

SOUTH AFRICA / JUDGMENT

Van Schalkwyk v Bredenkamp

(7650/2024)

[2024] ZAWCHC 380 (19 November 2024)

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COURT

Western Cape High Court, Cape Town

BEFORE

Van den Berg, AJ

CASE / FILE NUMBER

7650/2024

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 7650/2024

In the matter between

SONIA VAN SCHALKWYK

APPLICANT

And

KENNETH JOHN BREDEKAMP

RESPONDENT

Date of hearing: 11 November 2024

Date of judgment: The judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 19 November 2024

JUDGMENT

VAN DEN BERG, AJ

[1] The applicant, who is cited as the defendant under the above case number, applies for the following relief:

“1. The bar for the service and filing of the applicant’s plea be removed and that the applicant be allowed to serve and file her plea within 5 (FIVE) days from the date of the Order;

2. The respondent shall bear the costs of this application.”
- [2] The respondent, who is the plaintiff in the action, opposes the relief. The parties will be referred to as in the action (the applicant as the defendant and the respondent as the plaintiff).
- [3] In essence, this is an interlocutory application for condonation in terms of Uniform Rule 27(2) and (3). However, it is not a simple matter. To the contrary, the 398 pages of affidavits and annexures contain highly controversial allegations and counter-allegations of mistrust, lies, and even unprofessional conduct on the part of the plaintiff, who is an attorney and officer of this Court, as well as an advocate at the Cape Bar.

CONTEXTUAL BACKGROUND

- [4] The plaintiff is a duly admitted attorney practising as such under the name and style of KJ Bredenkamp Attorneys. It is common cause that the plaintiff acted as the defendant’s attorney of record in an acrimonious divorce and related proceedings, which are still pending. These proceedings included a Rule 43 application, a Rule 43(6) application, an eviction application, proceedings in the Magistrate’s Court in terms of the Family Violence Act, and at least 2 (two) petitions to the Supreme Court of Appeal.
- [5] In the combined summons, the plaintiff claims payment of attorney’s fees of R168,559.58 and R848,425.00 in respect to counsel’s fees.
- [6] The defendant filed a notice of intention to defend on 30 April 2024, which was followed by the plaintiff’s service of a notice of bar on 31 May 2024.
- [7] The defendant is currently represented by Nabal Attorneys, who failed to file the plea timeously. Despite being ipso facto barred, the defendant filed a plea and counterclaim on 10 June 2024 and immediately directed correspondence to the plaintiff’s

attorneys requesting condonation for the late service of the plea and tendering the wasted costs.

- [8] The explanation offered by the defendant for the late filing of the plea is that her attorney inadvertently overlooked the fact that the notice of bar had already been served on 31 May 2024, as he only became aware of the notice upon receiving it from his correspondent on 3 June 2024.
- [9] The plaintiff opposes the application for condonation on several bases. The plaintiff contends that the application is not bona fide, that the defendant’s version is untruthful, and that the defendant does not provide a sufficient explanation for the default.

Additionally, the plaintiff asserts that the defendant’s proposed plea lacks merit and fails to meet the standard for the

upliftment of the bar, namely, disclosing sufficient grounds, including a bona fide defence.

- [10] The founding, answering, and replying affidavits contain numerous irrelevant allegations of impropriety and misconduct. The plaintiff and the defendant's erstwhile counsel, whose fees the plaintiff claims in the matter, make serious, emotionally loaded allegations in the affidavits before the Court. The nub of the defendant's case is that the plaintiff and counsel acted in contravention of the Legal Practice Act and Code. In particular, it is alleged that the defendant attained the services of counsel directly, without the intervention of an attorney, and that counsel, after he allegedly accepted an instruction from the defendant, subsequently introduced her to the plaintiff.
- [11] The defendant contends that the plaintiff's involvement in the litigation was a mere formality, asserting that he did not actually render the services but that counsel managed and performed all of the work, allegedly even coercing her into taking actions which she did not want to take.
- [12] The defence as formulated in the defendant's plea is to the effect that, in as far as a mandate agreement was concluded with counsel and the plaintiff to act on her behalf, such mandate was solicited by counsel in contravention of the referral rule, both at common law and as encapsulated in section 34(2)(a)(i) of the Legal Practice Act and section 27(2) of the Code.
- [13] The defendant further pleads that the demands for payment made directly to her, as well as the subsequent payments that she made directly to counsel pursuant to the demands, constitute a contravention of section 27(4) of the Code and Rule 7.1.9.1 of the Uniform Rules of Professional Conduct promulgated by the General Council of the Bar of South Africa. As a result of the alleged contraventions of the Legal Practitioners Act, the Code and rules of ethics, the defendant contends that the mandate is against public policy, statutorily illegal, and void from the outset.
- [14] Adv Stelzner SC, who appeared on behalf of the plaintiff, argued that the application should be dismissed because no proper case has been made out for the upliftment of the bar. He further argued that the defendant has not shown a bona fide defence to the plaintiff's action for payment of fees. In addition hereto, it was argued that the defence falls squarely within the *condictio ob turpem vel iniustam causam* rule. The argument goes that the defendant comes to Court with unclean hands, having been dishonest about the mandate, her knowledge of the fees to be charged, the involvement of other legal practitioners, who have furnished the Court with confirmatory affidavits, and her acknowledgement of her indebtedness to the plaintiff. In the alternative, Adv Stelzner SC argued that should this Court find that, on the evidence in these proceedings, there is some room for argument of a bona fide defence on the merits, the submission would then be that the defence ought to be tested by way of parol evidence.
- [15] The plaintiff submits that the defendant has perjured herself, as evidenced by the overwhelming objective facts that are stacked against her. These include affidavits deposed to by 3 (three) legal practitioners, which destroy the defendant's version, as well as an

