

SOUTH AFRICA / JUDGMENT

Mfazi v Z and Z Ngogodo Inc. Attorneys (2023/126346) [2024] ZAGPJHC 985 (2 October 2024) [2024] ZAGPJHC 985

COURT

South Gauteng High Court, Johannesburg

BEFORE

Graves AJ

CASE / FILE NUMBER

2023/126346

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA,

GAUTENG LOCAL

DIVISION,

JOHANNESBURG

Case No.: 2023/126346

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED. Yes

DATE: 2/10/2024

SIGNATURE

In the matter between:

LINDELA

MFAZI

Plaintiff / Applicant

and

Z

& Z NGOGODO INC. ATTORNEYS

Defendant / Respondent

JUDGMENT

GRAVES AJ:

- [1] This is an opposed application for summary judgment. The Plaintiff is an Advocate of the High Court of South Africa registered as such with the Legal Practice Council in terms of the LPC Act, 28 of 2014. The Defendant is a firm of attorneys, notaries and conveyancers with its place of practise within the jurisdiction of this court.
- [2] In his Particulars of Claim the Plaintiff seeks payment from the Defendant in respect of 18 separate instances on which he was briefed by the Defendant to render legal services on behalf of persons represented by the Defendant. The application for summary judgment seeks payment for Claims 2, 5, 7, 8 and 9 (hereafter “the applicable claims”) in the total sum of R75 250,00. Interest is further sought on a variety of other claims which are said to have been paid by the Defendant after the issue of summons.
- [3] In the Particulars of Claim the essential elements of the cause of action is set out:
- [3.1] The Plaintiff was briefed by the Defendant to render professional legal services and/or to appear on behalf of the Defendant (which plainly means on behalf of individual clients).
- [3.2] The Plaintiff accepted the briefs and rendered the services on the basis that he would after rendering these services, submit an invoice for work done and would be paid “within a reasonable time”.
- [3.3] It was an implied, alternatively a tacit term of the agreement (the Plaintiff neglects to state whether the agreement was oral or in writing) between the parties that in all interlocutory applications and in matters dealt with in terms of Section 92 of the Legal Practice Act, 28 of 2014, the invoice would be taxed in terms of the court order by the Taxing Master and the Defendant would pay the Plaintiff the taxed and allowed amounts as agreed and/or taxed as per the Taxing Master’s stamped allocatur.
- [3.4] The Plaintiff submitted invoices and the Defendant subjected the bills of cost for taxation which were taxed and allowed by the Taxing Master in various sums.
- [4] Of the applicable claims in respect of which summary judgment is sought, only Claim 2 is pleaded to have been rendered in terms of Section 92 of Act 28 of 2014.
- [5] During February 2024, the Defendant delivered its Plea incorporating two Special Pleas. The first Special Plea admits that the Plaintiff rendered legal services to the Defendant’s clients as per the brief in respect of each of the claims from 1 to 20, but contends that it had been the practice that the Defendant would only pay the Plaintiff his taxed legal costs following taxation and payment by the principal debtor. The Defendant further says that the Plaintiff has not alleged that its firm has received payment of any of the taxed amounts from the judgment debtor, contending that the amounts claimed are not due and payable because the taxed fees have not yet been executed on by the Sheriff, alternatively paid by the judgment

debtor. The second Special Plea concerns a contingency fee agreement relied upon by the Plaintiff which does not apply to the applicable claims. In its Plea the Defendant deals with each of the amounts claimed in the Particulars of Claim, denying liability in respect of the applicable claims in, and repeating that as payment has not received from the judgment debtor the Defendant is not obliged to pay the Plaintiff. The Defendant's affidavit resisting summary judgment essentially conforms with its Plea. It adds some important detail regarding payments of claims 2 and 5, made after the delivery of the Defendant's plea on 21 February

2024. More about these payments, below.

[6] Counsel for the Plaintiff, Mr Nodwangu filed heads of argument dealing with the claim and the defences and represented the Plaintiff in argument. Mr Mashao, an attorney in the service of the Defendant similarly filed heads of argument and represented the Defendant in argument.

