

SOUTH AFRICA / JUDGMENT

W Capital Finance (Pty) Ltd and Another v GP Venter Attorneys Inc and Another (79444/2019) [2024] ZAGPPHC 223 (11 March 2024)

[2024] ZAGPPHC 223**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Janse van Nieuwenhuizen

CASE / FILE NUMBER

79444/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****Number: 79444/2019****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE: 11 March 2024****SIGNATURE:**

JANSE VAN NIEUWENHUIZEN J

W

CAPITAL FINANCE (PTY) LTD

First Plaintiff

B

P GEACH

and

Second Plaintiff

GP VENTER ATTORNEYS

INC

First

Defendant

GP

VENTER

Second
Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

INTRODUCTION

- [1] The first plaintiff, W Capital Finance (Pty) Ltd, an erstwhile client of the first and second defendant's, claims payment of an amount of R 584 209, 94 with interests and costs from the first and second defendants.
- [2] The first defendant is G P Venter Attorneys Incorporated, a personal liability company, and the second defendant, George Philippus Venter, is an attorney and director of the first defendant. In view of the provisions of section 19(3) of the Companies Act, no 71 of 2008, I will refer to the first and second defendants as "the defendants" or as cited. The amount claimed by the first plaintiff is monies held in trust by the defendants, which monies is due and payable on demand. Notwithstanding the issuing of the summons, the defendants have failed and/or neglected to pay the amount to the first plaintiff.
- [3] The second plaintiff, Brenton Patrick Geach, is a senior counsel at the Pretoria Society of Advocates and claims an amount of R 298 908, 00 from the defendants for the rendering of professional services.
- [4] The defendants defended the action, and the second defendant instituted a counterclaim against the first plaintiff. The claim is for fees due as a result of professional services rendered to the first plaintiff in the amount of R 1 078 620, 56.

Pleadings

1. Issues common cause
- [5] A rather strange phenomena emerged during the cause of the trial. Although most of the allegations in the first plaintiff's particulars of claim are common cause between the parties, Eugene Watson ("Watson"), the witness that testified on behalf of the first plaintiff, gave a version that is in total contradiction to the common cause facts. Watson's evidence and version resulted in a trial running for 5 days.
- [6] Notwithstanding the aforesaid, the first plaintiff did not seek an amendment of its particulars of claim. In the result, the matter will be adjudicated on the common cause facts in respect of the respective claims of the parties as it appears from the pleadings and the evidence led at trial.

First plaintiff's claim and second defendant's counterclaim

[7] It is common cause between the first plaintiff and the defendants that:

7.1 during or about 2011 the first plaintiff, being represented by Watson, engaged the services of the second defendant to act as its attorney in a litigious matter between the first plaintiff and Dykes Van Heerden Incorporated and Dykes van Heerden, which mandate was accepted by the second defendant;

7.2 it was an express, alternatively implied, further alternatively tacit term of the mandate that the second defendant would act on behalf of the first plaintiff and would:

7.2.1 recover the amounts that Dykes van Heerden Incorporated and Dykes van Heerden were obliged to pay to the first plaintiff;

7.2.2 be entitled to reasonable remuneration for his legal services;

7.2.3 upon recovery pay over the monies to the first plaintiff on demand;

7.3 in accordance with the mandate to represent the first plaintiff, the first defendant acted as attorneys of record in the action of the first plaintiff against Dykes van Heerden Incorporated and Dykes van Heerden;

7.4 the first plaintiff was successful in both the action and the subsequent appeal and as a result thereof, Dykes van Heerden Incorporated and Dykes van Heerden became obliged to pay to the first plaintiff the capital sum of R584 209,94 together with interest and costs on a party and party scale;

7.5 during or about June 2015, the sum of R 1 168 419, 88 was paid by Dykes van Heerden Incorporated and Dykes van Heerden to the defendants. The amount is made up of the capital sum of R 584 209, 94 and interest in the same amount;

7.6 on or about 14 July 2016 the defendants paid the capital sum to the first plaintiff;

7.7 on 24 November 2016, Watson, representing the first plaintiff, and the second defendant agreed that the second defendant may hold the interest in the trust account of the first defendant, pending:

7.7.1 taxation by the Taxing Master of the party and party costs payable by Dykes van Heerden; and

7.7.2 payment of such costs to the second defendant.

7.8 the costs payable to the first plaintiff by Dykes van Heerden Incorporated and Dykes van Heerden were taxed by the Taxing Master on 8 December 2017 in the amount of R 371 067, 53, which amount included counsel's fees;

7.9 the costs were paid to the defendants on or about 13 December 2017.

- [8] The first plaintiff raised a special plea of prescription to the second defendant's claim for payment of his legal fees. Mr Snyman SC, counsel for the plaintiffs, to his credit, did not persist with the special plea.

Second plaintiff's claim

- [9] It is common cause that the second plaintiff rendered professional services in the matter between the first plaintiff and Dykes van Heerden Incorporated and Dykes van Heerden and that he rendered an account in the amount of R 298 908, 00.

