

SOUTH AFRICA / JUDGMENT

Mkansi v Legal Practitioners Indemnity Insurance Fund (61050/21) [2022] ZAGPPHC 1019 (8 December 2022) [2022] ZAGPPHC 1019

COURT

North Gauteng High Court, Pretoria

BEFORE

Khwinana

CASE / FILE NUMBER

61050/21

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION:
PRETORIA)

Case

No. 61050/21

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

NO

08

December 2022

MN

MKANSI

APPLICANT

AND

LEGAL

PRACTITIONERS INDEMNITY INSURANCE FUND

RESPONDENT

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] This is an application to declare the respondent liable and that the respondent be ordered to pay costs of this application including costs of:
- (a) Wasted taxed costs against the applicant in respect of the trial date of the 27th day of August 2020;
 - (b) Any cost order made against the applicant under case number 15088/2015, and;
 - (c) Any future costs order that may be made against the applicant under case number 15088/2015. That the respondent be declared liable under case number 15088/2015 and to the extent provided in the respondent's policy document of 2012 and costs of this application.
- [2] The respondent is opposed to the application and has raised points in limine.

BACKGROUND

- [3] The applicant is a practising attorney as such under the name and style MN Mkansi Inc at 23 Dieperink Street, corner of Meyer Street Roodepoort, Gauteng Province. The respondent is a non-profit company established in terms of section 40A and 40B of the Attorneys Act 53 of 1979. The purpose of its establishment is to provide insurance cover in respect of claims that may arise from professional conduct of such attorneys.
- [4] The purpose of this application is to declare the respondent liable to indemnify applicant against a claim pending under case number 15088/2015 against the applicant. The applicant says on the 27th of February 2015 he received the summons in which a claim of R 3 120 000.00 was instituted against him for professional negligence based on a prescribed claim of the Road Accident Fund. He says on the 14 April 2015 he notified the respondent of the claim. He says the allegation is that the professional negligence arose in August 2009, alternatively on 25 February 2012 when the lodgement period prescribed alternatively on 11 March 2015 when summons were served on him.
- [5] The applicant says the respondent through Mr Mavundla Mhlambi sent him a fidelity claim form, self-assessment questionnaire and requested his fidelity fund certificate for that year. The applicant says on 28th April 2015 he sent the completed forms. The applicant says he was advised to communicate when the claim reaches stage of the Notice of bar and that all pleadings must be forwarded to Mr Mhlambi Mavundla. The applicant says in avoidance of a default judgment he served a plea and a copy was sent to the respondent.

- [6] The applicant says he became weary as the respondent had still not acted in the matter, he says he sent letters requesting that the respondent act promptly and he also telephoned the respondent wherein he was advised that they are busy processing the claim and he should continue to send all documents in the matter. The applicant says on the 08th June 2016 the applicant says he telephoned Mr Mavundla who informed him that he has not been receiving correspondence as his email has not been working and he informed him that he intended to appoint a legal practitioner as there was no action on their side.
- [7] The applicant says he was requested documents again that he sent via courier services to the respondent. The applicant says he brought a rule 13 notice against the respondent and they filed an opposition to the effect that applicant was carrying business in different names at different times and that they do not know which to cover. The applicant says he replied that at the time of prescription he was using the name and style of Mkansi and Associates although his fidelity fund certificate reflected the names Mkansi Attorneys.
- [8] The applicant says he was insured as an attorney. The respondent was saying he was not co-operating with their legal representatives. The applicant says he was unable to meet the legal representative due to him having to rush his mother for medical attention from Limpopo to Gauteng who subsequently passed on. He says this was communicated to the legal representatives. The application for rule 13 notice was dismissed with costs as the applicant is missed diarised.
- [9] The main matter was set down for 27th day of August 2020 and the applicant says he requested a postponement and tendered wasted costs. He says he paid the sum of R 74 748.87 to minimize the costs. The applicant had sent the bill of costs to the respondent and was met with a response that the matter is res judicata. On 13 August 2021, the applicant says he requested mediation and the respondent reiterated that the matter had been dismissed in 2017.
- [10] The applicant says the respondent's policy forbids him to engage in settlement negotiations which according to him would mitigate the loss. The applicant attributes the failure to timeously indemnify him to the respondent thus costs in the matter under case number 15088/2015. The applicant submits that the establishment of the respondent was to find a reason to indemnify than to repudiate legal practitioners' claims. The applicant relies on paragraph 6.5 of the policy document.
- [11] The respondent in reply says it opposed the notice to be joined on the basis that it was entitled to repudiate the insurance claim. The repudiation was according to clause 6 of the policy. On the 21 November 2017 the application for joinder was dismissed. The first defence is that the applicant's claim has prescribed. The respondent says the applicant's claim for specific performance that is indemnification in terms of insurance policy commenced to run on 24th April 2015 which accordingly prescribed by no later than 23 April 2018. The applicant opines that his claim for indemnity did not arise before the sum of money became due and payable by him to a third party.

