



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

10/1/11
DATE

SIGNATURE

CASE NO: 9832/2007

DATE: 4/2/2011

IN THE MATTER BETWEEN

F J HUMAN

PLAINTIFF

AND

C M C CHEMICALS (EDMS) BPK

1ST DEFENDANT

TIMBERLIFE (EDMS) BPK

2ND DEFENDANT

JUDGMENT

OMAR, AJ

This is an action in which the plaintiff claims from the defendants payment of an amount of R222 630,00 and an amount of R300 0000,00 together with ancillary relief for remuneration in terms of an agreement, marked as annexure "A" to the plaintiffs

particulars of claim, in terms of which he was appointed by the defendants to investigate and quantify their insurance claims against Mutual & Federal Insurance Company ("M&F").

The insurance claims arose from a fire which had gutted the factory premises in Waltloo, Pretoria on 26 April 2002 where the first defendant had been conducting its business, namely the manufacturing of timber-treatment chemicals. The second defendant was the owner of the premises. The defendants approached the plaintiff for assistance in the quantification of their claims after M&F had repudiated liability in terms of the relevant insurance policy.

The plaintiff alleges that the defendants breached the terms of the agreement in that the defendants, on or about 11 December 2006, agreed and settled their claims against M&F in respect of the *quantum* amount by way of an offer of settlement in terms of Rule 34 of the Rules of Court, without the plaintiff being involved or dealing with the *quantum* and without the plaintiff's written approval thereto. The offer of settlement and **acceptance** thereof is marked as annexures "B" and "C" to the plaintiff's particulars of claim. As such, the plaintiff alleges that he was entitled to cancel the agreement and claim damages calculated as 10% of the insured sums. The insured sums were summarised in annexure "D" to the plaintiff's particulars of claim as being R2 226 300,00 and R3 000 000,00.

The defendants' plea as amended reflected in essence the following defences, namely, that-

- (a) the plaintiff had failed to properly investigate and quantify the defendants' damages in that, *inter alia*, the plaintiff did not provide supporting proof of each item of machinery and equipment and trading stock;
- (b) the plaintiff neglected or failed to negotiate with M&F or their legal representatives with regard to agreement on *quantum*;
- (c) the plaintiff had breached certain tacit/implied terms of the agreement in that, *inter alia*, the plaintiff did not act in a *bona fide* manner towards the defendants as he misled the defendants by stating that he had certain communications with M&F and thereby intending to influence the defendants or their legal representatives with regard to the manner in which the action is to be conducted against M&F.

Further, the plaintiff resigned from the Institute of Loss Adjustors of Southern Africa ("ILASA") during the taking place of a disciplinary hearing against the plaintiff whereby the credibility and expertise of the plaintiff would be directly negatively influenced.

- (d) The agreement amounted to a *pactum de quota litis* which is *contra bonos mores* and unenforceable in that, *inter alia*, it allowed the plaintiff to

gamble or speculate in litigation and intentionally exaggerate or inflate the *quantum* of claims;

- (e) clause 4 of the agreement constitutes a penalty as intended in terms of section 3 of the Conventional Penalties Act 15 of 1962;
- (f) the *quantum*, as formulated by the plaintiff, was never agreed to or accepted by M&F as correct;
- (g) the defendants denied not complying with the conditions of the agreement on the basis of an unconditional and unequivocal waiver by the plaintiff on 8 November 2006 of his right that the claims could not be settled with the insurer without his written approval.

The plaintiff testified himself and Mr Barend Lubbe testified on behalf of the defendants.

Mr F J Human testified, briefly, that he has a B.Com degree and is a fellow of the Chartered Insurance Institute in London and has been involved in the short term insurance industry since 1970. He has also been a member of ILASA until 2005 when he resigned. He acts as a loss adjuster for insurance companies and also acts for the public in quantifying insurance claims. He assisted the defendants in formulating its claims against M&F and was recommended by Mr Cilliers of Cilliers Reynders Attorneys. Once

