

SOUTH AFRICA / JUDGMENT

Mohale v Road Accident Fund (7257/2019) [2022] ZALMPPHC 38 (14 July 2022) [2022] ZALMPPHC 38

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

7257/2019

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE NO: 7257/2019
REPORTABLE: YES/NO
OF INTEREST TO OTHER
JUGDES: YES/NO
REVISED.

In

the matter between: MATOME
JEALOUS PITSO MOHALE
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGEMENT

KGANYAGO J

[1] On 18th May 2022 advocate Mojamabu appeared for the plaintiff in case number 6476/2018 in the matter between Advocate Brian Ramotlane Matlhape v Road Accident Fund. In that matter advocate Mojamabu wanted to hand in an expert affidavit of one doctor Peter Tingini Kumbirai which was only signed but not commissioned or affirmed. Advocate Mojamabu informed the court that according to the instructions from his instructing attorney, doctor Kumbirai does not believe in taking oath. However, it was brought to the attention of advocate Mojamabu that this court has already seen the affidavits of doctor Kumbirai in other matters in which his expert affidavits were

signed and commissioned. However, on that date the court could not remember the specific files in which those affidavits have been

filed. The court rejected to accept the expert affidavit of doctor Kumbirai as it was neither commissioned or affirmed, and proceeded to grant a default judgment on the basis of other expert affidavits.

[2] On 6th June 2022 Mr Mphahlele appeared in the current matter of Mr Mohale and handed in the expert affidavit of doctor Kumbirai which was signed and commissioned, and informed the court that doctor Kumbirai believes in the taking of an oath. Since there were two conflicting versions of whether doctor Kumbirai believes in the taking of oath or not, the matter was postponed to 1st July 2022 for doctor Kumbirai to come and clarify the court on that issue. Advocate Mojamabu was also invited to attend court on that particular date.

[3] On 1st July 2022 doctor Kumbirai attended court, took an oath and testified. Advocate Mojamabu also attended court. Doctor Kumbirai testified that he believes in the taking of an oath. He conceded that the signatures on the two affidavits of which one was only signed but not commissioned, and the other signed and commissioned were both signed by him. He stated that the way he signs and commission affidavits is that he determines whether they were urgent or not. If the affidavits were not urgent, he will let them pile and an attorney whom he is having an arrangement with, will later come to his practice and assist him in commissioning the affidavits. That if the affidavit was urgent, he will sign and commission it immediately. He stated that in relation to the affidavit Maphosa, the commissioner of oath might have missed it when he commissioned other affidavits.

[4] Under cross examination by advocate Mojamabu, doctor Kumbirai conceded that the affidavit that was not commissioned, was sent to his practice by Shiviri Manzini Masetla INC attorneys on 10th May 2021 by email. Further that in that email he was requested to have the affidavit signed and commissioned, and that he was further

informed that the matter has been set down for trial on 16th May 2022. When it was put to the doctor that on the date of collection of the affidavit, his secretary had informed the messenger from Shiviri Manzini Masetla INC attorneys that he does not believe in the taking of an oath, he stated that the said messenger should have verified with him. He denied that he had told anyone that he does not believe in the taking of an oath.

[5] Musa Moses Chabalala testified under oath. He testified that he is a messenger at Shiviri Manzini Masetla INC attorneys. On 12th May 2021 he was sent to Pretoria to take one of their clients for assessment, and also to collect an expert affidavit from doctor

Kumbirai's practice. On arrival at his practice, the receptionist gave him an envelope that contained the affidavit. When

he checked the affidavit he found that it was only signed but not commissioned. He enquired from the receptionist why it was not

commissioned, and the receptionist told him that the doctor does not commission affidavits. He took the affidavit and left. Again on 24th May 2021 he went to Kumbirai's practice where he collected another expert affidavit in relation to Monareng's matter. That affidavit was also only signed by doctor Kumbirai and not commissioned. Under cross examination by Mr Mphahlele the witness

conceded that on both occasions that he had visited doctor Kumbirai's practice, he did not see the doctor, and also that the doctor did not say anything to him.