[12] The second defence is that the relief sought is res judicata in that the applicant claims cover for R 3102 500.00 whereas he is entitled to no more than R 1562 500.00 and that the application for joinder under case number 15088/2015 the respondent was entitled to repudiation on the basis that applicant had not complied with clause 6.4 of the policy. The respondent says the relief sought is the same as that was envisaged with the Rule 13 notice. It has been submitted as common cause that that application was dismissed. The applicant has not challenged the decision by means of an appeal or otherwise. The respondent says the conduct of the applicant shows that he accepted the order to dismiss the application for joinder and thus he paid costs. The applicant says he took advice from two counsels which respondent opines is wrong not to challenge the Rule 13 dismissal as the actual loss had not yet arisen.

[13] The third defence is that of non-compliance with clause 6.4 of the policy which states that

“ Any dispute or disagreement between the insured and the insurer as to any matter arising out of or in connection with this policy, shall be referred for a final decision to a senior counsel or senior practitioner agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured and the costs incurred in so referring the matter shall be borne by the unsuccessful party”

[14] The respondent says that the applicant’s claim was repudiated on 5th October 2016 and the applicant did not invoke the provisions of clause 6.4 of the insurance policy to date. The respondents submit that without same being exhausted this court is not legally competent to grant the order sought.

LEGAL MATRIX

[15] Section 77(1), (2) and Section 84 (1) of Legal Practice Act[1] governs the existence of the respondent and before the LPA it was section 40A and 40B of the Attorneys Act.[2] Section 77 (1) of the Act provides the statutory framework for the continued existence of the company as the vehicle through which professional indemnity insurance is provided for practising attorneys and advocates who practice with

Fidelity Fund certificates (FFC’s) in terms of section 34 (2) (b).The limited liability insurance cover is provided to legal practitioners that operate a trust account and only a single annual insurance premium must be paid to the respondent. The legal practitioner must be in possession of a fidelity fund certificate to have insurance cover.

[16] In terms of section 12 (1) of the Prescription Act 68 of 1969 “prescription shall commence to run as soon as the debt is due. Section 12(3) states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debts arises provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.

[17] In terms of section 6. (I)[3]

If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

[18] In terms of section 173 of the Constitution[4] “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

[19] in terms of the master policy published in the Risk Alert Bulletin dated May 2019 the dispute resolution is outlined as follows: “Subject to the provisions of this policy, any dispute or disagreement between the Insured and the Insurer as to any right to indemnity in terms of this policy, or as to any matter arising out of or in connection with this policy, must be dealt with in the following order: a) written submissions by the Insured must be referred to the Insurer’s internal complaints/ dispute team at disputes@lpiif.co.za or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the Insurer which has given rise to the dispute; b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the Insurer of the submission referred to in a), then the parties must agree on an independent Senior Practitioner who has experience in the area of professional indemnity insurance law, to whom the dispute can be referred for a determination. Failing such an agreement, the choice of such Senior Practitioner must be referred to the Chairperson of the Legal Practice Council to appoint the Senior Practitioner with the relevant experience; c) the parties must make written submissions which will be referred for determination to the Senior Practitioner

referred to in b).”

ANALYSIS

[20] The applicant instituted the claim against the institution as required in terms of the act. The applicant was requested to complete a questionnaire which he did and faxed the documents back to one Mr Mhlambi Mavundla. He was further requested that he must keep the respondent abreast of all the developments in the claim and fax all information to the respondent. According to the applicant, he kept the institution abreast of the developments in the matter and furnished them with all the pleadings.

[21] There is no allegation that he instituted the claim out of time, nor that he did not complete the questionnaire properly nor that he did not provide the required information at the time he submitted his claim. It is evident that the applicant had done what was required of him by Mr Mhlambi of the respondent. The applicant is a legal practitioner who had a fidelity fund certificate as of the date of the alleged incident.

[22] Mr Mavundla Mhlambi to whom the documents were being sent requested for the documents to be resent despite that his fax number had remained unchanged. The said Mr. Mavundla told the applicant his fax was not working. The respondent has failed to address this issue, in the opposing affidavit or in the confirmatory affidavit of the said employee Mr Mhlambi.