[7] Before dealing with the claims and defences on what I regard as the substantive issues I dispose of a preliminary contention raised on behalf of the Plaintiff:

[7.1] the Plaintiff maintains that the claims in respect of which summary judgment is sought are "due and payable" because, in accordance with Section 12(1) of the Prescription Act 68 of 1969 prescription starts to run when a debt is due. In the heads of argument it is said that, in accordance with SCA authority a debt is due when it is claimable by the creditor. During argument it became clear that the Plaintiff maintained that a debt which is due and payable must be paid forthwith, irrespective of any defence raised; [1]

[7.2] this judgment quoted is not authority for the contention advanced. The Court was there dealing with the effect of the period in the Prescription Act, after which a debt will become unenforceable. This Act does not apply in circumstances such as the present, where a creditor contends that an invoice is payable, but this is disputed by the debtor. The Prescription Act does not serve to create or supplement a cause of action based upon a contractual entitlement.

[8] I turn now to consider the principal points of dispute in the summary judgment application.

The agreement regarding fees (claims 5, 7, 8 and 9)

[9] For these claims the Plaintiff does not rely upon Section 92 of the Legal Practice Act. All of these claims are alleged in the Particulars of Claim to have involved interlocutory proceedings, which is not disputed by the Defendant. My understanding based on the papers before me is that the Plaintiff conducts practice as an Advocate by rendering legal services in expectation of a fee as contemplated by the Legal Practice Act and only upon receipt of a brief from an attorney. [2]

[10] Fairly understood, the Plaintiff's Particulars of Claim describe his claims as being based upon an agreement concluded with the Defendant which entitles him to payment of monies due for various invoices rendered by him to the Defendant for professional services

rendered, and also for fees due pursuant to bills of cost taxed and allowed by the Taxing Master. [3] Despite rather clumsy formulation, I read this to reference two different forms of agreement. The first form concerns fees rendered for which the Taxing Master has issued an allocatur. In these instances the Plaintiff alleges he would be paid within a reasonable time after taxation. The second form of agreement relies directly upon Section 92 of the Legal Practice Act which expressly permits recovery, in certain circumstances of legal services rendered for free (pro bono) but in respect of which costs have been taxed (which I deal with the following section of this judgment).

[11] In the Plaintiff's affidavit in support of his application for summary judgment he relies for the claims under the above header on the effect of the Taxing Master's allocatur, in combination allocatur, in combination with being in receipt of a brief respect of the matters for which he claims fees. He postulates that the allocatur is a liquid document which has the effect of a court order. He repeats that a letter of demand and then the summons served on the Defendant, rendering the amounts claimed due and payable. He disputes that non-payment by the judgment debtor has the effect of staying payment.

[12] Amongst the numerous reasons advanced by the Defendant in its opposing affidavit it (somewhat elliptically) references the legal nature of an allocatur, but restricts this point to the contention – correct in the event – that taxed fees in all cases belong to the individual

clients of the Defendant. [4] Further, it is contented that (i) the matters under this section were interlocutory proceedings where no capital of payments

had been made to the client, and that (ii) taxed fees are recoverable from the judgment debtor. When writing this judgment I had some residual concern about the agreement relied on by the Plaintiff. If the agreement relied upon contemplates an arrangement between the parties that the Plaintiff would be paid a fee as allowed on taxation, then in the absence of a contingency arrangement this would contravene Regulation 32.2 of the Code of Conduct Gen N 168 of 2019: PART V, promulgated in accordance with Legal Practice Act 28 of

2014. There is however no clear indication on the papers before me that such an arrangement exists and I consequently say no more

about this.

[13] In my view the Plaintiff has failed properly to appreciate the legal basis of these claims, and of the defences:

[13.1] the purpose of taxation is twofold: first, to fix the costs at a certain amount so that execution can be levied on the judgment, and second, to ensure that the party who was condemned to pay the costs does not pay excessive costs and that the successful party does not receive insufficient costs; [5]

[13.2] this is reinforced by Uniform Rule 70(4) which prohibits the taxation of a bill of costs unless the Taxing Master is satisfied that the party liable to pay the costs has received due notice; [6]

