five Percent) of the total amount awarded or any amount obtained by the Client in consequence of the proceedings.”

[5] It is common cause that the applicant’s claim against the Road Accident Fund was settled in December 2013 in the amount of R2 865 030.00 together with party and party legal costs. From the capital amount, respondent retained an amount of R 550 000.00 to cover his fees and disbursement. The applicant was not satisfied with the amount respondent retained as a fee for his legal services which he had not accounted for. This prompted the institution of an application for an order directing the respondent to inter alia, produce an attorney and client bill of costs, pay him R 250 000.00 as an interim payment pending the taxation of a bill of costs. In a judgment delivered on the 2 November 2016, Plasket J (as he then was) granted the applicant the relief that he sought.

[6] The interim payment of R 250 000.00 was paid by the respondent in three instalments the last payment being made in June 2017. The respondent’s attorney and client bill of costs was presented and ultimately taxed on the 10 May 2019 in the amount of R 38 679.37.

[7] According to the applicant, the respondent was only entitled to charge him a success fee of R 77 358.74, being R 38 679.37 x 100%. He is also said to have retained the party and party costs paid by the Road Accident Fund in the amount of R 99 809.60 which were to have been paid to the applicant.

[8] As it would appear for the Notice of Motion, applicant is making two alternative claims: A claim in the main for R 798 612.18 alternatively R 346 416.71.

The explanation proffered for the amounts that are claimed in the alternative is said to lie in the determination of date from which interest is calculated. The two alternative claims were quantified by an actuary - reports in this regard were provided by the applicant and are annexed to his founding papers. In respect of the claim being for R 798 612.18, interest is calculated from 10 December 2013 and 23 June 2014 being the dates the respondent is alleged to have appropriated monies from the capital amount and party and party costs respectively. In respect of the amount claimed in the alternative, interest is claimed as at 13 January 2020 being the valuation date when the calculation was done by the actuary.

[9] Respondent filed his opposing papers out of time. This applies to both the notice to oppose and the opposing affidavit. By so doing, failing to comply with the rules of this court. Even though applicant contends that the explanation provided by the respondent is not adequate, the application for the late filing of opposing papers is not opposed, but the matter is left in the hands of the court. Non-compliance with the rules of this court on the part of the respondent prevailed, with his heads of argument being filed on the 1 September 2020, with the matter scheduled to be heard on the 3 September 2020. Respondent attributes these delays largely to financial constraints – to being his being impecunious. I will exercise my discretion in favour of granting the condonation sought in this regard. In addition to opposing the merits of the application, respondent raised two point in limine being:

Firstly, he complains that both the founding and confirmatory affidavits do not comply with Justices of the Peace and Commissioners of Oaths Act[1] together with the relevant Regulations. He points out that the affidavits reflect that they were signed and sworn to in Grahamstown and yet the Commissioner of Oaths' stamp reflects East London, the district in which the Commissioner of oaths in question is authorised to act as such. Suggesting that the affidavits were not signed and commissioned in each other's presence.

Secondly, that there is a factual dispute in that there is no certainty on the applicant's part as to how much the respondent should be ordered to pay and on what basis. He refers the court to the amounts claimed by the applicant in the main and in the alternative. Added to this, he asserts is the fact that during November 2017 applicant's attorney indicated that his debt had been paid in full. So, the applicant should have realised that there was a dispute of fact in this regard. One that could not be resolved on the papers.

[10] Before venturing into respondent's case on the merits, I consider it apposite that I deal with the points raised by the respondent in limine. Respondent is correct in pointing out the requirements of compliant affidavit in particular the requirement that the declaration should be signed in the presence of the Commissioner of Oaths.[2]

[11] A plausible explanation has been provided why the portion below the respective deponents' signatures reflect that the affidavit was signed and sworn to in Grahamstown. This is said to have been an administrative error which resulted from the fact that applicant's attorneys who drafted the affidavits are based in Grahamstown. But the deponents (applicant and his wife) chose to sign the affidavits in East London because it is where they reside, which they

did in the presence of the commissioner of oaths. I am satisfied that the said affidavits substantially comply with the relevant legal requirements.

- [12] As regard the second point raised by the respondent, it cannot be said that there is a dispute of fact where there is a main and an alternative claim. This only relates to when the court finds to be the appropriate point at which the interest should have started running. In my view, this does not give rise to a dispute of fact. This in my view is a question of law not a dispute of fact. Both points in limine fall to be dismissed.

Respondent's defence to the merits

- [13] Respondent makes the following submissions:

That he charged the applicant R 550 000.00 as legal fees.

