

SOUTH AFRICA / JUDGMENT

Mutale v Van Tonder (33282/2020)

[2021] ZAGPPHC 410 (14 June 2021)

[2021] ZAGPPHC 410**COURT**

North Gauteng High Court, Pretoria

BEFORE

S C Mia

CASE / FILE NUMBER

33282/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****No: 33282/2020****REPORTABLE:**NO
OF
INTEREST TO OTHER JUDGES: NO**REVISED:**NO
DATE
14 June 2021**In the matter between:**CONSTANCE
MUTALE
Applicant
and
JACOBUS
MICHIEL VAN
TONDER
Respondent
(This
judgment is handed down electronically by circulation to the parties'
legal representatives by email and by uploading
it to the electronic
file of this matter on CaseLines. The date for hand-down is
deemed to be 14 June 2021.)

JUDGMENT

MIA J:

[1] In the present matter, the applicant sought an order on 9 March 2021 for the provisional sequestration of the respondent in the following terms:

“1. That the estate of the Respondent be placed under provisional sequestration.

2. The Respondent and any other party who wishes to avoid such an order being made final to advance reasons why such an order of sequestration of the said estate should not be made final on 11 December 2020 at 10 h00 or soon after as the parties may be heard in the matter.

3. The service of the order personally on the Respondent.

3.1 The Respondent's employees.

3.2 All trade unions of which the employees of the Respondent are member's, if any;

3.3 On the Master;

3.4 On the South African Revenue Services.

4. The costs of this application are costs in the sequestration of the Respondent's estate.”

The respondent opposed the application. The matter was initially enrolled on the urgent roll and was struck off for lack of urgency. The matter was subsequently enrolled on the opposed roll.

[2] The applicant is a female accountant. She pursued a law degree and was in her fourth year of study of law at the University of South Africa (UNISA) when the respondent employed her. The respondent is an attorney practising under the name of Mike Potgieter Attorneys. The applicant signed a general contract of employment with the respondent whilst he was still practising as Potgieter Marais Attorneys. The employment contract provided that the applicant would be paid R7000 per month. She would work as a candidate attorney during her period of employment.

[3] Before accepting the general contract of employment, the applicant

had worked as an accountant for various small businesses and ran a tuckshop to supplement her income. At some point, she had also

offered her accounting services to the firm Potgieter Marais Attorneys at a reduced fee. However, the offer was not taken

up. The employment contract with the respondent was thus to support her acquisition of practical legal knowledge to support her

theoretical legal studies to enable her to become a legal practitioner.

[4] Initially, the applicant continued working as a bookkeeper during weekends to supplement her income to cover all her living expenses. Her salary as a candidate attorney in the firm did not meet her family's needs. This arrangement also allowed time for her clients to find an alternative bookkeeper. She eventually

discontinued offering bookkeeping services to her clients. She was informed that she was required to commence doing the the respondent's

bookkeeping when Mr Marais' wife stopped doing so through her company. The applicant commenced doing the bookkeeping for the respondent only after she was sent on a three-day course to familiarise herself with the program utilised by the respondent.

[5] According to the applicant, she worked under the supervision of the professional assistant Mr Britz as a candidate attorney. When Mr Britz resigned, she was required to take over his files and take on new clients. The respondent did not employ a new professional assistant in place of Mr Britz. The respondent did increase the applicant's remuneration, and she was paid a higher salary of in excess of R 15000 but was not paid a salary similar to that of a professional assistant. At that stage, the applicant was carrying the increased workload after the departure of Mr Britz, the complexity which was beyond what she was qualified to attend to. She states she acquitted herself well in her view as there was positive feedback. She also maintained the new client base well in her view.

[6] As a result of the increased workload due to the increased number of clients, she was compelled to do the bookkeeping on weekends. She was required to catch up with the backlog because of the problems experienced because the firm transitioned from one accounting package to another and because the change in bookkeepers was sudden, leaving the respondent without a bookkeeper at short notice. She was busy attending to her increased number of clients during the typical working day during the week. She had stopped assisting her previous clients with bookkeeping and was thus able to take on the bookkeeping responsibility of the respondent's practice.