affidavit by the defendant's own brother-in-law. The evidence placed before the Court indicates that the defendant has, on multiple occasions, admitted her indebtedness not only to the plaintiff and her former counsel but also to Mr Francois du Toit, her attorney in the proceedings before the Family Violence Court, and to her brother-in-law, Mr Bekker.

- [16] The plaintiff argues that the Court should adopt a robust approach in rejecting the defendant's version and find in favour of the plaintiff, based upon the trite Plascon-Evans principle.

LEGAL REQUIREMENTS FOR UPLIFTING THE BAR

- [17] Uniform Rule 27 requires the case for the upliftment of the bar to be made out on the standard of good cause shown. The requirement of good cause has been interpreted to have 3 (three) requirements being:

[17.1] The applicant must have a reasonable and acceptable explanation for the default.

[17.2] The applicant must be bone fide.

[17.3] The applicant must demonstrate a bone fide defence which prima facie has some prospect of success.

EXPLANATION OF DEFAULT

- [18] I am satisfied that the defendant has offered a sufficient explanation of the default for the late filing of the plea. As a matter of fact, the plea was filed a mere 3 (three) days late. I do not accept the argument on behalf of the plaintiff that the defendant's attorney had more than 41 (forty-one) days after the service of the summons to obtain instructions and prepare a plea, and that, therefore, the client should be penalised.

BONA FIDE DEFENCE

- [19] The defendant is required to disclose facts in the application which, if proven at trial, would constitute a defence. The test to determine whether the defence has been pleaded sufficiently is similar to the test applied in summary judgment applications in terms of Rule 32.[1] It can hardly be argued that the defence was pleaded in a matter which appears to be needlessly bold, vague or sketchy. It would not have been sufficient for the defendant to simply state her defence without briefly stating the facts on which she relies for the defence. However, the question arises whether the defendant has put up a bona fide defence with some good prospects of success.[2]

- [20] In *Soft Coffee (Pty) Ltd v Molai Property Development*, [3] Splig J held that what constitutes a bona fide defence may be informed by the similar test applied in summary judgment proceedings in order to determine whether leave to defend, or in this application condonation, ought to be granted. In essence, the plaintiff wants the Court to find, as would be the case if the matter was argued on exception, that the plea does not disclose any defence on any possible interpretation thereof.

- [21] In relying on the well-known judgments in *Maharaj v Barclays National Bank Limited*[4] and *Breytenbach v Fiat SA (Edms) Bpk*,[5] the Court in *Soft Coffee* (supra) found that the defendant in that matter failed to disclose a bona fide defence on the basis that, having regard to all the circumstances, the defendant had, or may have, dishonestly sought to avoid the dangers inherent in presenting a further or clearer version of the events which he claims to have occurred.[6]
- [22] In *Ferris v FirstRand Bank Limited*,[7] the Constitutional Court held that lateness is not the only factor to be considered. The party applying for condonation must prove whether it is in the interests of justice to grant it, which includes factors such as the applicant's prospects of success and the importance of the issue to be determined.
- [23] The strongest argument on behalf of the plaintiff is that, on both parties' versions, a mandate agreement was concluded at the first consultation held at counsel's chambers. The plaintiff was present at the first consultation, and a mandate agreement was concluded between him and the defendant. Whatever counsel may have allegedly done subsequently, it was argued, cannot, per se, render the mandate void.
- [24] As persuasive as this argument may be, it loses sight of the fact that the defendant alleges that the terms of the mandate offend against public policy as well as the LPC Act and Code[8]. In addition, the defendant boldly alleges that the mandate was not properly performed as could be expected of an attorney and counsel.
- [25] If the same test as in summary judgment applications is applied, the question to be answered is whether the plaintiff has an unanswerable case. As a matter of law, attorneys initiate the contract between an advocate and his client and negotiate and receive fees from the client on behalf of the advocate and himself. The referral rule lies at the bedrock of the advocates' profession and exists in the interests of the public[9].
- [26] However, the defendant's version under oath does not convince me, though it may be premature to reject it altogether. It is common cause that the defendant was referred to counsel by a mutual friend and family member. Counsel arranged the first consultation at his chambers with the plaintiff and defendant, who were in attendance. The oral mandate agreement was concluded at this first consultation.
- [27] These facts raise the question of whether the mandate is against public policy because the first consultation was, in the defendant's words, 'solicited' by counsel at the behest of a mutual friend and family member. Or could a court find that the mandate agreement is against public policy given its terms, as alleged by the defendant in her plea?

