

SOUTH AFRICA / JUDGMENT

Sumelar Ontwikkelings (Pty) Ltd v HTF Developers (Pty) Ltd (22587/08) [2008] ZAGPHC 247; 2008 (6) SA 650 (T) (7 August 2008)

[2008] ZAGPHC 247

COURT
High Courts - Gauteng

BEFORE
Murphy

CASE / FILE NUMBER
22587/08

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 22587/08

Date: 07/08/2008

REPORTABLE

In the matter between: SUMELAR ONTWIKKELINGS (PTY)
 LTD Applicant
 And
 HTF DEVELOPERS (PTY)
 LTD Respondent

JUDGMENT

MURPHY J

1. This is an opposed application for summary judgment.
2. The plaintiff sued the defendant for an amount of R296 939,96 together with interest. The plaintiff sues as a cessionary of a claim that was ceded to it by Roestoff, Venter and Kruse ("RVK"). The claim ceded by RVK to the plaintiff is in respect of a taxed attorney and client bill of costs.
3. In the particulars of claim the plaintiff alleges that the defendant engaged the services of RVK to act as its attorneys in opposing an application for leave to appeal in the Constitutional Court brought by the Gauteng MEC: Department of Agriculture, Conservation and Environment and others. RVK accepted the mandate, rendered the professional services

and furnished the defendant with a bill of costs. After due notice of taxation the Registrar of the Constitutional Court taxed the bill of costs and allowed fees and disbursements in the sum of R296 939,96. The Registrar attached his allocatur to the bill on 25 April 2008. RVK ceded its right and title in the bill of costs to the plaintiff in terms of a written deed of cession on 6 May 2008.

4. Summons was served on the defendants on 9 May 2008 and the defendants filed their notice of intention to defend on 23 May 2008.
5. In the proceedings before me the defendant initially took the point that because an earlier application for summary judgment had been withdrawn the plaintiff was not entitled to reinstate the application. At the hearing the defendant abandoned the point and accordingly it is not necessary to decide it. Nevertheless, it can be said that as a matter of law and practice, in my view, once an application for summary judgment has been set down and then withdrawn it should only be reinstated in exceptional circumstances when the applicant is able to show his or her intention in withdrawing the application was not to effect a settlement of the issue in circumstances permitting a plea of settlement or *res judicata*. While the burden to establish the merits of such a plea would undoubtedly rest with the respondent, the mere fact of withdrawal will raise a strong evidentiary presumption that the summary judgment application ought to be considered settled or adjudicated. Be that as it may, it is unnecessary to pursue this aspect because the defendant has abandoned any reliance upon the point.
6. The defendant has instead chosen to rely upon a substantive defence which requires me to briefly set out the history of the litigation involving the defendant and in which for some of the time it was represented by RVK.
7. The plaintiff's bill of costs, as already explained, is based on a taxed bill of costs for fees and disbursements incurred in the Constitutional Court. The defendant submits that the matter in that court should not be seen in isolation because it was the culmination or final stages of litigation originating in this court ("the TPD") in April 2006.
8. Prior to the involvement of RVK, the defendant brought an application in the TPD (coincidentally also heard by me) against the Minister of Environmental Affairs and Tourism and others in respect of certain land of which it is the owner. The application was dismissed with costs. Thereafter, the defendant consulted with RVK and instructed them to proceed with an application for leave to appeal. Leave was granted to the defendant to appeal to the Supreme Court of Appeal ("the SCA"). RVK then noted and prosecuted the appeal on behalf of the defendant. The defendant succeeded in the SCA and my decision in the TPD was overturned. The MEC then sought leave in the Constitutional Court to appeal against the SCA decision. The defendant instructed RVK to oppose that application. The decision of the Constitutional Court went against the defendant and it is in respect of these proceedings alone that RVK prepared and taxed the bill of costs.