[7] The applicant stated that the respondent saved funds by not employing a professional assistant to replace Mr Britz and transferred a lot of the work to her. He did not pay her a professional assistant's salary but increased her salary. He, however, did not pay her for the bookkeeping function which she performed after hours.

[8] When the applicant demanded payment for her bookkeeping function, the respondent demanded the return of the computer and took it to an unknown location. She no longer continued with the bookkeeping

function. The respondent did not reduce the applicant's salary after she stopped the bookkeeping duties. The respondent thereafter

employed Ms Belinda Senekel of Adminfix to attend to the bookkeeping function. Ms Senekel charged R650 per hour. She left upon discovering that the applicant had a degree in accounting. After that, the applicant employed Ms Anosjka Tecklenberg.

[9] The respondent terminated the applicant's general contract of employment in April 2020 due to a lack of finances and referred to a previous instance of insubordination. The applicant states the termination was because she demanded payment for the bookkeeping work she had completed. She sent a letter of demand for the work completed. The matter was referred to the CCMA, where the applicant refused to participate in conciliation, alleging that she was unfairly dismissed. The ruling made was that since the applicant was dominus litis, she could refer the matter to the Labour Court, where she alleged unfair dismissal.

[10] The issues for determination in the present matter are:

1. whether the applicant's claim is liquid or not?
2. whether the applicant has established sufficient grounds for relief as set out in her prayers in the notice of motion.?

[11] Section 9(1) of the Insolvency Act(the Act) provides:

“Petition for sequestration of estate.—(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.”

[12] In *Kleynhans v Van Der Westhuizen* NO 1970 (2) SA 742 at 749F the Court stated

“Die bevinding dat appellant die bedrag van R150,000 gesteel het, is tegelykertyd 'n onbetwisbare bepaling van die bedrag van respondent se vordering gegrond op die betrokke onregmatige daad. Die blote feit dat 'n vordering betwis word is nie afdoende wat likwiditeit betref nie - daar moet gelet word op die aard en omvang van die geopperde geskilpunte. Kyk, o.m., Ford Brothers v Clayton, 1906 T.S. 205 te bl.208, en Ex parte Berson, 1938 W.L.D. 107 te bl. 115.”

TRANSLATION:

“”The finding that appellant stole the amount of R150,000 is at the same time an indisputable determine of the amount of respondent's

claim based on the wrongful act in the question. The mere fact that a claim is disputed is not conclusive as to equity- the nature and extent of the issues raised must be taken into account. See, o.m.,, Ford Brother v Clayton, 1906 T.S 205 and p. 208, in Ex parte Berson, 1938 W.L.D 107 and p.115”

[13] It is trite that a sequestration order may be granted on two grounds in terms of the Insolvency Act namely:

- (a) the commission of an act of insolvency;

(b) factual insolvency;

There are certain factors or circumstances that are usually relied upon to determine an act of insolvency. These include, among them, a nulla bona return or an inability to pay one's debts. When it comes to inability to pay, the debtor must evidence an inability to pay the debt rather than an unwillingness or refusal to pay the debt.[1]

[14] Ms Mutale submitted that the application was for sequestration of the respondent's estate for a liquidated account for 2017 until September 2019. She submitted that the applicant took over the bookkeeping function performed previously by Mrs Marais, the wife of the previous partner of the firm Marais Potgieter Attorneys. She submitted that the agreement that the applicant would take over the bookkeeping function was oral. She submitted furthermore that the budget was to come from the previous budget allocated to the previous bookkeeper namely Mrs Marais.

[15] Ms Mutale continued that when it was apparent that she had a Bachelor's degree in accountancy, Mrs Marais refused to continue doing the respondent's bookkeeping. She was then informed to take over the bookkeeping. She was expected to create time for the accounting function and was to be paid separately. She commenced with the books in March 2017. She was not paid in March 2017 or in April 2017 for bookkeeping services as she stated she received the same salary. She explained the reason was due to the respondent still paying Mrs Marais at that stage while she was doing the bookkeeping. The accounting work was done outside of office hours. She submitted that a salary increase took place in June

2017. She argued that the R7000 catered for the debt collections, which was not complicated. She argued that the salary increases were for the increased responsibilities in the office unrelated to the bookkeeping, and therefore she received an increase to R9000.