[6] In this case the issue is about the conduct of the legal practitioner who is an officer of the court. No one can be compelled to take an oath if he/she does not believe in taking an oath. If that person does not believe in taking an oath, he/she may make an affirmation if he/she wanted his/her evidence to be admitted in court. If the document was only signed, but not commissioned or affirmed that document will not be admissible as affidavit, but as a mere statement.

[7] The issue before me is not whether doctor Kumbirai should have commissioned or affirmed the affidavit, but the version been put before court by counsel for the plaintiff which seems to be misleading the court. Legal practitioners are officers of the court and are expected to act in an ethical manner at all the times and not to deceive the court. They are therefore expected to act with integrity and honesty at all times. A high standard of professionalism is expected of them at all times, and that standard will in no way be compromised.

[8] In Pretoria of Society of Advocates v van Zyl[1] it was held that the proper administration of justice relies heavily on the ipse dixit of advocates and attorneys. It was further held that whilst a legal practitioner owes a duty to represent his or her client fearlessly

and vigorously, there is a concomitant, equally important, duty as an officer of the court to serve the interest of justice by acting honesty at all times.

[9] For the 2nd term of 2022 I have been in the civil trial roll I have observed a practice that have developed where expert affidavits that have not been properly commissioned been filed in most of the files that were on the roll for trial. In some instances, an expert will sign his/her affidavit in another town on a different date, and that affidavit will be commissioned in another town on another date and not the same date it was signed by the expert. In some of the affidavits the commissioner of oaths will commission copy

of an affidavit which seems to have been faxed, and the possibility is that the expert was not present when the affidavit was commissioned. In one matter, the plaintiff's attorney stated under oath that the expert affidavit was signed by his paralegal who pretended to be the expert. In those matters I have rejected to accept the affidavits as evidence as they have not been properly commissioned, and the counsel did not attempt to deceive the court, but have conceded that they were not properly commissioned. However, in the one signed by the paralegal, I have found an element of dishonesty and referred the matter to the Legal Practice Council for their investigation.

[10] In the case at hand, doctor Kumbirai's testimony was not satisfactory, the unsigned affidavit had three questions which the commissioner of oath had to ask him before he appended his signature. There are no answers which have been recorded on the three questions, which in my view, there is a possibility that they were never asked, or that there was no commissioner of oaths when he signed that affidavit. It might be that he had signed it and handed it over to the messenger to go and commission it on his own, in the same manner I have alluded to above that some expert affidavits were signed in a different town and commissioned in a different town on different dates. Doctor Kumbirai denied that he had told her secretary that he did not believe in taking oaths. If indeed doctor Kumbirai did not believe in taking oath, there was nothing wrong with that, and the plaintiff's attorneys under case no 6476/2018 could have requested him to make an affirmation and not to present the court with a version that may seem to have been intended to deceive the court. If it was the plaintiff's attorney intention in case no 6476/2018 to deceive the court, that will amount to serious misconduct which goes into the plaintiff's attorney's fitness to be a legal practitioner. This court will not be in a position to determine whether the conduct of the plaintiff's attorney in case no 6476/2018 was intentional as full facts were not placed before it. It will need the Legal Practice Council to investigate this matter.

[10] Doctor Kumbirai has confirmed that he believes in taking the oath and that he is the one who had signed and commissioned the expert affidavit under case no 7257/2019. The plaintiff's attorneys in that matter are free to re-enroll the matter for trial. The expert affidavit of doctor Kumbirai under case number 6476/2018 did not affect the granting of the default judgment as it was rejected by the court and not accepted as evidence.

[11] In the result I make the following order:

11.1 The plaintiff's attorneys under case no 7257/2019 may re-enroll the matter for trial.

11.2 Copy of this judgment should be sent to the Legal Practice Council.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the plaintiff

: Mr Mphahlele

Instructed by

: Mphahlele & Makhumbila attorneys

Defendant

: In default

Date heard

: 1st July 2022

Electronically circulated on : 14th July 2022

[1]

[2019] ZASCA 13 (14 May 2019) at para 25

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Prepared on 10 October 2026 · Esheria