9. The defence raised by the defendant to the plaintiff's claim is that although several instructions were given to RVK commencing with the application for leave to appeal against the TPD decision, it bestowed only one mandate upon RVK throughout the several proceedings. Its position in this regard was communicated to RVK by its current attorneys of record on 4 March 2008 in a letter stating that it expected RVK to tax all its accounts. The taxation before the taxing master of the Constitutional Court in April 2008 was for obvious reasons only in respect of the matter in that court. Moreover, in the period between 22 July 2005 and 4 September 2007 the defendant paid RVK an amount of R289 147,49 in respect of fees and disbursements. It also paid an amount of R191 496,39 on 3 July 2008, some three months after the taxation and two months after the issue of summons. I was informed from the bar by the plaintiff's counsel that additional unspecified amounts have been paid since then. It is common cause that RVK has not taxed a bill of costs in respect of the proceedings before the TPD and the SCA. The defendant's defence to the summary judgment application is that without bills of cost having been drawn and taxed in the other matters it is not possible to determine the total amount payable to RVK, especially in the light of the amounts already paid.
10. The question then arising is whether the defence so put constitutes a bona fide defence within the meaning of rule 32(3)(b) sufficient to resist the plaintiff's claim for summary judgment. Will the facts set out by the defendant, if proved at trial, constitute a sufficient answer to the plaintiff's claim?
11. Although it is not formulated with the clarity and precision one might have preferred, as I read the defence of the defendant it has two legs: first it is contended that RVK may only recover fees and disbursements when it has taxed bills of costs in respect of its entire mandate and secondly that the defendant is entitled to set-off payments made against the amounts claimed in the taxed bill of costs. In respect of the second leg of the defence it is suggested by the defendant in the papers, though not clearly adumbrated, that it is unable to reconcile the full extent of its liability and any entitlement it may have to set off amounts paid against that claimed in the taxed bill until its liability in respect of the TPD and SCA proceedings has been determined by taxation.
12. With regard to the first leg, I can see no reason in principle why an attorney should be barred from recovering fees and disbursements which have been taxed by the taxing master of one court because the attorney has failed to tax a bill for fees and disbursements owing in respect of services in the same matter rendered in another court. Counsel has referred me to no authority to the contrary. The fact that the rules of the different courts envisage different taxations by different functionaries is a strong, if not conclusive, indication that separate recovery is not only permissible but inevitable. Thus Rule 70 of the Uniform Rules of Court, Rule 17 of the SCA Rules and Rule 20 of the Rules of the Constitutional Court deal separately with taxation in those courts. However, it is permissible for a client and attorney to agree, in accordance with the ordinary principles of contract, that no fees or disbursements will be recoverable until such time as bills of cost have been taxed in respect

of all services rendered by the attorney in relation to the litigation conducted in accordance with the mandate. As I read the defendant's affidavit resisting summary judgment, the defence raised is that such an agreement was in fact in place. Should the defendant prove the existence of such an agreement then its plea will be good. Thus, I am satisfied that the defendant has disclosed a bona fide defence.

13. Likewise, there is no reason why a debt owed by a client to his attorney for fees and disbursements should not be set-off against amounts owing by the attorney to his client - *Allison v Massel and Masse/1954 (4) SA 569 (T)*. Although, as I have intimated, the opposing affidavit does not explicitly make out a case for set-off, it is manifest from a reading of the affidavit as a whole that the defendant is motivated to resist payment because it believes that the amount of R480 643,88 it has paid, including the amount of R191 496,39, as well as the additional unspecified payments paid after the taxation, may exceed the amounts payable in respect of fees and disbursements for the appeals to the SCA and the Constitutional Court. If that is indeed so, any excess can be set-off against the bill of costs in respect of the proceedings before the Constitutional Court. Such liability as remains, if any, can be ascertained only after due taxation.
14. In the result, there is no basis for granting summary judgment. The defendant is granted leave to defend the action. Costs of the application are to be costs in the cause.

JR MURPHY

JUDGE OF THE HIGH COURT

TRANSVAAL PROVINCIAL DIVISION

Date Heard: 5 August 2008

For the Applicant: Adv EB Clavier, Pretoria

Instructed By: Roestoff, Venter & Krause

For the Respondent: Adv CP Wesley, Pretoria

Instructed By: Solomon Nicolson Rein & Verster

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