

SOUTH AFRICA / JUDGMENT

Ramesh Luckychund & Associates v Sewpal (AR441/2019) [2020] ZAKZPHC 37 (19 June 2020) [2020] ZAKZPHC 37

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D. Pillay, Balton

CASE / FILE NUMBER

AR441/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION,

PIETERMARITZBURG

APPEAL

CASE NO: AR441/2019

In

the matter between:

RAMESH
LUCKYCHUND &
ASSOCIATES
APPELLANT
vs
ADVOCATE
M. SEWPAL
RESPONDENT
ORDER
The

following order is granted:

The
application for condonation and consequently the appeal are dismissed
with costs such costs being on the scale between attorney
and client.

JUDGMENT

D. Pillay J (Balton J concurring)

- [1] The appellant, an attorney, instructed the respondent, an advocate, to appear for his client, Siriah Construction (Pty) Ltd in a trial proceeding in the High Court. The respondent rendered those services. The appellant refused to pay the balance of the respondent's fees. The respondent issued summons in the magistrates' court on 19 April 2018 to claim his fees. On 3 May 2018 the appellant caused a notice to defend to be filed in the magistrates' court and emailed a copy to the respondent's attorney. No arrangements had been made to exchange pleadings by email nor did the appellant check that the appearance to defend had been received and accepted.
- [2] The appellant had failed to deliver a plea. His explanation was that 'he may have thought for various reasons that the matter will lay in abeyance until the issues are finalised'. Application for default judgment was made on 31 May 2018 and granted on 4 July 2018. On 9 October 2018 a writ of execution was issued resulting in an attachment of goods to the value of R81 400. On 30 November 2018 the appellant applied to rescind the judgment on the grounds that magistrate erred in granting default judgment when a notice to defend had been filed. On 27 March 2019, the magistrate dismissed the application for rescission after finding that, procedurally, it had been properly granted. On the merits, the magistrate dismissed the defences raised.
- [3] The defences were first, that the respondent had been briefed for 2 days only but proceeded to finalise the matter in the High Court because the Judge President had allegedly directed him to do so and to sue Siriah Construction (Pty) Ltd to recover his fees. Second, liability for counsel's fees rests not with the attorney but with the client. Third, there was an arrangement to cover the respondent's fees by a contingency fee agreement.
- [4] This appeal against the magistrate's dismissal of the application to rescind is prefaced by an application for condonation. The appellant filed a notice of appeal on 26 April 2019, 21 days after the judgment. He was one day late. Then he omitted to prosecute it within 60 days of noting the appeal. He failed to apply for a date for the hearing of the appeal within 40 days of noting it. His application for condonation accompanying the appeal was filed about 12 September 2019. He claims his appeal is 36 days late. His explanation for the delay is that he awaited a statement from the magistrate. Thereafter he tried to secure counsel and none would accept a brief against a colleague. Finally, he prepared the application himself.
- [5] Of itself, the period of delay of 36 days is not so substantial as to cause prejudice to the respondent. However, if there are no prospects of success on the merits then even a delay of one day cannot be condoned.

- [6] Turning to the prospects of success on the merits of both the application for condonation and the appeal, the startling fact is that the appellant is an experienced attorney who knew the rules of court. His defence was not that he was unaware of the rules relating to the delivery of the notice to defend, a plea and the time limits for lodging an appeal in the High Court. He offered no explanation as to why, before the time had expired, he did not request the respondent to grant him an extension of time to file both the plea in the magistrates' court and to prosecute the appeal in the High Court.
- [7] He contends that the dispute raises complex questions about whether a judge of a high court can direct an advocate to continue a matter to conclusion when counsel is briefed to attend court for one day only, and the instructing attorney is not placed in funds for the continuation of the trial; and whether a Judge President can give an advocate a choice of either continuing with the matter to conclusion or to withdraw the client's claim and tender costs.
- [8] In my view, these are not complex questions. The Judge President manages the High Court. Attorneys manage their practices. That means attorneys must be sufficiently covered for costs when they instruct counsel. If they are not, then they are at risk of paying counsel's fees. An advocate on brief is obliged to look to the attorney briefing him for payment. These obligations are clear from the rules of the Kwazulu-Natal Society of Advocates and the General Council of the Bar of South Africa - Uniform Rules of Professional Conduct, on which the magistrate relied.
- [9] As an experienced attorney, the appellant ought to have also known that a contingency fee agreement has to be in writing.
- [10] The rules relating to the payment of counsel's fees are clear and well established. Anyone entering the profession must know them. For the appellant to raise them as defences that he must know have no prospects of success, suggest that the appeal is a tactic to delay the inevitable payment of the respondent's fees. The delays in delivering a plea and prosecuting the appeal are typically tactics of a litigant who wants to avoid the inevitable.
- [11] Siriah Construction (Pty) Ltd obtained judgment in the sum of R139 000 together with interests and costs in the High Court. The appellant issued a writ of execution for the recovery of this amount; it resulted in an attachment on 21 August
2019. He has received payment of R100 000 and two further instalments of R50 000 each. The balance of the debt is being paid in such instalments. This information came to the attention of the respondent not through any disclosure by the appellant but as a result of investigations undertaken by his attorney.
- [12] The appellant accuses the respondent and his attorney of uncolleagial conduct for not alerting him to their application for default judgment. He bemoaned the reputational risk he would suffer for having a judgment against his firm. Knowing the risks of having a judgment against the appellant, Mr Luckychund should have been particularly attentive to his

responsibilities. The respondent and his attorneys had no legal, ethical or moral obligation to forewarn the appellant of the steps they intended to take in prosecuting the claim against a recalcitrant colleague.

[13] What is unethical is refusing to pay counsels fees after having undertaken to do so and raising spurious defences when the honourable course of conduct was to make make arrangements to settle the debt, especially after Siriah Construction (Pty) Ltd succeeded in the High Court and the appellant received substantial payments, sufficient to cover the respondent's fees. Such conduct deserves a showing of disapproval by the court with an appropriate order of costs.

[14] In the circumstances, the application for condonation and consequently the appeal are dismissed with costs such costs being on the scale between attorney and client.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

I agree.

Balton J

APPEARANCES

NB: With the consent of the parties, the matter was dealt with on the papers.

For the appellant

: Ramesh Luckychund and Associates

c/o S.L Kunene & Partners

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For the respondent

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Date of Hearing

: 19 June 2020

Date of Judgment

: 19 June 2020

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