2. Issues in dispute

- [10] The second defendant denies that he instructed the second plaintiff as counsel in the matter between the first plaintiff and Dykes van Heerden Incorporated and Dykes van Heerden. The second defendant pleaded that the second plaintiff was appointed by the first plaintiff, there and then being represented by Watson.
- [11] Should the court find that the second plaintiff was appointed by the second defendant, the second defendant raised a special plea of prescription against the second plaintiff's claim.

Second defendant's counterclaim

- [12] Although it is common cause that the first plaintiff is liable to pay reasonable remuneration to the defendants, a dispute arose in respect of the reasonableness of the defendants' bill of costs and as a result, the bill needs to be taxed by the Taxing Master. For reasons I will allude to infra, the bill had still not been taxed when the trial concluded.
- [13] The second defendant, therefore, prayed for an order that the order directing the defendants to pay the amount of R 584 209, 94 with interest to the first plaintiff be suspended until the bill had been taxed.

Evidence

- [14] The second plaintiff confirmed that he is a senior counsel and testified that he had been practising as an advocate at the Pretoria Association of Advocates for more than 30 years.
- [15] The second plaintiff denied that he was instructed by Watson on behalf of the first plaintiff and testified that he met Watson for the first time during a consultation that was held at the offices of the second defendant on 2 March 2011. He was present when Watson instructed the second defendant in the matter between the first plaintiff and Dykes van Heerden Incorporated and Dykes van Heerden. The second defendant suggested that the second plaintiff be instructed as counsel in the matter and Watson did not raise any objection.
- [16] The second plaintiff, with reference to a brief cover containing instructions from the second defendant in respect of the matter, testified that he was instructed by the second defendant. The second plaintiff, furthermore, testified that the second defendant had briefed him extensively in the past in various other matters.

- [17] The second plaintiff also referred to his statements of account, which statements were at all relevant times addressed and submitted to the first defendant.
- [18] Finally, the second plaintiff testified that he, in all his years of practice, has never accepted instructions directly from a client. Advocates are, in terms of the rules regulating the profession, prohibited from accepting instructions directly from a client.
- [19] The second plaintiff's evidence was confirmed by Watson and Mrs Swart, a costs consultant who was also present at the consultation in the second defendant's office on 2 March 2011. I pause to mention, that the aforementioned three witnesses made a favourable impression on the court and their evidence in respect of this issue was satisfactory in all respects.
- [20] The second defendant testified and confirmed his version that the second plaintiff was appointed by Watson on behalf of the first plaintiff. The second defendant, however, had difficulty in explaining why his firm issued instructions to the second plaintiff and accepted his statements of account without protest, if the second plaintiff was indeed appointed by the first plaintiff. The second defendant's evidence in this regard was most unsatisfactory.
- [21] I take judicial notice of the fact that counsel is as a rule appointed by an attorney and not a client.
- [22] Having had regard to the evidence in its totality as well as the probabilities inherent in the two conflicting versions, I have no hesitation in rejecting the second defendant's version.
- [23] In the result, the first and second defendants are liable for the payment of the professional fees claimed by the second plaintiff.

Special plea: prescription

- [24] Having found that the defendants are liable for the payment of the second plaintiff's professional fees, it is necessary to have regard to the defendant's special plea of prescription.
- [25] The special plea of prescription is based on the following allegations:
- 25.1 the claim for the payment of fees is in respect of services rendered for the period 3 July 2011 to 10 June 2014;
- 25.2 the applicable period of prescription is three years;
- 25.3 a period in excess of three years has expired prior to the institution of the claim.
- [26] It is common cause that the summons was issued on 24 October 2019, being more than three years after 10 June 2014.
- [27] In his particulars of claim, the second plaintiff made the following averment in respect of the due date for the payment of his fees:

“3.4.2 The fees plus VAT would become due, owing and payable to the Second Plaintiff by the Second Defendant only upon taxation in the event that the First Plaintiff was successful, of the party and party bill of costs against DYKES VAN HEERDEN INCOPORATED and/or DYKES VAN HEEREN; and in the event that the First Plaintiff was not successful, of the attorney and client bill of costs.” (own emphasis)”

- [28] In his evidence the second plaintiff confirmed the aforesaid agreement. The second defendant did not dispute the second plaintiff's evidence in this regard.
- [29] The second defendant, however and without amending his special plea, made a turnabout during cross-examination and referred the second plaintiff to a pro forma tax invoice submitted by the second plaintiff to the defendants on 15 August 2013 in the amount of R 275 566, 50. The invoice is in respect of the Dykes matter and at the bottom of the invoice, the following appears: “This account is payable on or before 31 December 2013”.
- [30] The second defendant also referred to a further invoice dated 10 June 2014 in the amount of R 14 107, 50 that contained a similar note, to wit: “This account is payable on or before the end of September 2014”.
- [31] It is common cause between the second plaintiff and the second defendant that the second plaintiff refused to do any further work on the Dykes matter after the leave to appeal application was successful. The second plaintiff testified that he refused to do further work for the defendants in all matters that he was briefed in, because the defendants did not pay his accounts.
- [32] The evidence referred to supra was firstly not relied upon by the defendants in their special plea and secondly, the second defendant's failure to deny the term relied upon by the second plaintiff during his evidence resulted in the term of the agreement being admitted.
- [33] The fact that the second plaintiff demanded payment prior to the date of taxation does not change the term of the agreement. In the event that the second plaintiff issued summons prior to the taxation of the account, the defendants were at liberty to plead that the summons is premature.
- [34] The bill of costs was taxed on 8 December 2017 and the claim would have been extinguished by prescription on 8 December 2020.
- [35] Summons was served prior to 8 December 2020 and the second plaintiff's claim has not prescribed.