he has satisfied himself that there is a reasonable chance of a successful claim in the end where *quantum* will be paid he draws up an agreement with the client. At the time of his first meeting with the defendants he conducted a preliminary investigation. He studied the letters of repudiation and looked at the claim documents prepared by the defendants' brokers and boxes full of quotations and other documents. He felt at that stage that there was a 60/40% chance of success and he explained to the defendants what his terms would be to assist them and he prepared an agreement to record the terms and conditions as discussed. This is the agreement which is marked as annexure "A" to the plaintiffs particulars of claim. In terms of the agreement he was appointed to investigate and quantify the defendants' claim against their insurers and also to negotiate with the defendants and their insurers and/or their legal representatives with regard to reaching agreement on the *quantum* of their claims. He had to rely on the defendants to tell him what was there and a quantity surveyor, recommended by him, was appointed to prepare a report and based on that he formulated the claim for the building. The physical examination and verification of invoices and quotations was done at the defendants' offices. The actual formulation was done at his offices. There were boxes full of documentation that he had to work through. Apart from the damages to the building itself, this building was also subject to a bond with Absa Bank. The amount of R1 492 795,31 would have been the maximum amount which the insurance company would have had to pay directly to Absa Bank. After he had provided his *quantum* formulation on both claims his work was partly done. It was expected that M&F would defend the matter. In terms of his agreement with the defendants he had to negotiate with the defendants' insurers and/or legal representatives but he could not do so as protocol

prevented him from doing so. He agreed that he would assist the defendants on a contingency basis and if the defendants did not succeed with their claim against M&F he would get nothing apart from the loan payment of R7 500,00 which had to be paid to him when the agreement was signed. Would there be a settlement, negotiated or accepted by M&F or their legal advisors or ordered by the court, then he would be entitled to 10% of the final settlement amount. The reason for him not allowing a settlement without his written consent is that he sees this as a power of attorney as it will obviously affect his remuneration and that is why he has made provision for the penalty clause in the agreement. The defendants' attorney was not happy with the way he had replied to the request for further particulars and confirmed to him in a letter that the legal advisors of M&F did not accept his *quantum* calculation as correct.

Mr Human further testified, in summary, that he at all relevant times acted in good faith towards the defendants and he explained the intent of the information received from M&F as well as the non-significance of his resignation from ILASA. He also denied waiving his rights relating to the settlement of the claims on the occasion of the 8 November 2006 meeting. He stated that when the defendants negotiated and concluded the final settlement of the claims on 11 December 2006 by accepting the offer of R2 850 000,00, without his involvement and approval they breached the terms of the agreement as a result thereof. As such he was entitled too cancel the agreement which he did and was entitled to the application of the calculation of his remuneration in terms of clause 4 of the agreement.

Under cross-examination by counsel for the defendants, briefly, he stated that he paid an amount of R2 500,00 to Mr Carpenter, an employee of Alexander Forbes as a referral commission and ILASA perceived this as being a misconduct. He had offered the money because it is his marketing strategy. He had offered Alexander Forbes a 10% referral commission which they refused. He conceded that he lied to ILASA by saying that he did not pay Mr Carpenter anything. He stated that he lied because he did not want to jeopardise the man's career. He also conceded that he lied to the defendants about his source in M&F because he wanted to get the *quantum* aspect finalised. He stated that he did not consent to the R4 million offer from M&F as it would have been counter-productive. This would have caused financial loss for the defendants and himself. Everything was for the money including the lie. He disagreed with the contention by counsel for the defendants that he negotiated himself into a position where he can veto a settlement between two litigating parties, which is in itself against good legal order. He stated that, with the exclusion of the business interruption claim, all the other claims were correct. The calculation of the claim is correct but it is not the amount payable as the average clause was not mentioned. He denied that it was deliberately concealed. He conceded that the moment an expert gets a financial interest in a case, he loses his independence. He stated further that the average clause applies automatically if there is a total loss.

On re-examination, he stated that he presented two scenarios to the defendants. His intention was to give them the scenarios, and explain to them exactly what it meant and what it boiled down to and he then sat back.

That was the plaintiff's case.

Mr B Lubbe, on behalf of the defendants, testified, briefly, that he is a business man and a director of Timberlife (Pty) Ltd, the second defendant in the matter. The first and second defendants were separate companies but they are now one company called Timberlife. On 26 April 2002 a fire gutted the building belonging to the first defendant and M&F repudiated the claims of the first and second defendants. The defendants approached the plaintiff, Mr Human, to assist in the quantification of their claims against M&F. Mr Human suggested that there was a good chance of success and agreed to act as a *quantum* expert and an agreement was signed between the parties, namely annexure "A" to the particulars of claim. He received a letter on 27 March 2003 from Absa Bank confirming that the balance outstanding on the bond over the property as at 26 April 2002 was R1 492 795,31. He was not happy with the business interruption claim as quantified by Mr Human as they did not lose any money but accepted what Mr Human said as he was the *quantum* expert. During 2003 action was instituted against M&F based on the strength of the calculations by Mr Human. He recalls a meeting on 8 November 2006 at the offices of Adv Gerhard Cilliers where he was present together with Adv Cilliers, Mr Human, Mr Grobler and Mr Conradie. The gist of the meeting was to discuss the allegations of wrongdoings against Mr Human. Adv Cilliers was not happy with the explanation given by Mr Human because obviously it had an influence on the future continuance of the case of the defendants against M&F. On or about 20 November 2006 an offer was made in terms of Rule 34 by M&F to settle the claims of the

