
SOUTH AFRICA / JUDGMENT

Ncongwane SC and Another v Ehlers Fakude Inc (41189/2017) [2017] ZAGPPHC 680 (29 September 2017) [2017] ZAGPPHC 680

COURT

North Gauteng High Court, Pretoria

BEFORE

T Brenner

CASE / FILE NUMBER

41189/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

Date of hearing : 11 September 2017

Date of judgment: 29 September 2017

Case number 41189/2017

In the matter between :

ABRAHAM THAMI NCONGWANE SC

First Applicant

ISAAC PHUMLANI NGOBESE

Second Applicant

versus

EHLERS FAKUDE INC

Respondent

JUDGMENT

BRENNER, AJ:

1. In this opposed application for summary judgment, the first applicant is advocate Abraham Thami Ncongwane SC ("Ncongwane"), and the second applicant is advocate Isaac Phumlani Ngobese ("Ngobese"). The respondent is Ehlers Fakude Incorporated, ("Ehlers Fakude"), a professional corporation which carries on practise as attorneys. Messrs Ncongwane and Ngobese are also referred to below, where cited jointly, as "the applicants".
2. Ncongwane claims payment of fees totalling R461 244,00, including Vat, for services rendered, at the behest of Ehlers Fakude, in motion proceedings involving the latter's client, Deborah Moosa ("Moosa"). The proceedings are cited as Burgh Group Holdings (Pty) Ltd versus Deborah Moosa and six others under case number 80178/ 2014. The claim of Ngobese is for payment of fees totalling R345 933,00, including Vat, for services rendered for Ehlers Fakude in the same case. The invoices of the respective applicants are attached to the summons and particulars of claim.
3. The affidavit in support of the application for summary judgment was deposed to by Ngobese solely. In his affidavit, Ngobese asserts that he is the second plaintiff and is authorized to depose to the affidavit. He states that he signed the affidavit, both in his personal capacity, and on behalf of the first plaintiff, Ncongwane. No written authority is attached to Ngobese's affidavit to corroborate his averment that Ncongwane had authorized him (Ngobese) to depose to the summary judgment affidavit. No explanation is proffered as to why Ncongwane was unable to sign an affidavit on his own behalf.
4. This omission falls foul of rule 32 (2) of the uniform rules of court, which requires the affidavit to be made by the plaintiff

himself, or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed. Based in the averments in the particulars of claim, and the fact that each advocate raised a separate, discrete invoice to Ehlers Fakude, the only person who had personal knowledge of Ncongwane's claim was Ncongwane himself. He did not depose to his own affidavit, nor did he execute a confirmatory or supporting affidavit to corroborate the averments in Ngobese 's affidavit. It follows that the summary judgment application by Ncongwane was not properly before the Court.

5. It was suggested by Counsel for the applicants that the hearing could be postponed to cure this omission, by means of a supplementary

affidavit from Ncongwane. I declined this suggestion. An indulgence of this nature would offend the provisions of Rule 32(4), which

precludes any evidence being adduced by the plaintiff, otherwise than by means of the affidavit referred to in Rule 32(2). This should be read with the peremptory time constraint in Rule 32(2), which prescribes that the application for summary judgment should be delivered within 15 court days after the date of delivery of the notice of intention to defend. For the failure to comply with the provisions of rule 32, simpliciter, the summary judgment application in favour of Ncongwane must fail.

6. Counsel for Ehlers Fakude made an attempt to supplement its opposing affidavit by asking the Court to permit the

introduction

of a supplementary affidavit, to amplify its request for the taxation or assessment of the applicants' invoices. This was refused because any supplementation of its papers would offend the peremptory time constraint in Rule 32(3)(b), which prescribes that the opposing affidavit in summary judgment proceedings shall be delivered before noon on the court day but one preceding the day of the hearing of the application.

7. Indulgences of the nature sought by the parties in this application would militate against the purpose of summary judgment proceedings,

which are designed to be heard summarily and expeditiously, via a curtailed process which calls for the exchange of one affidavit

by each opposing party. For this reason, strict adherence to the requisites of rule 32 is desirable. Any relaxation of its clear requirements would result in the prolongation of the process, and would defeat the objective.

8. I refer to Ngobese's claim. It is based on what is considered to be a liquidated amount in money. Where mention is made of Ncongwane's claim, this is for convenience, as both advocates acted in unison with one another in Moosa's case.