That the bill of costs was taxed down to R 77 358.74 from R 153 534.00.

The Road Accident Fund paid an amount of R 99 806.60 in respect of party and party costs into his account. He made a payment of R 250 000.00 as an interim payment as per Plasket J's order. According to the respondent, after making payment of R 28 000.00 in November 2017, he requested that applicant's attorney provide him with a letter confirming the outstanding balance. He was provided with a letter indicating a R 0.00 balance.

- [14] It is common cause that the interim payment of R 250 000.00 was paid in three instalments, with the last payment made in June 2017. It is also common cause that a letter from applicant's attorneys in November 2017 recorded that there were no amounts that were due for payment by him in respect of this matter. I do not have any reason why I should not accept applicant's assertion in this regard. Namely that the Nil balance related to the amount of R 250 000.00 respondent was required to pay by way of an interim payment.
- [15] Surely, respondent could not have concluded that this related to the amounts he retained from the capital payment made by the Road Accident Fund towards applicant's damages. The interim payment was to be made pending the taxation of his bill of costs, which was only done in May 2019. Respondent makes reference to payments he allegedly made during the years 2016 and 2017 to applicant's attorneys or their correspondents. He however does not state what the payments were meant for. On the other hand, the applicant has shown that those payments were made not as part of the amount owed to him by the respondent but were in respect of costs in subsequent matters and those involving other parties who had litigated against the respondent in matters similar to applicant's and the latter's attorneys had acted for those parties. It is not surprising that the respondent does not persist with this assertion in argument. His argument hinges on the computation of the amount in particular the point at which interest should have started running. In my view, this is the only issue that should detain this court. Should interest be calculated from the day after that respondent retained the amounts he did from the settlement amount paid by the Road Accident Fund, namely 10 December 2013 and June 2014 in respect of party and party costs to which applicant was entitled. Or, should interest be ordered to run from a date after the

taxing of respondent's bill of costs and the quantification of his claim.

- [16] In the main, the payment that is sought from the respondent is comprised of the amount he is alleged to have appropriated with interest therein calculated from the day after the said appropriation from the capital amount, (settlement amount) and the day after the appropriation of party and party cost which respondent was not entitled to.
- [17] The motivation for claiming this amount is that the applicant should not be prejudiced by the delay in quantifying the amount due to him as a result of delays brought about by respondent's conduct. On 2 November 2015 Plasket J ordered the respondent to inter alia, produce and make available to the applicant's attorneys a bill of costs on the High Court's scale on an attorney and client basis. The respondent complied with this part of the order in 2017. The initial delay. There was a further delay in the taxation of the bill of costs by the taxing mistress who apparently insisted on respondent presenting the bill of costs. It was only after the issuing of an order by Malusi J on the 16 April 2019 that the taxation was scheduled for the 10 MAY 2019. The blame for the delay in the taxing of the bill cannot only be placed on the doorstep of the respondent.

[18] I also note the following:

Contrary to what applicant suggests at paragraph 9.1 of his heads of argument, in his order of the 2 November 2016, Plasket J did not order the respondent to restore the funds that formed part of the settlement by Road Accident Fund to the applicant.

The claim having been settled on the 4 December 2013, payment to applicant having been made on the 10 December 2013, the latter seems to have only taken steps to challenge the respondent's entitlement to the amount he retained only around 2016. Granted that had the respondent not appropriated the amounts in question, interest therein would have accrued to applicant. By the same token, had action been taken against the respondent at an early stage – after 2013, and had taxation taken place earlier, respondent would not have been required to pay interest on the amounts in question from 10 December 2013 and 23 June 2014, respectively.

[19] I am satisfied that a case has been made for respondent to restore the monies he appropriated from the funds meant for the applicant to the latter. I am however not persuaded that it will be just and appropriate in the circumstances to order that interest should start running from 2013. But, that it should run in accordance with the certification of values compiled by actuary and marked JE 10.

[20] Accordingly, the following order will issue:

- (a) The respondent is to pay to the applicant the amount of R352 309.85 being the amount due to applicant.
- (b) Interest on the aforesaid amount at the legal rate of 10.5% as from 13 January 2020.
- (c) Respondent is to pay the applicant's costs on the scale as between attorney and client.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 3 September 2020

Date Reserved : 3 September 2020

Date Delivered : 19 January 2021

[1] Act 16 of 1963.

[2] Article 3 (1) of the Regulations Governing the Administration of an Oath or Affirmation made in terms of relevant Act.

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Prepared on 23 October 2026 · Esheria