

15/12/2010
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DATE WHICH EVER IS NOT (REPUBLIC OF SOUTH AFRICA)

MY REPORTABLE: YES NO

OF INTEREST TO OTHER JUDGES: YES NO

REVISED

2010-12-15

SIGNATURE

CASE NUMBER: A294/2008

In the appeal between:

TJAARD DU PLESSIS INGELYF

Appellant (Plaintiff)

and

SJP JOUBERT

Respondent (Defendant)

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

(1.1) This is an appeal against the whole of the judgment of the learned Magistrate, M Venter in terms of which:

1.1.1 She dismissed the Plaintiff's claim with costs;

1.1.2 She found that the counterclaim in principle succeeded, but she ruled that the quantum thereof as well as the costs pertaining to the counterclaim should stand over.

(1.2) The aforesaid is clear from paragraph 3 of the affidavit of JJ van der Schyff (attorney) dated 22 April 2008 as the order has not been recorded by a stenographer but was handed down / given in chambers.

2 BACKGROUND / RELEVANT FACTS:

(2.1) The Appellant was the Plaintiff in the court *a quo* and the Respondent was the Defendant in the court *a quo*.

(2.2) The Plaintiff is a firm of attorneys.

- (2.3) The Defendant is a former client of the Plaintiff.
- (2.4) The Plaintiff instituted action against the Defendant for R4 296,73 plus interest and costs for professional services rendered during 2005 at the Defendant's special instance and request.
- (2.5) It transpired that the ground for the counterclaim seems to be that the Defendant has withdrawn his action against the seller of the vehicle (INTO CARS) and settled for an amount of R1 500,00 which he alleges being the damages he has suffered in this regard. More in particular, the defendant avers the following (which are to a great extend common cause):
- 2.5.1 During December 2004 the defendant instructed the plaintiff to institute action against INTO CARS (from which the defendant purchased the vehicle) for damages pertaining to repair costs which the defendant incurred in repairing the said vehicle;

- 2.5.2 During February 2005 particulars of claim were prepared by advocate MCC de Klerk;
- 2.5.3 The said particulars of claim (which also included a claim for cancellation) were sent to the defendant to peruse;
- 2.5.4 After the defendant confirmed that the particulars of claim were in order, same were issued during March 2005;
- 2.5.5 On the 22nd April 2005 the plaintiff incorrectly (which was readily admitted) applied for summary judgment on behalf of the (now) defendant against INTO CARS;
- 2.5.6 The aforementioned application for summary judgment was withdrawn on the 25th of April 2005;
- 2.5.7 Shortly thereafter the defendant terminated the mandate of the plaintiff and settled with INTO CARS for an amount of R1,500,00.

[3] **THE GIST OF THE MATTER:**

- (3.1) At the trial (see: page 30 of the record) the parties agreed that the only dispute to be adjudicated would be the question of whether the Plaintiff had been instructed by the Defendant to claim for damages only or whether he was also entitled to claim for cancellation and damages from the seller of the motor vehicle, being the seller who sold the motor vehicle to the Defendant.
- (3.2) Only the director of the Appellant testified. The Defendant did not testify.

[4] **THE LAW:**

- (4.1) It is trite law that (see for instance ***Amler's Precedents of Pleadings, Harms (5th Ed) at p55*** where the following is said: *"The liability of an attorney towards his client for damages caused as a result of his negligence is based upon a breach of the contract between the parties."*
- (4.2) It is also trite law that *"It is a term of the mandate that the attorney will exercise the skill adequate knowledge and diligence expected of an average practising attorney"* (my underlining).

See: Amler's Precedents of Pleadings (7th Ed) at 59

- (4.3) What is expected is reasonable care not absolute care. See in this regard: ***The Law of South Africa, Vol 14 (1st Reissue)*** at 408 where the following is said:

"In pursuing his occupation, an attorney, like professional men in other fields, is obliged to exercise due and reasonable care. The duty to take care is established once it is clear that the danger "would have been foreseen and guarded against by the diligens paterfamilias.

An attorney will not be guilty of negligence merely because he committed an error of judgment, whether on matters of discretion or law. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed."

(My underlining)

- (4.4) It is thus clear that the attorney is not absolutely liable.

[5] ARGUMENTS /SUBMISSIONS:

(5.1) I have carefully perused the record and other documents filed as well as the heads of argument by counsel and have also listened to their arguments/submissions.