9. The particulars of claim advert to an instruction given by Ehlers Fakude to Messrs Ncongwane and Ngobese on 8 December 2015 to

represent Moosa in the proceedings. To this end, they were mandated to consult with Moosa and/or any persons who were well versed with the issues, draw an answering affidavit and a condonation application for the late filing of the answering affidavit, prepare for the hearing, and appear in the North Gauteng High Court on 14 January 2016, to represent Moosa. It is alleged that it was an implied term of the instructions that Messrs Ncongwane and Ngobese would be entitled to payment of a fair and reasonable fee for their services.

10. On 8 March 2016, they submitted their respective invoices to Ehlers Fakude. The invoices were required to be paid within 90 days of the date of receipt. The deadline appears to have expired on or about 6 June 2016 .
11. When payment was not timeously made, a letter of demand was sent, to inform Ehlers Fakude that, failing payment within seven days, the applicants would report the default of Ehlers Fakude to "the Bar Council". On 2 July 2016, the Pretoria Society of Advocates ("the PTA") sent a written notice to Ehlers Fakude that it would be placed on the list of defaulters in the absence of payment within 10 days from the date of its letter.

12. Ehlers Fakude sent two letters to the applicants, on 8 August 2016, and on 4 May 2017. In neither letter

was the reasonableness of the fees disputed . The first letter records that

Ehlers Fakude was "vigorously working on having your invoices, at least part thereof, settled in due course, hopefully before the end of the current month." An apology was extended for any delay and inconvenience, both by Ehlers Fakude, and on behalf of its client. The second letter mentions Ehlers Fakude's being "saddened to advise and inform you that as at date hereof and despite client' s undertakings, and promises to do so, we are yet to be placed in funds by client." An assurance was given that Ehlers Fakude would "for the umpteenth time" proceed to communicate with its client. The letter records that, if summons is served on Ehlers Fakude, it would join its client as a co-defendant.

13. The contents of these letters are tantamount to acknowledgments of liability for the amounts

claimed in the applicants' invoices.

14. Ehlers Fakude's opposing affidavit in the summary judgment proceedings is deposed to by Zithule le Emmanuel

Fakude ("Fakude"), a director of Ehlers Fakude. The confirmatory affidavit of Moosa is attached to the opposing affidavit.

15. Three issues are raised. They are traversed ad seriatim.
16. Ehlers Fakude alleges that it briefed Ngobese on his own. When Ngobese informed Ehlers Fakude that the case was too complicated for him, Moosa asked for advocate David Mtsweni ("Mtsweni") to be briefed with him. It is alleged that Moosa did not have funds to pay for both Ngobese and Ncongwane. However, Ngobese refused to work with Mtsweni. The issue was discussed at a meeting at Ngobese 's chambers on 8 December 2015, at Which Moosa purportedly proposed the conclusion of a contingency fee agreement with the applicants. The proposal was allegedly accepted. The parties agreed that this agreement would be finalized at a later stage, and that the applicants would proceed to act for Moosa in the interim. On 30 March 2016, however, the applicants sent their invoices to Ehlers Fakude by email, and thereafter, refused to perform further work until they were paid.
17. The second issue constitutes a dilatory defence which relates to a claim for taxation of the invoices. It is set out in the following paragraph of the opposing affidavit:

"I am of the view that a different or favourable solution must be looked into and arrived between the applicants, respondent and my client. I am further of the view that the applicants' invoices, in the event that this Honourable Court finds that they are already due and payable, must first be taxed by the Taxing Master of this Honourable Court. The invoices, as they currently (sic) are not a liquid document as their liquidity is being disputed and cast into doubt by my client."

18. The third issue is procedural in nature, namely, that Moosa should have been joined as a second defendant owing to her "direct and substantial interest in these proceedings' the view being expressed that the outcome of the application would have a "direct and huge effect on her."
19. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses fully the nature and grounds of the defence and the material facts relied upon therefor.

20. A holistic approach constitutes the logical starting point in the overall enquiry concerning whether a bona fide defence has been advanced. In Erasmus Supreme Court Practice, second edition, Van Loggerenberg Volume 2, at DL-388, the author stated:

"In the exercise of its discretion under the wider test, the court must not look only at the summons in order to decide whether a claim is for a liquidated amount of money, the defence as disclosed in the defendant's opposing affidavit must also be taken into account."

21. In the case of *Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)*, the Court held as follows:

"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice.....if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

22. A further inciteful case is that of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, at paragraph 31, my emphasis included:

"The summary judgment procedure was not intended to 'shut a defendant out from defending': unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court."

