

SOUTH AFRICA / JUDGMENT

Sesane v Road Accident Fund and Another (36587/2016) [2019]

ZAGPPHC 1020 (10 December 2019)

[2019] ZAGPPHC 1020

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

36587/2016

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

CASE NO: 28678/2019

13/12/2019

In

the matter between:

PALESA

SESEANE

APPLICANT

and

THE

ROAD ACCIDENT FUND

FIRST APPLICANT

MOTHLE

JOOMA SABDIA ATTORNEYS INC.

SECOND APPLICANT

JUDGEMENT

COLLIS J:

INTRODUCTION

1. This is an opposed application wherein the applicant, a duly admitted advocate and a member of the Johannesburg Society of Advocates, is seeking payment for professional services rendered on behalf of the first respondent on instruction of the second respondent.
2. On 28 January 2019 the applicant avers that she received instructions from the second respondent, to represent the first respondent in defending claims made against the latter.
3. At paragraph 8 of the founding affidavit, the applicant alleges that the material, alternatively express, further alternatively tacit terms of the agreement were as follows:[1]

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"8.1 The Second Respondent has entered into an agreement of mandatum with the First Respondent.

8.2 In terms of the mandate, the Second Respondent as agent, is instructed to attend to defending claims made against the First Respondent as principal, by third parties.

8.3 Furthermore and in terms of the said mandate, the Second Respondent is instructed to secure the services of Counsel to represent the interests of the First Respondent in three (3) matters scheduled for hearing before court.

8.4 Counsel instructed in pursuance of the said defence of claims, shall be remunerated for all professional services rendered.

8.5 Counsel shall submit invoices for professional services rendered at the conclusion of each matter, consecutively which shall be settled within 30 days of receipt."

4. Pursuant to rendering the professional services the applicant submitted her invoices to the second respondent at different intervals. On 26 March 2019, she made telephonic enquires about the payment of her outstanding invoices. She also made her inquiries per e-mail. Ms Chantel Van Heerden employed at the second respondent, respondent to the applicant's e-mail informing her that the interval for payments of invoices is two (2) to (3) months after receipt. In the same email Ms Van Heerden also undertook to make an effort to process the payment of her invoices faster.[2]

ARGUMENT ON BEHALF OF THE APPLICANT

5. Before the court, the applicant argued the following:

5.1 The first and second respondent entered into a service level agreement (the SLA), in terms of which the latter would defend the former against litigious claims from third parties.

5.2 Significantly, the terms of the SLA between the respondents formed the basis of instructions issued by the second respondent to the applicant: in the following manner:

5.2.1 In executing instructions, the applicant accepted a marked brief;

5.2.2 the applicant would be remunerated in accordance with a schedule of tiers complied by the first respondent and captured in Annexure D of the Service Level Agreement.

5.2.3 It was a material term of the agreement between the parties that the applicant would be paid within 30 days of submitting invoices to the second respondent.

5.3 The applicant disputed that her fees charged is unreasonable as claimed by the second respondent as the second respondent had failed to annex documentary proof to support this allegation.

5.4 In addition to this, the applicant denies that her claims before this court is premature, as the applicant maintains that payment terms agreed upon was to take place 30 days of dispatchment of invoice.

GROUND OF OPPOSITION BY THE SECOND RESPONDENT

6. The second responded opposes the application on the following grounds:

6.1 Firstly a point in limine was raised that the monetary amount of the applicant's claim falls within the jurisdiction of the Magistrate's Court and as such the applicant should have first obtained leave from this court to have instituted proceedings in the High Court;

6.2 Secondly that an agreement was reached with counsel that her fees would be paid in accordance with the first respondent's tariff;[3]

6.3 that such fees charged will be reasonable;

6.4 it denied that Ms Liesl Webber as alleged by the applicant could have entered into an agreement with the applicant as Ms Webber is a secretary who cannot lawfully enter into an agreement with the applicant.

6.5 that payment in Road accident Fund matters will only be paid, once payment was received from the first respondent and not within 30 days as alleged by the applicant.

6.6 In respect of all three matters the instruction to the applicant was accompanied with a letter of instruction, titled Memorandum to Counsel together with a document headed "Procedure on invoices";[4]

6.7 In respect of both the Mpya and Jwara matters the applicant has been paid R16 500 upon the first respondent having advised the second

respondent that it has assessed the fees raised by the applicant and that it had found it to be unreasonable. The first respondent had instructed the second respondent that it considers the amount of R16 500 as reasonable which amount was duly paid.[5]

ARGUMENTONBEHALFOFTHESCONDRESPONDENT

7. Before this court the second respondent argued the following:

7.1 It was argued on behalf of the second respondent that the applicant's version as to when payment fell due is contradictory. Firstly, the applicant alleges that payment fell due within 30 days from receipt of invoice but in her letter of demand the applicant alleges that payment was to be made in compliance with the Legal Practice Act, which does not prescribed a payment period.

7.2 The second respondent denied that the 30-day period was agreed upon between the parties.

7.3 At all material times the second respondent maintains that payment of invoices would only be made once payment had been received from the first respondent.

7.4 Furthermore, the second respondent had argued that the applicant's fees are also not reasonable and does not fall within the prescripts of the General Council of the Bar. In this regard it was argued that the applicant should have complied with Rule 7.1.5 of the Uniform Rules of Professional Conduct.

7.5 In addition to this, counsel had argued the applicant had failed to invoke the provisions of Ad Rule 7.7.3 of the Local Rules and

Practice of the Johannesburg Bar.