Suspension of order

- [36] When the trial commenced on 15 January 2024, the second defendant indicated that the bill of costs would be taxed by the end of January

2024. In the result, the relief claimed by the second defendant has become academic. Although the second defendant's claim stands to be dismissed for this reason, I will deal with the costs of the counter claim infra.

Interest

[37] Mr Snyman submitted that interest on the capital amount should run from 19 September 2016. In support of this submission, Mr Snyman relied on a letter from Pieterse & Curlewis addressed to the defendants on 19 September 2016, in terms of which the defendants, according to Mr Snyman, was instructed to invest the interest and costs collected from Dykes van Heerden until the dispute in respect of the mandate had been resolved.

[38] The letter is written in Afrikaans and, in order to do justice to the parties, it is necessary to quote the relevant portion as it was written:

“Dit is ons instruksies om hiermee u te versoek om onverwyld en binne sewe dae vanaf datum hiervan 'n volledige rekonsiliasie in terme waarvan al bovermelde berekeing (sic!) gestipuleer en uiteengesit aan ons te voorsien vir voorlegging aan ons kliënt.”

[39] The only instruction from the first plaintiff that is conveyed in the letter, is a request that a reconciliation of all amounts received by the defendants in respect of the Dykes matter be delivered to Pieterse & Curlewis within 7 days from the date of the letter.

[40] Neither the first nor the second plaintiff alleged or proved that the parties agreed to interest mora ex re and in the result interest will only start running once a proper demand for payment has been made (mora ex persona).

[41] Neither the first nor the second plaintiff alleged or proved that proper demand was made prior to the issuing of the summon and I will accept that demand was made when the summons was served on the defendants.

Costs

[42] The defendants filed their notice of intention to tax the bill of costs on 28 June 2018. On 24 August 2018, the first plaintiff filed a notice of intention to oppose the taxation. The objection reads as follows:

“That the Attorney of Record and the Plaintiff concluded a fee agreement on the 8th of March 2011 and that the Attorney of Record would limit his charges to the fees taxed against the defendant PLUS R 50 000, 00 as an attorney own client fee.

The Advocate appointed by the Plaintiff agreed to taxed cost PLUS R 50 000, 00.

THAT the taxed cost had already been recovered from the opponents.”

[43] Due to the dispute raised by the first plaintiff in respect of the fee agreement between the parties, the Taxing Master could not tax the bill until the dispute had been resolved between the parties or until there is an order of court.

- [44] As stated supra summons was issued on 24 October 2019. In the particulars of claim the first plaintiff alleged that the second defendant would “be entitled to taxed party and party costs as reasonable remuneration for his legal services.”
- [45] On 17 February 2020 the first plaintiff served a notice of intention to amend the particulars of claim by deleting the words “taxed party and party costs as”.
- [46] The amendment was affected on 5 March 2020 and on 25 May 2020 the defendants delivered their plea to the amended particulars of claim. The defendants admitted that it was a term of the mandate that the second defendant will be entitled to reasonable remuneration for his legal fees. It was, therefore, common cause from 25 May 2020 that the first plaintiff had to pay reasonable remuneration for the legal services rendered by the second defendant.
- [47] The objection to the bill of costs was, however, not withdrawn. To the contrary, the first plaintiff insisted on running a 5-day trial, in circumstances where there were virtually no disputes between the first plaintiff and defendants on the pleadings. The defendants, in turn, did not object to the leading of irrelevant evidence and participated wholeheartedly in the entire running of the trial.
- [48] Both parties are at fault for the unnecessary costs that was incurred and in the exercise of my discretion, I find that the first plaintiff and the defendants will be liable for their own costs, both in respect of the claim and counter claim.
- [49] The second plaintiff was successful, and costs should follow the cause.

ORDER

The following order is issued:

1. The first and second defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay:
 - 1.1 an amount of R 584 209, 94 to the first plaintiff with interest a tempore morae from date of judgment to date of payment;
 - 1.2 an amount of R 298 908, 00 to the second plaintiff with interest a tempore morae from date of judgment to date of payment;
 - 1.3 the costs of the second plaintiff.
2. The second defendant’s counter-claim is dismissed.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

DIVISION, PRETORIA

DATES HEARD:

1, 2 March 2023 & 15, 16 and 17 January 2024

DATE DELIVERED:

11 March 2024

APPEARANCES

For the Plaintiff's: Advocate M Snyman SC On behalf of the First Plaintiff Instructed by: Danie Prinsloo Attorneys On behalf of the Second Plaintiff Instructed by: Louw Le Roux Inc For the Defendant's: Mr GP Venter in person

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Prepared on 12 October 2026 · Esheria