23. The suggestion by Ehlers Fakude that the applicants concluded a contingency fee agreement with it and Moosa is uncorroborated by any independent facts, and is contradicted by its own conduct on receipt of the invoices. No details are provided in its affidavit of the terms of this alleged agreement, nor is any correspondence on the subject produced. Nor is there mention in its letters of 8 August 2016 and 4 May 2017 of such an agreement. This defence is unsubstantiated and neither genuine nor bona fide.

24. Concerning the issue of the non-joinder of Moosa, Ehlers Fakude's affidavit does not suggest that the applicants concluded an agreement which included a term that Moosa would be directly liable to them for payment of their fees. Absent an express agreement between Counsel and the instructing attorney, it can never be implied that Counsel are obliged to look to the client directly for payment. Vide *Serrurier and another v Korzia and another* 2010(3) SA 166 WLD. The defence based on the non-joinder of Moosa is inherently implausible and lacking in foundation, and must fail.

25. The remaining defence pertains to the fairness of the fees charged, and this is germane to the determination of whether the claims are liquidated to warrant the granting of summary judgment. An untaxed bill has been found to constitute a liquidated claim. It is not a condition precedent to the launch of an action for a bill of costs to be taxed. It is left to the discretion of the Court to determine whether, on the facts of a particular case, the claim for legal fees is liquidated. In casu, various considerations were taken into account.

26. The correspondence of Ehlers Fakude is silent on any request for taxation, appears to admit liability for the invoices, and fails to dispute the quantum thereof. Its demand for the applicants to refer their bills for taxation (I presume it means assessment by the relevant body) came at a very late stage, and only after the summons had been served.

27. Nevertheless, in its opposing affidavit, Ehlers Fakude calls for the taxation of the applicants' invoices, as their "liquidity is disputed". Its dissatisfaction with the quantum charged by the applicants is implicit in this statement and in the paragraph in which it appears.

28. In the enquiry as to whether a genuine, bona fide defence was raised concerning the fairness of the invoices, Ehlers Fakude's

pre-litigation admissions of liability, while important, are not dispositive of the matter. The Court cannot without further ado

disabuse its mind of the call for taxation in the opposing affidavit. All facts of relevance need to be addressed to determine whether, in the face of the contra-indications in its prior letters, Ehlers Fakude was bona fide, genuine and convincing in calling for the assessment of the invoices, and whether this gives rise to a triable issue, and imposes an obligation on the applicants to have their invoices assessed before pursuing their claims.

29. In this case, the brief cover from Ehlers Fakude, dated 24 November 2015, to Ngobese (and, by necessary implication, Ncongwane), and attached to the opposing affidavit, mandated three functions. They were: to peruse the brief and to draw Moosa's answering

affidavit, to draw a condonation application for the late filing of this affidavit, and to draw heads of argument and a practice

note. The brief recorded that the matter would be heard on 14 January

2015. This was obviously intended to mean 14 January 2016.

30. The applicants' invoices reveal identical days and hours spent by them in performing their instructions. They did not charge for heads of argument or a practice note. The performance of their mandate related to time spent to peruse papers, to attend several consultations, and to draw Moosa's answering affidavit and condonation application. They appeared in Court on 14 January 2016, they drew a memorandum and they consulted on 7 March 2016 to discuss the settlement of the case. For the above, Ncongwane charged a fee of R461 244,00 including Vat, while Ngobese charged a fee of R345 933,00 including Vat. A consideration of their invoices indicates that their engagement entailed time spent of about 15 days in the aggregate. This assumes an eight hour day where hours are mentioned in their invoices.

31. Ehlers Fakude mentions the possibility of Moosa suffering prejudice if summary judgment were granted. While Moosa was not a necessary party to the action, I am obliged to take account of the potential consequential impact of an adverse summary judgment against Ehlers Fakude, based on unassessed invoices. The possibility, if not probability, remains extant that Moosa may be sued by Ehlers Fakude for the same amount claimed in this action by the applicants. The argument may well be advanced against Moosa, potentially to her detriment, that the costs of Counsel were found to be liquidated, and therefore fair and reasonable, because summary judgment was granted in their favour. Cognisance needs to be taken of the fact that Moosa may call upon Ehlers Fakude to tax an attorney and own client bill of costs in due course, and this bill would include the fees of Counsel.
32. A Court should be reluctant to arrogate to itself the functions of a taxing master or a fee assessor, both of whom are suitably equipped with the expertise to examine the details of, and justification for, the work done, including, inter alia, the magnitude and complexity of the case, the time spent, and the results achieved.
33. As a general principle, it is not within the province of this Court, as a Court of first instance, to pronounce upon the fairness of Counsel's fees, where this is disputed. This function falls squarely within the jurisdiction of the relevant fee assessment committee of Counsel. In casu, this appears to be the PSA. Even where an attorney and his client have agreed to a specified hourly rate, the binding nature of the agreement is not absolute, and is not definitive of the fairness of the bill raised. The following cases have endorsed this approach.
34. In *Tredoux v Kellerman* 2010(1) SA 160 CPD, an advocate and his instructing attorney sued for payment of their legal fees, which were rendered for the defendant in a divorce action. The defendant disputed the reasonableness of the