[16] She submitted that she attended consultations and argued that she ran the litigation department. She maintained that the amount was a liquidated amount and was an amount for the services similar to the claim submitted by Mrs Marais. She claimed that after the accounting was done, the respondent could obtain his Fidelity Certificate based on the bookkeeping services she rendered. She issued a letter of demand after requesting payment over several months. She stipulated in the letter of demand the work done and the amounts charged in Annexure "CM 1" for March 2017 to September 2019. She argued that the liquidated amount she established by determining how much the respondent paid Ms Senekal and Mrs Marais. She submitted that the contract was concluded

verbally in February 2017, and this was for separate payment for bookkeeping services.

[17] In the founding affidavit, the applicant indicated that she was caused to attend a course to take over the bookkeeping function. There appears to be no agreement but appears to be a compulsion or an agreement she entered into without clarifying the terms of payment. The applicant thus relied on the payment to Mrs Marais and the payment rate of Ms Senekal. This differs from the offer made by the applicant. She submitted that the rate could not have

been known because she did not know the extent of work required. This submission does not indicate clarity with regard to a rate but merely indicates

the lack of clarity with regard to the extent of work to be completed. It does not assist the applicant in proving the liquidity

of the claim. Both rates are in any event different to the rate that she quoted the first time she approached the firm.

[18] Ms Laas referred to the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A). She submitted that matters in motion court are to be decided on the facts, which are a common cause. The applicant could not obtain relief where the indebtedness is in dispute. Where there is a dispute, the summons issued by the applicant must go to trial, and there must be a determination whether there is any amount due to the applicant or not. If there is a determination that she is entitled to further remuneration, then she may proceed.

[19] However, Ms Laas argued that the respondent denied that such debt was due. It was the respondent's version that the applicant was an employee who was paid for her work according to their signed agreement. She took on the accounting function at some point, and she was remunerated accordingly. Ms Laas pointed out that bookkeeping was

part of an attorneys' function, and as such, the applicant was exposed to this aspect as well. She continued that the applicant's salary was increased over some time for the services she rendered.

[20] She submitted that proceedings for the compulsory sequestration of a debtor's estate might be instituted by a single creditor who has a liquidated claim in terms of section 9 of the (the Act) The meaning "liquidated" in the context of the Act required that the amount must be fixed and determined either by agreement (actual or implied), by judgment or otherwise. She referred to, *Braithwaite v Gibert (Volkskas BPK Intervening)* 1948 (4) SA 717 (W) where the court states at p 721:

"The following remarks of Murray J in Ex parte Berson; Levin and Kagan v Berson 1938 WLD 107 at 115 seems to me to be particularly apposite herein:

"Though a debt is not liquidated merely because it neither rest upon a judgment nor is admitted by the debot, yet when the debt is disputed it cannot be regarded as liquidated where as in this case its establishment obviously depended upon the determination of a number of questions of fact in dispute between the parties themselves and the consideration of contradictory evidence as to the nature of requisite services and the extent of a reasonable fee. If disputed, the debt is not liquidated unless capable of easy and speedy proof (Treasurer General v Van Vuuren 1905 TS 589). Its accuracy must be capable of being clearly and promptly established (Ford Bros v Claxton 1906 TS at 208)."

[21] Ms Laas argued that the applicant based her claim on the letter of demand in which she inserted specific amounts. She disputed the amount and reasoned that it was not evident whether the claim is contractual, delictual, or some other ground of liability. She continued

that the amounts were not agreed upon and were not determined by judgment or otherwise. She argued that the applicant stated that she calculates the fees based on a rate which she avers is lower than a market rate but did not disclose this rate. This undisclosed rate Ms Laas submitted was not a liquidated claim and, moreover, was not an agreed rate. In her submissions to the court, Ms Laas submitted, the applicant reasoned that the amount was ascertainable and was not known before because she did not know before she undertook the bookkeeping the number of hours she would invest in completing the required work. When regard is had to Annexure "CM 1", Ms Laas pointed out that the applicant claimed round amounts and increased the amounts when it suited her. This was precisely indicative of the lack of agreement between the applicant and the respondent. She continued that the statement does not reflect an hourly rate and how many hours of work was completed.

