

SOUTH AFRICA / JUDGMENT

Michael Brian Snoyman & Associates v Land Investments (Pty) Limited (A5005/2000, 99/4995) [2000] ZAGPHC 1 (13 June 2000)

[2000] ZAGPHC 1

COURT

High Courts - Gauteng

BEFORE

N.P. Willis, P.J. Schabert, M.B. Labe

CASE / FILE NUMBER

A5005/2000, 99/4995

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IN THE HIGH COURT OF SOUTH AFRICA(
WITWATERSRAND LOCAL DIVISION)

Johannesburg

DATE: 13 /

06 / 2000

CASE NO:

A5005/2000; 99/4995

In the matter between:

MICHAEL BRIAN SNOYMAN &
ASSOCIATES

And

LADD INVESTMENTS (PTY) LIMITED

JUDGMENT

WILLIS J:

This is an appeal against the dismissal, with costs, of an application brought by way of notice of motion, for the payment of fees allegedly due to the appellant .

The appellant claimed payment of R76 950,62 in respect of outstanding fees and disbursements arising from professional services rendered by the appellant in its capacity as attorney to the respondent in the course of litigation.

The appellant also claimed interest a tempore morae and costs. The appellant claimed the aforesaid by way of motion proceedings. The matter came before Kruger AJ who dismissed the application with costs. Kruger AJ also dismissed the appellant's application for leave to appeal with costs. The appellant's petition to the Supreme Court of Appeal was successful. The Supreme Court of Appeal granted leave to appeal and directed that the appeal be heard by the full bench of this division.

It is common cause that Mr Brandi, the sole shareholder and director of the respondent instructed the appellant to act for the respondent in acrimonious litigation involving separate cases with a certain Mr Winterstein and a company with which he, Mr Winterstein was associated, namely Aucor (Pty) Ltd. The entire dispute became settled.

It is clear that the appellant sent the respondent regular statements of account reflecting fees charged and disbursements in respect of this litigation. It is also clear that on a regular basis the respondent made part payments in reduction of the account. It seems that the respondent had a particular affinity for paying amounts of R20 000 at a time. In October 1998, the outstanding balance on the account was, in round figures, R180 000. This was the largest amount outstanding at any one time.

There are disputes of fact between the parties as to what occurred and what was agreed between the parties once the respondent had protested about the fees in response to the appellants persistent requests and, eventually, demands that the outstanding balance be paid. The normal principles relating to disputes of fact in motion proceedings must obviously apply.

There is a dispute of fact as to whether or not the respondent agreed to pay the balance outstanding on the account. There is a dispute as to whether or not the respondent's periodic payments were in respect of disbursements only or included payment for the appellant's fees. There is furthermore a dispute as to whether or not the appellant's fees were fair and reasonable.

The respondent has claimed that the appellant should have its fees taxed in a bill of costs. The appellant avers that this is unnecessary in the circumstances.

The disputes of fact are narrow. In the event that there was not an agreement to pay the fees, the failure by the appellant to have a bill of costs taxed prior to the institution of the proceedings may be significant.

On the basis of the decision in *Kalil vs Decotex (Pty) Ltd and Another* 1988 (2) SA 943 (A) esp. at 981D-982C, the Court a quo, in my view erred in not referring these issues to viva voce evidence and the Court a quo erred in deciding disputed matters on the affidavits. See *Mahomed vs Malk* 1930 TPD 615 at 619 where the following is said:

"Where the question at issue is, as in this case, whether a certain statement was made by the debtor to the creditor, in my opinion it is not sufficient that on the affidavits the balance of probabilities is in favour of the creditor's version. The Court must be satisfied that a viva voce examination and cross-examination will not disturb this balance of probabilities, before making an order for sequestration on the affidavits."

Accordingly, in my view the appeal should succeed. In regard to the costs in the Court a quo, these in my view should stand over for determination by the Court which hears the matter, when oral evidence is led.

I propose that the following order be made:

The appeal is upheld;

The order of the Court a quo is set aside and the following is substituted therefor:

“

(a) The application is postponed to a date to be arranged with the registrar of this division for the hearing of viva voce evidence.

(b) The issues to be resolved at such hearing are:

(i) Whether the payments made by the respondent to the appellant were made in respect of fees and not for disbursements;

(ii) Whether, by reason of the allegations set out in the affidavits (other than those relating to an alleged agreement to pay the fees declared by A.N. Goodman SC Esq. to be reasonable) the respondent agreed to pay the fees of the appellant.

The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any witness unless-

it has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of the evidence.

Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not. The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned. Within 30 days of the making of this order each of the parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are, or have at any time been , in possession or under the control of such party.

Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents shall be operative. In addition to the aforesaid, the Court which hears such viva voce evidence shall decide, on the basis of the evidence referred to in paragraph (b) above, whether or not the appellant was obliged to have a bill of costs taxed in respect of its fees prior to launching the application in the Court a quo.

The costs of the hearing of the application before Kruger AJ are to be determined by the Court which hears the postponed application.”

- (3) The respondent is to pay the costs of the appeal, including the costs of the application for leave to appeal.

DATED AT JOHANNESBURG THIS 13th DAY OF JUNE, 2000.

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

P.J.SCHABORT

I agree.

M.B. LABE

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