defendants. The amount offered was R2 850 000,00 and represents the outstanding balance and interest owing to Absa Bank. The offer was accepted and a VAT invoice was made out in favour of M&F by the first defendant. He was advised by their auditors that this is the procedure that they would want to follow to handle the documentation after obtaining the figure from the bank. At some stage they said we need to get the VAT story sorted out. He had his auditors handle this and the auditors instructed him to issue an invoice though C M C Chemicals at that which he did. The whole amount was paid into their attorneys' trust account and from there it was paid into their account and then to Absa Bank.

Under cross-examination by counsel for the plaintiff, briefly, he agreed that he never said that there was a problems with the quantification of Mr Human, but stated that he was not asked to comment on that. He stated that he did not ask Mr Human to negotiate as he left that to his legal team. He was unaware, at the time of entering into the agreement with the plaintiff, that the plaintiff was a member of ILASA. It did not matter to him whether Mr Human was a member of ILASA or whether he resigned or not. He, however, had a concern about the information relating to the ILASA disciplinary hearing obtained from the internet during September 2006 and the impact it may have on the credibility of the plaintiff. His legal team raised the concern regarding the accuracy of the quotations supplied by Mr Human and they suggested that we start the process of obtaining other quotations to make sure that the information is correct. He forwarded the request for further particulars, regarding the *quantum*, to Mr Human to answer on as he was the expert. He stated that Mr Human and his legal team would drive

the matter directly and jointly. He did not instruct Mr Human. He was still prepared to honour the agreement with Mr Human on 8 November 2006, if it was justified in what he did and did not have any influence on the merits or the success of the case. He stated that at the meeting on 8 November 2006, Mr Human walked out and cancelled dealings with them. He understood that Mr Human would walk out of the contract for a fee of R150 000,00 which he will take up with us. Mr Human also stated that he will no longer be their broker and that they should deal with his company LATSURE. The last he heard was that Mr Human would supply his legal team with documentation to prepare a defence if the issue regarding his credibility came up. He agreed with what is written in the defendants' plea that Mr Human agreed not to veto the settlements is correct. After the meeting of 8 November 2006 they had to take a decision to continue or to stop. They were not 100% sure of the merits of the case as they were investigating the influence of all that transpired during that period. He stated that the amount that was settled for was to cover the amount owing to Absa Bank. That was the case for the defendants.

It is common cause that M&F paid the amount of R2 850 000,00 into the defendants' attorneys' trust account and that that amount was then paid into the first defendant's account who issued a VAT invoice for the amount of R350 000,00.

It is also clear from the evidence that the plaintiff had complied with his obligation to investigate and quantify, save for the aspect relating to the business interruption claim, and he was willing to perform the obligation to negotiate.

Counsel for the defendants further submitted that it is not necessary to deal with the aspects relating to the non-compliance by the plaintiff, the waiver of a right by the plaintiff and breach of contract by the plaintiff.

It is further clear from the evidence that the *quantum* as formulated by the plaintiff was not agreed to or accepted by M&F as correct. What is in issue is whether:

- (a) the agreement amounted to a *pactum de quota litis* which was *contra bonos mores* and as such unenforceable;
- (b) clause 4 of the agreement constitutes a penalty as intended in terms of section 3 of the Conventional Penalties Act 15 of 1962;
- (c) the defendants breached clause 3 of the agreement.

I will deal with the issue of *pactum de quota litis* first. Counsel for the plaintiff submitted that a *pactum de quota litis* is not per definition unlawful and unenforceable. In my view the agreement clearly amounts to a *pactum de quota litis* or an agreement to receive a portion of the proceeds of a court case.