fees in a summary judgment application brought against him. The full bench of the Western Cape High Court held that such claims were not liquidated where they involved an enquiry into the nature and extent of the services, and their reasonableness. These matters were considered by the Court as "not mere matters of calculation" but fell instead within the purview of the taxing master.

35. The case of *Malcolm Lyons and Munro v Abro* and another 1991(3) SA 464 WLD, involved an unsuccessful application for the judicial review of a decision taken by the Taxing Master to tax off certain amounts from an attorney and own client bill of costs. The Court found that the Taxing Master is not bound by an agreement in which the hourly rate was specified, where he considered certain work to have been unnecessary and therefore not reasonable. At page 699, the Court stated:

"All in all, therefore, the Taxing Master in my opinion rightly did not regard the client nor, of course, himself, to be bound by an agreement to the effect that the attorneys would be entitled to payment at the rate of R220 per hour for all the work they did in connection with the action, necessary or unnecessary, prudent or prodigal."

36. A relationship between a former attorney and client came to the fore in *Blakes Maphanga v Outsurance Insurance* 2010(4) SA 232 SCA. The attorneys sought to set off monies collected for their former client against untaxed fees and disbursements, on termination of their mandate. The client had called for its former attorneys to tax their fees and disbursements. The SCA held that, flowing from a client's right to taxation of an attorney and own client bill, the amount of an untaxed disputed bill of costs was not a liquidated debt, but one yet to be ascertained by the taxing master. The SCA held, at paragraph 18E (page 241) to 18A (page 242), my emphasis:

"The duties of a taxing master include the duty to determine whether costs have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special

charges and expenses to witnesses or to other persons or by other unusual expenses. It is his duty to decide whether the services have been performed and he should not close his eyes and ears to evidence which may be readily available to show that any work alleged to have been done was in fact not done. Even where an agreement exists between an attorney and client a taxing master is empowered to satisfy him- or herself that fees related to work done and authorised were reasonable. There are sound reasons for a client's right to insist on taxation and to regard the amount of a bill of costs that has not been taxed as not liquidated. The question whether a debt may be capable of speedy ascertainment is a matter left for determination to the individual discretion of the Judge. In the case of a disputed bill of costs in litigious matters, however, the reasonableness is to be determined by the taxing master and not by the court."

37. While her non-joinder is not a defect in the pending action, on a practical level, Moosa has a residual interest in the outcome. There are sound reasons why an independent body with comparable powers to those of a taxing master should assess the fees of the applicants. This would serve the interests of litigating parties, who should be able to approach access to justice with the confidence and trust that there are mechanisms in place for the independent oversight of legal fees. Ultimately, it is Moosa who may eventually foot the entire bill for the services rendered to her.

38. Albeit that the call for the taxation/assessment occurred at a late juncture, in summary judgment proceedings, this fact alone should not deprive Ehlers Fakude of exercising this defence, albeit that it is one which impacts on verification of the quantum of the claims.
39. Based on the relevant facts, taken cumulatively, Ehlers Fakude was genuinely convincing in proving a bona fide, prima facie, triable defence on the merits. Its opposing affidavit contained enough substance to fortify a defence that the quantum of the claims was disputed, and therefore liable to be assessed, and that the claims were not liquidated, as required by Rule 32. Leave to defend in regard to Ngobese's claim should be granted, with the usual costs order, namely that the costs of the application should be costs in the cause of the main action.
40. The summary judgment application for Ncongwane must be dismissed because his supporting affidavit was not attached to the application.

Since no affidavit was signed, there should be no order as to costs.

41. The following order is granted, namely:
 - a. In the first applicant's application for summary judgment:
 - i. the application is dismissed;
 - ii. there is no order as to costs;
 - b. In the second applicant's summary judgment application:
 - i. the application is refused;
 - ii. the respondent is granted leave to defend in the main action;
 - iii. costs shall be costs in the cause of the main action.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

29 September 2017

Appearances

Counsel for the Applicant: Advocate G Bofilatos SC

Instructed by:

Bekker Attorneys

Counsel for the Respondent: Advocate ASL van Wyk

Instructed by:

Ehlers Fakude Inc Attorneys

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