OPPOSED APPLICATIONS FOR FINAL RELIEF

8. Motion proceedings for final relief such as in the present application are appropriate only where it is not foreseeable that there will be a dispute of fact in the affidavits.[6]

9. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; [2009] 2 ALL SA 243 (SCA); 2009 (4) BCLR 393 (SCA); 2009 (2) SA 277 (SCA) the court said:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities."

10. A failure to heed this basic proposition can (and generally should) result in the application being refused when the disputes of fact on material issues were foreseeable.

11. In order to decide whether the affidavits disclose real, genuine or bona fide disputes of fact a court must carefully scrutinise the affidavits. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 ALL SA 512 (SCA); (2008) JOL 21447 (SCA); 2008 (3) SA 371 (SCA) the court outlined the approach that should be adopted:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or merely untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact, said to be disputed.....
....."

12. In the present instance as mentioned, the applicant avers that it was a material, alternatively express, further alternatively a tacit term of the agreement that counsel will be paid within 30 days of presenting her invoices for professional services rendered. On the applicants' own version the agreement was concluded orally on or about 28 January 2019 between herself and one Liesl Webber and the 30 day payment period as per her founding affidavit was raised when the first invoice was submitted by her on 26 February 2019.[7]

13. The second respondent specifically denies that Ms Liesl Webber had the necessary authority to enter into a contract with the second

respondent and avers that Ms Webber was merely tasked to ascertain the availability of counsel to appear on behalf of the first

respondent. It is further specifically denied that the second respondent concluded an oral agreement with the applicant and it was specifically pleaded that the terms of instructions were recorded in the Memoranda to Counsel and the Procedures on Invoices documents.[8] In the said Memorandum to Counsel with specific reference as to how fees will be calculated and when invoices will be settled the

following passage is of relevance:

"We further confirm we have briefed yourself in accordance with the RAF's tariff and that our offices will settle your invoice as soon as we have payment from the RAF for same."[9]

14. Regarding the procedure of invoices; it was specifically recorded by the second respondent in their letter addressed to the applicant that: "Please ensure that you clearly state on your invoice the date of your admission as an Advocate, and that you utilize the correct RAF tariff tier." [10]

15. The applicant in her replying affidavit, does not deny having received instructions to attend to the trial matters from the second

respondent and in so doing to act on behalf of the first respondent. As such there is no express denial by the applicant that she received the Memorandum to Counsel and Procedure on Invoice, albeit that she reiterated that payment of her invoices was to be done within 30 days of receipt of invoice. Another significant factor for consideration is that upon receipt of the Memorandum to Counsel and Procedure on Invoice the applicant did not immediately challenge the terms set out therein or insist that her invoices are to be settled within 30 days of receipt notwithstanding the memorandum.. She did not present to this court any correspondence emanating from her wherein she disputed the payment terms set out in the Memorandum to Counsel, but instead it appears she only challenged same when payment was due, when she first dispatched her first invoice on 26 February 2019.

16. Having regard to what has been alleged in the answering affidavit and more specifically with reference to the terms of the agreement concluded between the parties, I am satisfied in applying the Plascon-Evans test that there exists a real, genuine and bona fide dispute of fact as to the terms of the agreement and that the second respondent has seriously and unambiguously addressed the dispute of fact in their answering affidavit.
17. It is for this reason that I conclude that this dispute cannot be resolved on affidavits.
18. As previously mentioned, this dispute of fact on material issues relating to the terms of the agreement should have been foreseeable

by the applicant when the initial Memorandum to Counsel and Procedures on Invoice was first dispatched to her as early as 31 January

2019. In casu the Notice of Motion was issued on 25 April 2019. If the applicant had failed to appreciate the existence of a dispute of fact as to the terms of the agreement as early as 31 January 2019, she should have appreciated the existence of such a dispute when she received only part payment on her three invoices on 13 June and 7th July 2019 respectively. This she failed to do and instead she persisted with the application.
19. At paragraph 6.1 supra, this court has set out the point in limine raised by the second respondent. I do not intend dealing with the merits of the point in limine given the final outcome in the application.

COSTS

20. As to the appropriate costs order to be made by the court, counsel for the second respondent had argued that the court should award a punitive costs order against the applicant as she persisted with the application albeit the existence of a dispute of fact.
21. I do not believe that a punitive costs order is warranted under the circumstances, more so as same was not requested in the answering

affidavit filed on behalf of the second respondent.

ORDER

22. In the result the following order is made:

22.1 The application is dismissed with costs.

C COLLIS

JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances:

For the Applicant:

: In Persona

Attorney for the Plaintiff : Molosi Attorneys

For the Second Respondent : Adv M Niewoudt

Attorney for the

Second Respondent

: Mothle Jooma Sabdia Incorporated

Dates of Hearing

: 29 August 2019

Date of Judgment

: 10 December 2019

[1] Founding Affidavit para 8 p 7-8

[2] Founding affidavit para 23-25 p 11

[3] Answering affidavit para 11 p 55

[4] Answering affidavit para 14 p 55

[5] Answering affidavit para 19 & 32 p 56 & 59

[6] Essential Judicial Reasoning author BR Southwood.

[7] Founding affidavit para 7 & 20 p 7 & 11

[8] Answering affidavit para 14 p 69

[9] Founding affidavit Annexure "PAS 4" P 19

[10] Founding affidavit p 21

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