(5.2) Mr Geach SC (for the Respondent) heavily relied on *inter alia* the following:

5.2.1 Page 99 of the record pertaining to be instituted for damages only;

5.2.2 The incorrect application for summary judgment in the High Court (which the Plaintiff has withdrawn and tendered the costs). This Mr Geach SC argues is proof that the Appellant did not pay proper attention to the matter.

(5.3) Mr Rossouw SC (for the Appellant) on the other hand, pointed to *inter alia* the following:

5.3.1 A case develops, so with time the relief sought is sometimes broaden to cover more possible

possibilities. *In casu* only an oral warranty was given and it was more diligent and prudent to cover that possibility. It would be less prudent in not doing so.

5.3.2 He referred to page 102 of the record. This is a letter to the Respondent pointing out that an advocate has drawn the particulars of claim as well as that the claim pertains to three possibilities. His father had also perused the draft particulars of claim and through his silence confirmed his consent thereto.

(5.4) In view of the aforesaid, Mr Rossouw SC argues that the Respondent as well as his father knew about the advocate having been briefed to settle the particulars of the claim and the three possibilities pertaining to *inter alia* the fact that the claim was also for cancellation and damages.

[6] **DISCUSSION:**

- (6.1) As stated above, I have carefully perused the record and other documents filed as well as the heads of argument by counsel and have their arguments/submissions.
- (6.2) It is clear that when the draft particulars of claim was sent to the Respondent and his father also had knowledge of this as the father made some corrections and never objected or had any problems with the fact that the said particulars also covered a claim for cancellation and/or damages.
- (6.3) It is clear that the duty of an attorney is not absolute.
- (6.4) From Volume 2 of the record it is clear that various letters, keeping the Respondent up to date, was written to him by the Appellant. This clearly points to diligent behaviour.
- (6.5) The application for summary judgment was an error for which the Appellant took responsibility and tendered the wasted costs occasioned thereby, and is accordingly irrelevant to the dispute between the parties.
- (6.6) In view of the oral warranty it was diligent to institute (in the alternative) *inter alia* relief pertaining to cancellation and

damages. In any event, if this was a judgment of error, it cannot be regarded as negligence in view of the authorities referred to in paragraph (4.2) above.

- (6.7) The Respondent and his father were aware at all times that an advocate had drafted the particulars of claim and the fact that action has been instituted *inter alia* for cancellation and damages.
- (6.8) The Respondent never informed the attorney (Appellant) that his car had been repaired elsewhere.
- (6.9) It cannot be expected from an ordinary attorney (which is the test) to fail every time, everyday to enquire whether the vehicle had been repaired or not. It is at least expected from the client to call his attorney.

[7] **CONCLUSION:**

- (7.1) In view of the aforesaid, I find that the Plaintiff did in fact carry out his mandate and that he had a mandate and did not act negligently.

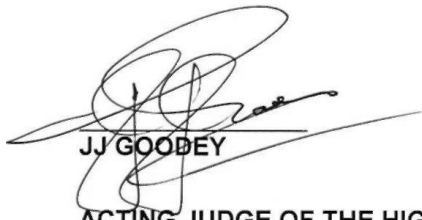
(7.2) Thus the claim should have succeeded with costs and consequently the appeal to my mind succeeds in this regard.

(7.3) Pertaining to the counterclaim, since the mandate was carried out and there was no negligence on the part of the Plaintiff, the counterclaim cannot stand and should fall away and the appeal should also succeed in this regard. It should also be recalled that the action was withdrawn at the specific instruction of the Respondent, after consultation with the Appellant.

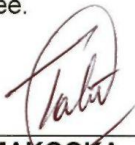
(7.4) Consequently, I make the following order:

1. The appeal is upheld;
2. The order of the Magistrate is substituted by the following: *"The Plaintiff's claim in the amount of R4 269,73 succeeds with interest at a rate of 15,5% per annum as from the date of service of summons plus costs."*

3. The counterclaim is dismissed with costs.


JJ GOOBEY
ACTING JUDGE OF THE HIGH COURT

I agree.


TM MAKGOKA

JUDGE OF THE HIGH COURT

Date heard: 11 November 2010
Date of Judgment: 15 December 2010
Counsel for the Appellant: Mr BP Geach SC
Counsel for the Respondent: Mr DPJ Rossouw SC

Attorneys for the Appellant:

TJAARD DU PLESSIS INC
c/o PRETORIUS and WILSNACH
386 ORIENT STREET
PRETORIA
REF: T DU PLESSIS/TB0264
Tel: (012) 755 5445/6

Attorneys for the Respondent:

EMMA NEL ATTORNEYS
STANDARD BANK CHAMBERS
59 CHURCH STREET
REF: E NEL/jm/J132