[23] The applicant says that he entered an appearance to defend the matter in an effort to ensure that judgment is not taken against him. He further says he notified the respondent through the fax of Mr Mavundla Mhlambi. The respondent did not reply and there is no evidence as to what was the situation at the respondent's offices. What is evident is that the applicant wrote countless

letters to the respondent in an effort to confirm the status of his claim. It is concerning that there was no timeframe within which the respondent was to reply to the applicant. According to the counsel for the respondent, the applicant was not supposed to do anything but wait for the respondent indefinitely. This is unfair to the applicant who is faced with a claim of over R 3 million and must wait without any communicate whatsoever from the respondent. It is imperative to also note that the amount that the respondent provides insurance coverage is less than the amount that was claimed against the applicant.

[24] The applicant's claim was lodged timeously and the prudent thing to do was to either accept or repudiate the claim. The respondent waited until a rule 13 notice was instituted against them. It is so that both the applicant and the respondent missed the date of the hearing. It is unfortunate that the rule that was applied for the absence of the respondent was not similarly applied to the applicant when he also missed the court date. It was opportunistic of the respondent to have the matter dismissed taking into account that they themselves were in the same boat at some point.

[25] The respondent says that the matter has prescribed. The decision that has been quoted by the applicant's counsel says the SCA's[5] found that "To conclude, a claim for indemnification insurance under an insurance contract can only arise when liability to the third party in a certain amount has been established. The debt, for purpose of prescription, therefore, becomes due when the insured is under a legal liability to pay a fixed and determinate sum of money. Until then a claim for indemnification under the policy does not exist, it is only a contingent claim. In Magic Eye's[6] the court was approached for a declaration concerning the obligation of Santam to indemnify it in the event of imperial establishing

liability has thus not prescribed, the court held that prescription has not even begun to run. Court held that Santam's special plea ought to be dismissed.

- [26] The facts herein are almost similar in that the respondent is an insurance company against a third-party claim in respect of legal practitioners. The amount that must be paid by the applicant has been determined in relation to the allocator the date thereof being the 23rd of June 2021. This is part of the claim against the applicant, however, the other claim that is yet to be determined is that of the main claim as it is not conclusive that whatever amount that the applicant has been sued will be the amount that will be pronounced by the court.
- [27] The second point in limine raised is that of res judicata[7] which is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again[8]. In casu, the applicant is forcing the respondent to honour their obligations as per their contract. The matter is between the applicant and the respondent only. The cause of action is premised on a contract that the applicant and the respondent have entered into by virtue of the applicant being a legal practitioner who had a fidelity fund certificate and the respondent being the insurance company that provides the cover to the legal practitioner. The application in terms of Rule 13 is premised on joining a third party to a claim. The claim that I am ceased with is not an interlocutory proceeding nor is it premised on Rule 13[9]. This matter is not similar to what was before my sister Justice Van Niewenhuizen. The two notices of motion differ materially as the one seeks for the respondent to be joined to a claim as a third party whereas the applicant is the defendant whom a cost order has been granted against. In casu the applicant seeks a declaratory order[10] that the respondent is liable to pay the determined amount in terms of the allocator and any future amounts. This matter is therefore not res judicata.
- [28] The third point in limine is that of non-compliance with clause 6,4 of the policy. Clause 6.4 states that “Any dispute or disagreement between the insured and the insurer as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, shall be referred for a final decision to a senior counsel or senior practitioner agreed upon between the insured and the insurer or failing such agreement, nominated by the president of the statutory law society having jurisdiction over the insured and the costs incurred in so referring the matter shall be borne by the unsuccessful party”
- [29] The applicant says he requested mediation and the respondent refused. It was prudent upon the parties to have the matter referred to a senior counsel or practitioner by agreement failing which the President of the Law Society with the jurisdiction over the member would nominate the senior counsel or senior practitioner. This clause is obviously outdated as it speaks of the law society President whereas it should be the Legal Practice Council and the Chairperson. The clause does not depict the timeframe within which clause 6.4 provisions have to be invoked neither does it say which of the parties should refer the matter. It is not

in dispute

that same had not been adhered to by both parties. There is also another clause 2.7 which says the matter must be referred to the

President of the Law Society. These two clauses are obviously in conflict with each other. It is evident that the lacunas and the

ambiguity in the two clauses have been amended over the years.

[30] Counsel for the applicant opines that Cape Concentrate[11] does not find application in this matter as in the said matter it related to an exception and also says the respondent in casu is not seeking an application to stay the proceedings pending the determination of the claim. In terms of section 6 of the Arbitration

Act an application to stay the proceedings must be brought or a special plea must be pleaded. In casu the respondent has filed a special plea as a last resort in their defence. The applicant relied on *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) Sa 301 (D) at 305E-H. The parties have not requested that this matter be referred for arbitration in fact both parties attended this matter requiring the court to make a finding. Counsel for the applicant submits that the respondent used clause 6.4 as the last resort however, even though it has been alluded to as a point in limine the order the respondent seeks is that of the matter to be dismissed for failure to refer it in terms of clause 6.4.