Thus she submitted that even if this court were to adopt the position that the liquidated amount was to be calculated by the agreed rate and amount of hours worked as a liquidated amount can be a readily ascertainable amount. In this instance, this was not possible as the rate was undisclosed.

[22] Ms Laas continued further to submit that regarding the applicant's claims, she issued the letter of demand and concluded thereby that she has a liquidated claim. There is no mention of an agreement in the letter of demand. It is a mere demand with an arbitrary amount. The respondent replied to that demand and denied the content thereof.

He denied that she has a claim. He raised the basis of the claim and pointed out that this is a wish on her part rather than an agreement between the parties. The applicant's basis of a claim is the agreement that commenced at R7000, which increased to R9000 and subsequently increased further. The respondent indicated that the applicant was not employed as a bookkeeper in the firm, but that bookkeeping was part of the experience required as an attorney, the applicant was exposed to this area. At the end of her employment she was earning R15 900.

[23] Ms Laas points out that the applicant in her papers attaches correspondence where she points out that she believed that it would serve her to do the respondent's bookkeeping for a mere trifle, and this is also echoed in the letter of introduction when she introduced her bookkeeping service to the firm. She said she would charge next to nothing. Ms Laas submitted that she was not paid next to anything but was paid her salary. Ms Laas continued that the applicant's application was conspicuously lacking in invoices rendered to the respondent for the period that the applicant alleges she attended to the bookkeeping as per the verbal agreement. She was under no obligation to continue with the bookkeeping if the verbal agreement was not adhered to. She was under no obligation to remain with the firm. Despite not being paid on her version, she remained with the firm. She continued to work with the accounts, and she continued to accept the increases given to her over some time that she was with the respondent. This indicated that there was no agreement as suggested by the applicant. Instead, the applicant was paid in terms of the agreement initially concluded and was given increases as her workload increased.

[24] Ms Laas submitted that the applicant then introduced elements of a claim for unjust enrichment by suggesting that the respondent saved money by not employing a bookkeeper. The respondent maintains that he

increased the applicant's remuneration over some time. The applicant has issued a summons, and the respondent has defended the action. This all suggested that the applicant's claim is not liquidated. She persisted after receiving the answering affidavit. The case law referred to *Standard bank v Renico Construction (Pty) Ltd* (2011/33789) [2012] ZAGPJHC 287; 2015 (2) SA 89 (GJ) does not support her case and neither does the case of *Phillips v Phillips* (292/2018) [2018] ZAECGHC 40 which indicates no triable issues should be outstanding. She filed a supplementary affidavit which did not support her case. She was advised from the outset that the claims were contested, and yet she persisted. She, therefore, requested that the application be dismissed with costs on the attorney and client scale.

[25] In reply, Ms Mutale was unable to point out the terms of the verbal agreement. However, she maintained that the accounting agreement was auxiliary. She submitted that if this court accepts an auxiliary agreement that the respondent requested the applicant to take over the files, then the applicant should succeed. On the other hand, if the court does not accept an auxiliary agreement to take over the bookkeeping function, then the application should fail.

[26] Having regard to the submissions and the evidence, the applicant was unable to prove the auxiliary agreement that she referred to. She argued this was a verbal agreement, but there is no indication about

the terms of the agreement. There is no indication of the date and time when the discussion took place and the rate she would

charge. If indeed the rate was agreed upon, then the respondent would have become a client as her previous clients. It would have been expected that she would have invoiced the respondent every month. She argued that she did not know the extent of the work when she took on the responsibility. This might be so. However, once she has undergone the training to familiarise herself with the accounting package, she would have completed work every month after hours as she usually completed work in the past for her previous clients. She did not invoice the respondent each month as she completed work. She argued that the increased salary was for the increased workload she assumed because Mr Britz resigned, and she took on the extra responsibilities. If she accepted that the increased amount was for the increased responsibilities related to paralegal work, she ought to have invoiced the respondent. She did not do so for over two years. She also now calculates her rate on an average between Mrs Marais and Ms Senekal. Ms Senekal only took on the books later. Thus it is opportunistic to suggest the rate was based on these two rates. This also contradicts the suggestion that there was an agreement in February 2017 as Ms Senekal was not yet appointed at the time the applicant contends the agreement took place for her to do the bookkeeping.

