

SOUTH AFRICA / JUDGMENT

Jordaan N.O and Others v Azar & Havenga Inc. and Others (4956/2019) [2022] ZAFSHC 320 (17 November 2022)

[2022] ZAFSHC 320**COURT**

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

4956/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4956/2019****Reportable:**

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

JACQUES

JORDAAN N.O. First

Plaintiff

ERICA

CAROLINE JORDAAN N.O. Second

Plaintiff

RENE

KEYTER

N.O. Third

Plaintiff

And

AZAR

& HAVENGA

INC. First

Defendant

PAUL
AZAR
Second
Defendant
MARGARETHA
DOROTHEA ELIZABETH BROODRYK First
Third Party
JACOBUS
PETRUS BROODRYK Second
Third Party

JUDGMENT

BY: C REINDERS, ADJP

HEARD ON: 20 JULY 2022

DELIVERED ON: 17 NOVEMBER 2022

[1] The plaintiffs are the trustees of the Jacques Jordaan Besigheidstrust (“the Trust”). The first defendant is a firm of attorneys. The second defendant is a director of the first defendant and a practising attorney. Mrs and Mr Broodryk are cited as respectively the first and second third parties (collectively referred to as “the Broodryks”).

[2] The plaintiffs issued summons against the defendants praying for judgment against the first defendant, alternatively the second defendant, for payment of the amount of R 300 000-00 together with interest and costs.

Defendants filed a plea and simultaneously filed a notice in terms of Uniform Rule 13 for indemnification. No plea was filed in respect of the said notice.

[3] In the amended particulars of claim the plaintiffs aver that it instructed the defendants during early 2018 to claim and recover from the Attorneys Fidelity Fund, alternatively the Legal Practitioners Fidelity Fund (hereafter for ease of reference “the Fidelity Fund” in both instances), the amount of R 300 000-00 in respect of money misappropriated

by a certain Mr Rothmann. Rothmann at the time was an admitted attorney but has since been struck from the roll of attorneys whilst his estate has been sequestered. It is averred that the defendants accepted the instruction and pursuant thereto claimed the said amount from the Fidelity Fund. On 11 September 2018, so the particulars aver, the fund made payment of the said amount to the first and/or second defendant in accordance with the claim. However, despite receiving payment the first and/or second defendant failed to make payment to the Trust.

[4] In the alternative the plaintiffs aver that the first and/or second defendants failed to discharge their mandate with reasonable care and skill in that the first and/or second defendant at the time acted for a Mrs Broodryk and was aware of the fact that the plaintiffs’ claim and the claim of Mrs Broodryk, were in respect of the same transaction which related

to the sale of the same immovable property. The sale of Mrs Broodryk's property therefore included the amount of R 300 000-00 and Mrs Broodryk was not entitled to receive the R 300 000-00, as the plaintiffs were entitled

thereto.

- [5] It is alleged further in the alternative that the first and/or second defendants failed to exercise reasonable care and in breach of the tacit, alternatively implied, term of the agreement made payment to Mrs Broodryk of an amount being inclusive of the amount of R 300 000-00 owing to plaintiffs, wherefore plaintiffs suffered damages in the amount of R 300 000-00. The defendants in their amended plea aver that the plaintiffs instructed "the defendants" to claim from Rothmann or from the Fidelity Fund an amount of R 386 960-00. It is averred that "the defendants" was instructed by the third parties (the Broodryks) to claim from Rothmann or the Fidelity Fund the amount of R 527 234-84. Pursuant to accepting the instructions, the defendants executed its instructions by the plaintiffs and the third parties. The first and/or second defendant submitted a claim on behalf of the plaintiffs against Rothmann, and by submitting a claim against the Fidelity Fund in writing. Copies of the respective claims were annexed as annexures to the plea. The defendants aver that a claim was filed on behalf of the Broodryks against the Fidelity Fund in writing and annexed a copy of the claim to its amended plea. It is averred that the amount of R 527 234-84 was successfully recovered and an amount of R 517 705-88 paid over to the Broodryks on 22 September 2018 "with the understanding that they would repay the amount of R 300 000-00 to the Trust".
- [6] Before the defendants filed their amended plea, the plaintiffs filed a replication denying all the allegations in the plea and joining issue with the defendants.
- [7] The remainder of the allegations by the plaintiffs were denied which therefore included a denial that the Fidelity Fund on 11 September 2018 pursuant to plaintiffs' claim, paid the amount of R 300 000-00. Mr J Jordaan testified on behalf of the plaintiffs, whilst Mr P Azar (the second defendant) and Mr JM Losper (employed by the Fidelity Fund), were called on behalf of the defendants.
- [8] According to Mr Jordaan the plaintiffs provide bridging finance in respect of immovable properties. He is acquainted with Mr Rothmann and he confirmed that the Trust lent and advanced an amount of R 350 000-00 to Rothmann. He has never seen the Offer to Purchase in respect of the property sold by the Broodryks. He instructed second defendant to submit a claim to the Fidelity Fund on the Trust's behalf for payment of the amount of R 386 960-00, and subsequent thereto the second defendant addressed correspondence to the Fidelity Fund for purposes of submitting a claim. The correspondence led him to believe that the claim of Mrs Broodryk had been approved. He admitted not having had any dealings with the Broodryks. During cross-examination he testified that Mrs Broodryk never signed an acknowledgement of debt in favour of the Trust. He agreed that Mrs Broodryk had a valid claim against the Fidelity Fund for the balance due to her and that the claim of the Trust