[31] It is imperative to consider the history of this matter. However. It is so that where there exists a contract between parties and there is an alternative dispute resolution same must be adhered to. What is concerning in this matter is the communication between the parties wherein the respondent is adamant that the claim by the applicant has prescribed and that the decision was not merely

based on one aspect but all the issues were considered for the repudiation to be granted. The applicant is an attorney who practiced

with a fidelity fund certificate as required to have insurance cover by the respondent. The issues regarding the negligence of the applicant to have the matter prescribed and surrounding issues have been alluded to by the parties and I have chosen not to articulate same for reasons that I will allude to.

[32] The issues that have been raised by the respondent in relation to why the claim of the applicant has been repudiated are such that they can be raised before the senior legal practitioner to be nominated by the Chairperson of the Legal Practice Council. This will allow the applicant to counter the issues and in the event the matter has to be referred to court for litigation all the facts will have been canvassed. This court has been requested to make a declaratory order on an amount that has been determined and future

amounts. This matter arises from that repudiated claim which is subject to a dispute resolution. These issues are such that it will be proper to have this matter referred to a senior legal practitioner who will be able to look at the policy requirements and the issues raised in order to determine whether the applicant can be indemnified. The arbitration process will be costly for the parties and might take longer. I have considered all these issues and I do not believe that both parties have been able to furnish enough information to avoid the provisions of clause 6.4. The ADR allows the process to be reviewed. I do not think it will be proper for this court to jump the ADR.

[33] The parties have not applied for the application to be stayed pending referral to the senior legal practitioner. However, it is in terms of the contract between the parties and it will be in the interest of justice^[12] that the provisions of clause 6.4 be invoked. It is evident that the parties are in dispute and it will no longer be in the interest of justice that the process be stalled further by saying they must agree on the appointment of the senior practitioner. The applicant does not trust the process and this cannot be encouraged. I am therefore inclined to have the matter referred to the Chairperson of the Legal Practice Council who will nominate a senior legal practitioner on a pro bono basis in order to save costs for both parties. Practitioners are expected to provide a service on pro bono basis in terms of the Legal Practice Act.

[34] In result, I make the following order:

1. The application is stayed pending the appointment of the senior legal practitioner on pro bono basis by the Chairperson of the Legal Practice Council within a period of fourteen days of this order.
2. That the matter be dealt with within a period of two months from the appointment of the senior legal practitioner by the Chairperson of the Legal Practice Council.
3. That the parties serve this order on the Legal Practice Council's Chairperson.
3. Costs are reserved.

I have considered the draft order and I have amended it and I make it an order of court.

ENB KHWINANA

ACTING JUDGE OF NORTH GAUTENG

HIGH COURT, PRETORIA

APPEARANCES:

APPEARANCES FOR THE APPLICANT: ADVOCATE PG LOUW

INSTRUCTED BY: MN MKANSI INCORPORATED

FOR THE RESPONDENT: ADVOCATE GF HEYNS SC

INSTRUCTED: SWART REDELINGHUIS NEL & PARTNERS

DATE OF HEARING 08 SEPTEMBER 2022

DATE OF JUDGMENT 08 DECEMBER 2022

- [1] Act 28 of 2014 (as amended)
- [2] Act 53 of 1979 (as amended)
- [3] Arbitration Act 42 of 1965
- [4] Constitution of RSA
- [5] Magic eye Trading 77 CC v Santam Ltd (775/2018) [2019] ZASCA 188 (10 December 2019)
- [6] Magic eye Trading 77 CC v Santam Ltd (775/2018) [2019] ZASCA 188 (10 December 2019)
- [7] In his judgment, van der Westhuizen J discussed the requirements for a successful reliance on the doctrine of res judicata, namely: ‘(i) same parties (the parties are the same); (ii) the same cause of action (the invalidity of the 1998 patent); (iii) the same relief (the revocation of the 1998 patent); and (iv) a final judgment (the [SCA] judgment)’ and ‘[certifying] that all the claims of the 1998 patent are valid in accordance with s 74 of the [Patents] Act’. In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC).
- [8] *Dr.Subramanian Swamy V State of Tamil Nadu & Ors.* Citation; AIR2014 SC460
- [9] Uniform Rules Of Court
- [10] *Democratic Alliance v Brummer* (793/2021) 2022 ZASCA 151
- [11] *Cape Concentrate v Pagdens Incorporated* case no. 2338/2019 delivered 10 May 2022
- [12] Madlanga J said “Courts may regulate their own process taking into account the interest of justice. What justice requires will depend on circumstances of each case” in *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) para 67-8

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