[28] The Court has a wide discretion to be exercised judicially having regard to, inter alia, the importance of ventilating disputes between parties and whether an appropriate order for costs could cure prejudice.[10] Herein lies a further problem. The defendant says that she is an unemployed 'stay-at-home' mother. The defendant does not dispute that she does not have the means to pay any costs order granted against her. Therefore, the plaintiff's prejudice

cannot be countered by an order for costs.

[29] In light of the aforesaid, I am not convinced that the application is bona fide or that there are good prospects of success. I will, however, grant the defendant the benefit of the doubt. She seeks an indulgence for her attorney's failure to have filed a plea timeously. I cannot merely refer the dispute for oral testimony, as this would inevitably lead to nothing more but a full-blown trial without the parties having exchanged pleadings. The relief sought is not final, but only interlocutory. The situation would have been different if, as is the case in many of the authorities previously referred to, the Court was called upon to decide both an application for default judgment and an application for condonation simultaneously.

[30] I am also mindful that the parties are still in the initial stages of the proceedings, the substantial amount involved and the importance of ventilating the true disputes at trial. The court has a wide discretion and the defendant did not recklessly disregard the rules. The defendant is anxious and serious about proceeding to trial, even though the plaintiff and counsel, with reason, question her motive for doing so. Opposed hereto, the plaintiff suffers prejudice because he incurred the costs of opposing this application. He will also expend costs in proceeding to trial against a litigant whose financial position seems doubtful. However, the defendant's financial position was known to the plaintiff and counsel, yet they willingly litigated in the fashion and to the extent they did. In the premises, I cannot shut the proverbial court doors in the face of the defendant, and she will proceed at her peril.

COSTS

[31] The Court appreciates the serious nature and potential implications of the allegations made by the defendant, particularly against her erstwhile counsel. However, the defendant's erstwhile counsel filed a confirmatory affidavit in support of the plaintiff's answering affidavit. In this affidavit, counsel makes statements that I believe are regrettable. Two wrongs do not make a right. The starting point should be that advocates, as members of an honourable profession, render fees honestly and behave ethically[11]. Advocates and attorneys are as much a part of the court where they practise as the judges who preside over them.[12] Unfortunately, the legal representatives allowed the contents of the affidavits to become overly contentious and detract from the matter at hand. This is an important factor in considering the appropriate scale of costs in terms of Uniform Rule 67A(2)(c) and

(d) read with Uniform Rule 69(7).

- [32] Irrespective of which of the parties will ultimately succeed, there is no reason why the plaintiff should be out of pocket with any of his legal expenses. The defendant seeks an indulgence and should, therefore, be held liable for at least payment of the party and party costs occasioned by the application for condonation on Scale A.
- [33] However, should the Trial Court reject the defendant's defence or the action be decided in favour of the plaintiff, the defendant should be penalised with the costs of this opposed application with an attorney and client costs order on Scale C.
- [34] In the premises, I reserve the question of costs to be determined by the Trial Court on the basis as set out herein. The following order is granted:
- 1) The applicant is granted condonation in terms of Uniform Rule 27 and the notice of bar is uplifted.
 - 2) The applicant served a plea and counterclaim while ipso facto barred from doing so. Such plea and counterclaim are deemed to have been filed on the date of this order, and the usual time periods per the Uniform Rules shall apply for the further exchange of pleadings.
 - 3) The costs are reserved.

For the applicant/

Defendant : Mr Nabal

Nabal Attorneys

For respondent/

Plaintiff : Adv Stelzner SC

KJ Bredenkamp Attorneys

- [1] Ford v Groenewald 1977 (4) SA 224 (TPA) at 226B to G
- [2] Colyn v Tiger Food Industries Limited trading as Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at para 12 and 13
- [3] 2015 JDR 1250 (GJ)
- [4] 1976
- (1) SA 418 (A)
- [5] 1976
- (2) SA 226 (T)
- [6] Soft Coffee at p 9
- [7] 2014 (3) SA 39 (CC)

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- [8] Pretoria Society of Advocates v Ndleve 2013 JDR 1295 (GNP) at [10] –[14]
- [9] De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) at [17] and [18]
- [10] Smith N.O. v Brummer N.O. and another Smith, N.O. v Brummer, N.O. and another Smith, N.O. v Brummer 1954 (3) SA 352 (O) at 357 to 358
- [11] Van Pletzen v Taxing Master o f the High Court (Free State Society of Advocates Amicus Curiae) 2021 JDR 1236 (FB)
- [12] Herbstein and Van Winsen, The Civil Practice of the High Courts and the supreme Court of Appeal of South Africa, Volume 1 pp40
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