

SOUTH AFRICA / JUDGMENT

Mothopo v Pule Pule Attorneys (2018/4318) [2018] ZAGPJHC 106 (11 April 2018) [2018] ZAGPJHC 106

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Adams

CASE / FILE NUMBER

2018/4318

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2018/4318

Not

reportable

Not

of interest to other judges

Revised.

11/4/2018

In the

matter between:

MOTHOPO,
ADV KGABELA
THABANG Plaintiff
and
PULE
PULE
ATTORNEYS Defendant

JUDGMENT

ADAMS J:

[1]. This is an application by the plaintiff, an advocate practising in this division, for summary judgment against the defendant, a firm of attorneys. The plaintiff's claim against the defendant is for an amount of R315 800, being in respect his professional fees for services rendered at the special instance and request of the defendant during 2015 and 2016. The total amount claimed was based on the plaintiff's agreed fees for the services rendered in four separate matters in which the defendant had briefed the plaintiff and he (the plaintiff) had performed the services.

[2]. In his particulars of claim the plaintiff avers that the total amount claimed is constituted as follows:-

2.1. R5950 for services rendered in the matter of The State / Ndlovu & Madonsela during March and April 2015.

2.2. R31 600 for services rendered in the matter of Cindi / SAPS during November and December 2015.

2.3. R11 250 for services rendered in the matter of Rammutle / City Power & City of Johannesburg during February 2016.

2.4. R267 000 for services rendered in the matter of The State / Donald Sebolai during 2015 and 2016.

[3]. In his affidavit resisting summary judgment, the defendant deals with the plaintiff's individual claims separately.

[4]. In respect of the matter of The State / Ndlovu & Madonsela, the defendant states, in rather ambiguous and equivocal terms, that 'to the best of the respondent's knowledge Advocate Kabelo Legane of Duma Nokwe Chambers was instructed in this matter'. It is instructive to note that the defendant does not deny unequivocally that the services were not rendered by the plaintiff. The defendant also does not deny that the amount claimed is not due and payable by the defendant to the plaintiff. Contrast the averment of the defendant with that of the plaintiff in his particulars of claim and the annexures thereto, as verified by him in

his affidavit in support of the application for summary judgment, to the effect that the work was done during March and April 2015 and that he rendered an invoice shortly thereafter, and the irresistible conclusion to be drawn is that the defendant does not have a bona fide defence to this claim.

[5]. Similarly, I am not persuaded that the defendant has a bona fide defence to the plaintiff's claim for R11 250 in the Rammutle / City Power & City of Johannesburg matter. Also in

this matter the defendant states rather equivocally that ‘the respondent has no knowledge of the applicant being instructed in this matter’. He goes on to say that to the best of his knowledge one Adv Allison was instructed in the matter. The plaintiff, on the other hand, is adamant that the work was done and that he rendered an invoice for the services rendered.

[6]. As regards the other two claims the defendant does not deny that the professional services were rendered at his (the defendant’s)

special instance and request. However, he alleges that the amounts owing are not presently due and payable in view of the fact that there is in place oral agreements between the parties in terms of which plaintiff’s fees would only become payable after the defendant had received payment of his fees and disbursements, including Counsel’s charges, from the client. As far as the Sebolai matter is concerned, the agreement, so the defendant alleges, was that the plaintiff would await the outcome of a civil suit which the defendant had instituted against the client and his mother, in which he is suing for his fees, also including Counsel’s fees.

[7]. The defences raised by the defendant relative to the latter matters are in my view of the kind which demonstrates that he has a bona fide defence to the plaintiff’s claim as envisaged in Uniform Rule 32(3)(b), which requires the defendant to satisfy the court by affidavit that he has a bona fide defence to the plaintiff’s claim. ‘Satisfy’ does not mean ‘prove’. What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

[8]. While it is not incumbent upon the defendant to formulate his opposition to the summary judgment application with the precision that would be required in a plea, nonetheless when he advances his contentions in resistance to the plaintiff’s claim he must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides.

[9]. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant’s bona fides but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff’s

case is unanswerable.

[10]. All that the court enquires, in deciding whether the defendant has set out a bona fide defence, is: (a) whether the defendant has disclosed the nature and grounds of his defence; and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.

[11]. The defendant is not at this stage required to persuade the court of the correctness of the facts stated by him or, where the facts are disputed, that there is a preponderance of probabilities in his favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[12]. In terms of subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[13]. Applying these principles in casu, I am satisfied that in its resisting affidavit the defendant has demonstrated a bona fide defence to a portion of the plaintiff's claim, whilst at the same time I am not satisfied that he has a bona fide defence to a part of the claim.

[14]. The plaintiff is therefore entitled to summary judgment for payment of the amount of R17 200. The defendant on the other hand should be granted leave to defend relative to the balance of the plaintiff's claim for R298 600.

Order

Accordingly, I make the following order:

1. Summary Judgment is granted in favour of the plaintiff against the defendant for payment of the sum of R17 200.
2. The defendant is granted leave to defend the action for the payment of the balance of the amount claimed by the plaintiff, namely

R298 600.

3. The cost of the application for summary judgment shall be in the cause of the main action.

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 5th April 2018 JUDGMENT DATE: FOR THE PLAINTIFF: 11th April 2018 Adv S
Mathiba INSTRUCTED BY: Mathopo Attorneys FOR THE DEFENDANT: Mr Pule INSTRUCTED BY:
Pule Pule Attorneys

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