[27] Both parties referred to the matter of Plascon-Evans above. It is agreed and trite that “in proceedings on notice of motion where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”.

[28] In the present matter, the applicant's claim is not liquidated. She relies on an auxiliary agreement. She seeks to have the amount calculated based on the rate paid to the previous bookkeeper and the last bookkeeper appointed by the respondent. She had issued a letter of demand, but it is not clear on what basis her rate is calculated

in the letter of demand. There are increases from time to time, and this is disputed. By all accounts, this is not a liquidated claim in that the amount has not been fixed, agreed upon or determined by a court. The applicant has issued summons against the respondent, which may yield an amount that she could issue sequestration proceedings upon if she is successful and the amount remains unsatisfied.

[29] In Braithwaite above, the court said:

“The matter was put as follows by Murray J in Berson's case supra at 114-115:

“Where the probabilities favour the creditor's contention of the existence of a claim of the necessary extent, but disputed by the debtor, the Court would no doubt follow the principle of Mahomed v Malk 1930 TPD 615 and give the debtor an opportunity of leading vive voce evidence if such could possibly disturb the balance of probabilities as

appearing on the affidavits. Where, however, there is no such balance of probabilities favouring the creditor it does not seem to me that the Court should afford the creditor the opportunity of bringing viva voce evidence in a case when from the affidavits it is obvious that the creditors claim is not one based on an obvious and ascertainable legal claim which is capable of quick and ready proof (Wessels Contract vol I 2548). In Tomkin (Pty) Ltd v Bauer 1931 TPD 292 the Court allowed a creditor, against whom the balance of probabilities lay, to adduce viva voce evidence to establish an act of insolvency. I think a different principle applies where it is not an act of insolvency, but the existence of the creditor's necessary liquidated claim, which is in dispute. The former can only be established in sequestration proceedings: the proper method of establishing the latter is a separate action on the claim preparatory to the invocation of the Insolvency Act. This view is, I think, in accordance with the judgments in Minooden v Attard 1933 TPD 281 and Els v Brest 1931 EDL 2.”

[30] The applicant's claim is not liquidated as I have indicated above because it is not agreed upon, is not capable of being ascertained and was not determined by the court. It is not capable of ascertainment as the auxiliary agreement referred to by the applicant does not refer to an agreed-upon rate. Thus, the applicant seeks the court to impose a rate upon two contracting parties if indeed there was a contract for bookkeeping services that flies in the face of the parties' freedom to contract. The applicant's claim requires a separate action that is preparatory to the invocation of the Insolvency Act. I am of the view that where the claim is disputed by the respondent any order and referral to oral evidence is unwarranted.

[31] I move now to the order of costs. Ms Laas submitted that a punitive order for costs was warranted if the application was dismissed. This was because the application was opposed, and the applicant was warned

from the outset that she did not have a liquidated claim. She persisted with her claim in the urgent court, where costs were awarded against her and then continued to the motion court knowing that the application was opposed. The applicant persisted with her application and appears resolute that she is correct in her interpretation of the law. She has a law degree has experience in debt collection with little other experience. She has also taken the route of arguing her matter, and it follows that she is emotionally involved, invested and does not view the matter with the impartiality of a legal representative who is not emotionally invested. For this

reason, I do not intend to visit a punitive costs order upon the applicant. The usual costs order will follow.

ORDER

[32] For the reasons above, I grant the following order:

1. The application is dismissed.
2. The applicant to pay the costs.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Appearance for the applicant

: C Mutale

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Appearance for the respondent

: Ms AM Laas

Instructed by

: Laas Doman Inc.

Laas-am@law.co.za

Date of hearing

: 9 March 2021

Judgment

Reserved On

: 9 March

2021

Date of judgment

:

14 June 2021

[1] Barlows (Eastern Province) Ltd v Bouwer 1950(4) SA 385(E) at 390C; Optima Fertiliser (Pty) Ltd v Turner 1968 (4) SA 29 (D) at 33C; Court v Standard bank of South Africa Ltd; Court v Bester NO [1995] ZASCA 39; 1995

(3) SA 123 at 134 A-B

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