There are a number of South African cases dealing with such agreements which were always treated as unlawful and unenforceable as it allowed a person to traffic, gamble or speculate in litigation. The only exception to this was a case where anyone in good faith gave financial assistance to a poor suitor thereby helping him to prosecute an action in return for a reasonable compensation or interest in the suit.

In the matter of *Price Waterhouse Cooper Inc & Others v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) at 79 SOUTHWOOD AJA held that this exception is now recognised by the Constitution of the Republic of South Africa. This only consolidated the case of the needy litigant. See also:

1. *Thomas Hugo & Fred J Moller NO v The Transvaal Finance & Mortgage Co* (1894) 1 OR 336 at 339-341;
2. *Schweitzers Claim Holders' Rights Syndicate Ltd v Rand Exploring Syndicate Ltd* (1896) 3 OR 140 at 144;
3. *Green v De Villiers, Dr Leyds NO & Rand Exploration Syndicate* (1895) 2 OR 289 at 293-4;
4. *C V J J Platteau v S P Grobler* (1897) 4 OR 389 at 394;
5. *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287.

This case clearly in my view does not fall within the exception, as it appears from the evidence, there was clearly no need for such an arrangement ie the contingency arrangement in order for the defendants to have access to the court. The defendants were not impecunious litigants as they paid the legal fees to their attorneys to advance their case and they employed many other experts without such a contingency arrangement.

Counsel for the plaintiff, in fact, during cross-examination put it to Mr Lubbe that he paid an amount of R300 000,00 to his lawyers to proceed with the case. The submission by counsel for the plaintiff that no evidence was presented to prove that the defendants were or were not impecunious is in my view untenable and is rejected with the

contempt it deserves. In my view the only reason why this agreement was entered into was because of the way the plaintiff did his business. He, in fact, stated in evidence that he concluded a number of agreements in this manner and actually dealt with defendants' attorneys in the past. The fact that no one took up this aspect in the past does not mean that what the plaintiff is doing is correct.

In the *Schweitzers Claim Holders Rights Syndicate* case *supra* at 144-145 it was stated that:

"... the plaintiff company has therefore done nothing else than advance money in order to make a profit out of a law suit, and in order to obtain a share of a judgment for itself, being inspired solely by the desire for speculation."

In my view this is exactly what the plaintiff did. The plaintiff also stated in his evidence that if these insurance claims fail in court in total he will get nothing, if it succeeds he will get 10% of whatever it succeeds with. This arrangement, in my view, is clearly of a gambling nature.

In the *Campbell v Welverdiend Diamonds* case, *supra*, it was stated that:

"It is clear from the authorities that while a transaction of this kind may be properly entered into, and may be supported whether it is a genuine case of assisting a litigant for a fair recompense, it cannot be supported in other cases; a court is not to give effect to arrangements which are made by persons who traffic in litigation."

In my view the plaintiff was indeed trafficking, gambling or speculating in litigation. Therefore, the common law prohibition against this kind of agreement is fully in tact. As such, this court cannot enforce this agreement as it is contrary to public policy. The plaintiff further failed to present evidence to show that it was necessary to enter into this agreement, which is clearly a *pactum de quota litis*, to assist someone to get access to court.

Further, clause 3 of the agreement provides that the defendants may not agree to any *quantum* amount without the written consent of the plaintiff. The effect of this provision is that the plaintiff has a veto right and as such being a non-party to the envisaged litigation would take the drivers seat. All the litigants, all the lawyers and even the court will be subjected to the plaintiff's whims. Even if M&F, the defendants, their attorneys, their advocates and the court feel that this matter could and should be settled on an equitable basis the plaintiff would be in a position to overrule them all and to command that the litigation proceeds. In other words, the plaintiff has put himself in a position where he can hold the litigating parties, their representatives as well as the court to ransom. Clearly a provision such as this can never be enforced by a court. It obviously follows that if such a provision is unforceable the non-compliance therewith cannot found a claim.

I am satisfied that the defendants have established on a balance of probabilities that the agreement between the parties amounted to an unlawful and unenforceable agreement.

Accordingly the plaintiff's claim against the defendants is dismissed with costs on this ground alone.

As far as the issue of the Conventional Penalties Act is concerned, it was submitted by counsel for the defendants that clause 4 of the agreement upon which this action is based, is clearly a conventional penalty as contemplated in section 1(1) of the Conventional Penalties Act 15 of 1962. Counsel for the plaintiff submitted that it was not.

The relevant part of section 1(1) of the Conventional Penalties Act 15 of 1962 reads as follows:

"A stipulation whereby it is provided that any person shall in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall subject to the provisions of this act, be capable of being enforced in any competent court."