against

the Fidelity Fund related to bridging finance. He conceded that there is no indication or proof for the contention that the Trust's

claim had been approved by the Fidelity Fund and/or that any money had been paid to the first and/or second defendant in respect of the Trust's claim. He conceded that the Fidelity Fund confirmed in writing that the Trust's claim was not included in respect of the Broodryks claim.

[9] Mr Azar testified that the Trust's claim related to bridging finance. The claim on behalf of Mrs Broodryk was in terms of the Offer to Purchase. Mrs Broodryk should have received R 1,3 million from the sale of her property and in the event an amount of R 227 234-84 was paid to her instead of R 527 234-84, she would have received R 300 000-00 less than what she was entitled to. He stated that he was wrong in earlier correspondence where he indicated that the R 300 000-00 claimed by the Trust was included in Mrs Broodryk's claim, and he confirmed that the Trust's claim was not duplicated in the claim of Mrs Broodryk. He confirmed the recordal in writing by the Fidelity Fund that the Trust's claim was not included in the claim of Mrs Broodryk. He confirmed the Fidelity Fund to have repudiated the Trust's claim whilst approving the claim of Mrs Broodryk.

[10] Mr Losper confirmed the repudiation by the Fidelity Fund of the Trust's claim and confirmed the approval of Mrs Broodryk's claim. He confirmed the approval of Broodryk's claim based on the affidavit and supporting documentation filed by Mrs Broodryk.

[11] It was not in dispute that the plaintiff bears the onus to prove its case on a balance of probabilities. In respect of the pleadings it is trite that pleadings define the issues and that the object of pleadings is to ascertain the issues between the parties.

See: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 C-D.

[12] The very essence of the plaintiffs' cause of action as pleaded is that on 11 September 2018 the Fidelity Fund made payment of the R 300 000-00 based on the plaintiffs' claim to the said Fund (as filed by the defendant). In my view the plaintiffs in this respect failed to prove its case on a preponderance of probabilities. The plaintiffs did not adduce any evidence to prove the aforementioned allegations made in the particulars of claim. The defendants, who did not bear the onus, adduced the evidence of Mr Losper in the employ of the Fidelity Fund. His evidence is clear. The fund received the plaintiffs' claim, considered it and repudiated it. The fund similarly received the claim of Mrs Broodryk. It considered her affidavit and the supporting documentation where after the fund, based on Mrs Broodryk's claim, approved her claim and made payment on her behalf into the trust account of the first defendant. The long and the short thereof is therefore that the Fidelity Fund did not pay any amount into the trust account of the first defendant for or on behalf of the plaintiffs. The allegation

therefore by the plaintiffs that an amount was paid to the first defendant in the first defendant's trust account in lieu of the plaintiffs' claim, is simply not so. The contrary is true, namely that plaintiffs' claim was rejected. The plaintiffs therefore fail or have failed to prove vital allegations in its cause of action.

[13] None of the alternative claims assist the plaintiffs in view of the uncontroverted evidence of Mr Losper. Notwithstanding the second defendant's initial wrong viewpoint that the plaintiffs' claim was included in Mrs Broodryk's claim, I am satisfied that such viewpoint was not only wrong, but definitely not borne out by the proven facts or undisputed evidence of Mr Losper. A breakdown of the calculation of Mrs Broodryk's claim (as contained in paragraph 6 of her affidavit) makes it clear that the amount of R 527 234-84 was due to her. I am in any event in agreement with the submission by counsel for the defendants that the second defendant received a pertinent instruction from Mrs Broodryk to claim an amount of R 527 234-84 from the Fidelity Fund and upon receipt of the relevant amount was bound by the terms of his mandate to pay that amount to Mrs Broodryk. He could not out of his own accord pay any portion thereof to the Trust.

[14] In these circumstances the plaintiffs' claim cannot succeed and stands to dismissed with costs. I believe the same order should be made in respect of the Rule 13 notice issued by the defendants. I therefore make the following orders:

14.1 The plaintiffs' claim is dismissed with costs.

14.2 The defendants' notice in terms of Uniform Rule 13 is dismissed with costs.

C REINDERS, ADJP

On behalf of the applicant: Adv

JW Steyn

Instructed by: Kramer

Weihmann Inc.

BLOEMFONTEIN

On behalf of the first and second

respondents: Adv

JA du Plessis

Instructed by: Ditsela

Incorporated Attorneys

c/o Honey Attorneys

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Prepared on 14 October 2026 · Esheria