[13.3] to the extent that taxed a bill of costs constitutes a liquid document for summary judgment purposes (which I doubt)[7], the bills in question are not liquid documents in favour of the Plaintiff. The Plaintiff has failed to appreciate that any exigible right that flows from an allocatur accrues to the successful party (the client of the Defendant) in each litigious cause in which he was engaged as counsel;

[13.4] even if the Plaintiff was correct in his reliance upon his entitlement to payment consequent on taxation of the bills (which is not the case) his contention that an allocatur has the effect of a court order, is incorrect. The allocatur only constitutes proof of the amount of the debt and does not prove the indebtedness; [8]

[13.5] the Plaintiff is also mistaken that a demand for payment and the issue of summons has the effect of rendering payment in respect of a taxed bill of costs, due and payable. As indicated above this arises from a misplaced reliance upon the Prescription Act.

[15] In effect, the Defendant maintains that the agreement with the Plaintiff was that payment in respect of services rendered for which a bill had been taxed would only be made once payment in respect of the taxed costs was recovered from the judgment debtor. The Defendant disputes the agreement as alleged by the Plaintiff, including disputing the term relating to payment within a reasonable time. It further deals in its plea and affidavit with the specific bills in respect of which the Plaintiff seeks summary judgment, providing reasons why the amounts claimed are not payable. I do not need to consider these further reasons in any

detail. The Defendant's affidavit alleges that payment of the fees for claim 5 was subsequently made on 20 May 2024. Some

documentary evidence is attached which is not entirely clear, but the allegation of payment cannot be ignored.

[16] It is clear from the foregoing that there is a clear dispute of fact regarding both the existence of an agreement regarding payment of the Plaintiff's fees and the contractual terms, which cannot be resolved except through the hearing of oral evidence. Although the Defendant's affidavit resisting summary judgment raises some extraneous grounds for non-payment which are dubious, the essential defence that is raised concerns the agreement with the Plaintiff. What is set out by the Defendant fully discloses the nature and grounds of the defence and the material facts relied on (see Rule 32(3)(b)). Further, and for the reasons set out above the Plaintiff has fallen short in identifying a sustainable cause of action, as implicitly required by Rule 32(2)(b).

[17] The Plaintiff cannot succeed in obtaining summary judgment on these claims.

The claim in terms of Section 92 of the Legal Practice Act

[1] Standard Bank of South Africa Ltd v Miracle Mild Investments 67 (Pty) Ltd 2017

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- [1] SA 185 (SCA) para [24].
- [2] Regulation 27 of the Code of Conduct Gen N 168 of 2019 PART V, promulgated in accordance with the Legal Practice Act.
- [3] Particulars of Claim (“POC”), para 5.
- [4]
- [5] *Mouton & another v Martine* 1968 (4) SA 738 (T) at 742 A-C.
- [6] *Turnerland Manufacturing v Taxing Master*, WC High Court 2024 (1) SA 517 at para [32].
- [7] In *Gluckman v Winter* 1931 AD 449 the Court found that a claim based upon a taxable of costs assumes that there has been a proper mandate, which is a matter determined by a court and not by the taxing master. In *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* 1939 WLD 159, a judgment dealing with provisional sentence it was said that a taxed bill cannot be elevated to the position of a judgment of a Court, regarding the bill as a judgment not only on the amount of the debt, but also on the essence of the liability itself- at 166; followed in *Dyason v Main Pretoria Road Properties (Edms) Bpk* 1977 (3) SA 177 (T) at 179 E-H.
- [8] *Martens*, above at [164].
- [9] For example, where a court makes an order that costs are to be paid de bonis propriis, for example, by a legal practitioner or by the representative of a legal entity.
- [10] See Regulation 32.2 of the Code of Conduct for all Legal Practitioners, above. The Defendant does not in its plea of affidavit
- resisting summary judgment, dispute the Plaintiff’s reliance on Section 92.
- [11] In this case, the Defendant as attorney.
- [12] *Floridor Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878 A.
- [13] *Tumileng Trading v National Security and Fire* 2020 (6) SA 624 (C) at para [15].
- [14] D1 Rule 32-6.
- [15] Compare: *Johannesburg City Council v Television & Electrical Distributers* 1997 (1) SA 157 (A) at 177 D-F.
- [16] *ABSA Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268 I-J.

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Prepared on 10 October 2026 · Esheria