Although counsel for the plaintiff submitted that clause 4 of the agreement merely provided for a method of calculation of remuneration, the plaintiff himself in his evidence, referred to the clause as a penalty clause and conceded that it was a penalty clause. Clause 4 of the agreement, in my view, simply means that if something happens which results in a breach of the contract, then the "defaulting" debtor will pay a certain amount to the creditor. This clearly in my view constitutes a penalty, and such a penalty is subject to a reduction by the court if it is out of proportion to the prejudice suffered by the creditor, in terms of section (3) of the Conventional Penalties Act 15 of 1962.

Counsel for the defendants submitted that the best method of determining whether the penalty is excessive, is to compare the effect thereof with the plaintiff's position if the defendants have not defaulted. See: *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 3 SA 47 (T).

In terms of clause 2 of the agreement, if the defendants had fully complied with the agreement, the plaintiff would have earned 10% of an amount eventually agreed upon or awarded by the court. It is clear from the evidence that no one knows what amount would have been agreed to or ordered. What is known is that the claim of the first defendant could not have succeeded for more than R1 799 058,37 because of the application of the average clause to the business interruption claim. The plaintiff's claim in terms of the penalty clause is R222 630,00. The penalty clause puts the plaintiff in a position of R42 640,00 better than he would have been if the agreement had been complied with. The penalty is clearly excessive.

Further, if all the actions were settled or decided on the basis that Absa Bank's claim succeeds, while the other claims are dismissed on the merits, the plaintiff would have earned no commission at all. In terms of the penalty clause his remuneration would be R300 000,00. The penalty is clearly excessive.

From the documents and the evidence the plaintiff has failed to establish or prove which amount would have been reasonable. I am satisfied that the defendants have shown that the penalty is excessive and the plaintiff's claim is accordingly reduced to zero.

As far as the breach of clause 3 of the agreement is concerned, the plaintiff alleges that the defendants on or about 11 December 2006 agreed and settled their claims against M&F in respect of the *quantum* amount by way of an offer of settlement in terms of Rule 34 of the Rules of court, without the plaintiff being involved or dealing with the *quantum* and without the plaintiff's written approval thereto.

It is clear from the wording of clause 3 of the agreement that the plaintiff's veto right is limited to the *quantum* amount only and does not extend to a settlement or concession of the merits of any claims. There is clearly a difference between settling the *quantum* amount and the merits.

Counsel for the plaintiff submitted that the wording of clause 3 of the agreement should be interpreted to mean "ooreengekom" as negotiated downward from what was claimed and in terms of negotiations on the *quantum*. This submission is untenable as in my view each and every word should be interpreted in terms of their normal meaning in order to give effect to the intentions of the parties.

The plaintiff bore the *onus* of proving that the defendants had settled or agreed to any *quantum* amount. The plaintiff did nothing more than relying on the wording of the offer and acceptance in terms of Rule 34 which was totally inarticulate about the aspects of the case or cases that were settled. The evidence of the defendants was that the amount of R2 850 000,00 which was settled upon, represented the outstanding capital and interest owing to Absa Bank.

The plaintiff had ample opportunity to obtain evidence or call witnesses from M&F, its erstwhile attorneys or any official from Absa Bank regarding the outstanding amount due to Absa Bank but failed to do so to this detriment. The plaintiff was not dependant on the defendants' discovery to do so and could have requested the relevant documents from the defendants in terms of Rule 35 of the Rules of Court which he failed to do.

As far as the invoice for R350 000,00 from the first defendant is concerned, it was the uncontested evidence of the defendants that the invoice was issued on the instructions of their auditors for reasons best known to them. The amount of the invoice, in any

event, does not cover the claim of the first defendant and nothing can be deduced from that. The plaintiff has failed to convince this court that he has discharged his *onus* of proving that the defendants had breached clause 3 of the agreement.

As far as the demeanour of the plaintiff is concerned, the court has not found him to be a very impressive witness. He failed to acknowledge simple truths and gave the court the distinct impression that he was prepared to lie just for the sake of making money. In fact, counsel for the defendants referred to him on several occasions as a liar and a scoundrel. I tend to agree with the sentiments of counsel for the defendants.

In the result, I make the following order:

The plaintiff's claims against the defendants are dismissed with costs.



S S OMAR
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

9832-2007

HEARD ON:
FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: