

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A345/23

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
06/11/2024	
DATE	SIGNATURE

In the matter between

THAMA RAMOROMISI

Appellant

and

TSHABANGU ATTORNEYS

First Respondent

MIYELANI AUBREY TSHABANGU

Second Respondent

TUMELO MATLOU

Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and by uploading it to the CaseLines. The date for hand-down is deemed to be 06 November 2024.

JUDGMENT

CORAM: LESUFI, AJ (MOSHOANA J CONCURRING)

Introduction

[1] The foundation of this appeal is a judgment from the court a quo that granted absolution from the instance with costs. The appeal emanates from a decision by Magistrate Chauke from the Magistrates' Court for the District of Tshwane, regarding a claim initiated by the Appellant against the Respondents, jointly and severally, for payment of R 102,709.06 due to the alleged breach of an oral and partially written agreement between the Appellant and the third Respondent.

[2] In pursuit of his claim, the Appellant pleaded that he entered into an oral and partly written agreement with the third Respondent, who was employed by the first Respondent, a law firm trading as Tshabangu Attorneys.

Factual background

[3] The Appellant issued summons against the first, second and third Respondents, jointly and severally, seeking an order for payment in the amount of R 102 709, 06 and the interest thereof in the prescribed rate. The claim was based on the alleged breach of oral and partly written agreement. At the time, the Appellant was an Attorney working for another firm and was in constant communication with the third Respondent and a certain Mr. Kopano Molaudzi, who is not cited in this proceedings. Both the third Respondent and Mr Molaudzi were employed by the first Respondent, a law firm trading as Tshabangu Attorneys. The Appellant contended that he had

entered into an oral and partly written agreement with the third Respondent, who was acting on behalf of the first Respondent.

Evidence of WhatsApp communications was presented in the court a quo. The Appellant contended that he was under the impression that the second Respondent, who is the Director of the first Respondent, was aware of the agreement. He contended further that he believed that the third Respondent was acting within the course and scope of his employment at all material times.

[4] In terms of the agreement, the Appellant was to procure clients for Road Accident Fund (RAF) matters on behalf of the first Respondent and the Appellant would be entitled to one-third fee or share of 25% of contingency fee. It was disputed that the first Respondent had failed to honour its obligations in terms of the agreement. Although the Appellant was entitled to receive one-third of over R 300 000, he was only paid R16 500.00. Consequently, the Appellant instituted a claim against the Respondents for breach of agreement.

[5] At the close of the Appellant's case, the first Respondent applied for absolution from the instance on the basis that there was no evidence that there was an agreement between the Appellant and the Respondents. The court of quo found that the Appellant had failed to adduce sufficient evidence upon which a reasonable court might grant judgment in the Appellant's favour and consequently granted absolution from the instance.

Applicable legal principle

[6] The correct approach for absolution from the instance is pertinently set out in ***Claude Neon Lights (SA) Ltd v Daniel***, cited in ***Gordon Lloyd Association v Rivera and Another***,¹ as follows:

"The test for absolution to be applied by a trial court at the end of a plaintiff's case

¹ *Gordon Lloyd Association v Rivera and Another* 2001 (1) SA 88 (SCA) at para 2.

was formulated in the case of *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

‘ . . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonable to such evidence could or might (not should, nor ought to) find for the plaintiff.’”

Essentially, for the plaintiff to survive absolution, he must establish a prima facie case, meaning that there must be evidence relating to all the elements of the claim. Without such evidence, no court could find in his favour.

[7] The court has discretion to grant or refuse absolution. In the exercise of this discretion, the court normally does not have regard to credibility of witnesses unless there is a serious issue regarding their credibility that prevents the court from placing any reliance upon them. Additionally, the court may consider the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case.

[8] Uniform Rule 49(2) requires a notice of appeal to state two things, namely: (a) the part of the judgment or order appealed against; and (b) the particulars in respect of which the variation of the judgment or order is sought.

[9] The following grounds of appeal were raised, in essence arguing that the court a quo erred in:

- (a) Finding that so-called agreement between the Appellant and the Respondents lacked identification, offer and acceptance, meeting of minds, capacity, and contract liability;
- (b) Finding that the third Respondent was not authorized by Tshabangu Attorneys to enter into an agreement with the Appellant;
- (c) Finding that the WhatsApp communication between the Appellant and the third Respondent did not constitute a written agreement;

- (d) Finding that the Appellant failed to call the third Respondent and one Mr. Kopano Molaudzi as a witness;
- (e) Granting the absolution from the instance; and
- (f) That the court erred by not accepting that the Appellant was entitled to one-third of the 25% contingency fees.

[10] The trial court bears the task of analysing and evaluating evidence. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence; such assessment must prevail unless there is a clear and demonstrable misdirection. This principle is well established in our law.²

[11] In ***Rex v Dhlumayo and Another 1948 (2) SA 677 (A)*** at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius 2014 (2) SACR 315 (SCA)* par 30, which cited, inter alia *Dhlumayo* with approval that:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another 1948 (2) SA 677 (A)* at 706; *S v Kebana [2010] 1 All SA 310 (SCA)* para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings."

² *Jikela v The State*, unreported judgment of the Free State High Court, Bloemfontein, Case No A135/2021 (1 September 2022); *Botha v S (A182/2023) [2024] ZAFSHC 167* (28 May 2024).

Issues

[12] The overall basis of this appeal lies on two things. Firstly, whether or not the Magistrate erred in granting absolution from the instance and, secondly, whether or not the Magistrate erred in granting judgment in favour of the Plaintiff without the Plaintiff leading any evidence.

Analysis

[13] It is common cause that no agreement was entered into between the Appellant and the first Respondent. The court is therefore required to determine whether there was any verbal or partly written agreement between the Appellant and the first Respondent; and whether the court a quo misdirected itself in granting the absolution from the instance.

[14] In order for the agreement to be valid it must comply with the following requirements:

- (a) Consensus: This pertains to meeting of minds (agreement). The consensus must also relate to the intended obligation (who must perform, what must be performed, to whom the performance be rendered), and intention to be bound legally. The parties must be aware of their agreement, that is the parties must be at ad idem.
- (b) Contractual Capacity: The parties to a contract must have the capacity and/or the necessary authority to conclude a contract.
- (c) Formalities: Constitutive formalities must be complied with.
- (d) Performance: Performance in terms of the contract must be possible.
- (e) Legal Validity: The contract must be valid.
- (f) Certain determinable content: The content in terms of which the contract is concluded must be determinable.

[15] South African law recognizes oral agreements as legally binding, provided they contain all the elements of a valid contract. These elements include offer and acceptance, mutual consent, intention to create legal obligations and consideration.

[16] The Appellant claims that he concluded a verbal and partly written agreement with the first Respondent. The written agreement relates to WhatsApp message with a person who turned out to be a clerk in the employ of the first Respondent. It is also common cause that the Appellant did not call, either, the third Respondent, or corroborate his version.

[17] There is no evidence suggesting that any form of agreement existed between the Appellant and the first Respondent. It is also not clear whether communication between the Appellant and the third respondent constituted an agreement. The so-called WhatsApp communication that the Appellant relied on, was said to have been sent by another person and its contents did not suggest there was an agreement in place.

[18] The court a quo correctly found that there is no proof that the third Respondent and the Appellant informed the first Respondent about their so called agreement. There is also no proof that the third Respondent was authorised by the first Respondent to enter into any form of agreement. The court a quo also found that the alleged agreement lacks identification, offer, acceptance, meeting of minds and contractual legality.

[19] In the circumstances of this case, the Appellant provided no evidence to prove his case against the Respondents and to justify an order in his favour. In light of the above, I am convinced that the absolution from the instance was correctly granted by the court a quo.

[20] In conclusion, I am not persuaded that the Magistrate erred by granting the absolution from the instance.

Order

[21] I accordingly make the order in the following:

- (1) The Appellant's appeal against the absolution from the instance is dismissed, with costs.
- (2) The Appellant to pay costs on party and party scale B.



B LESUFI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA



GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

(I agree and it is so ordered)

APPEARANCES:

For Applicant:

Adv. Hilita

Instructed by:

Ramoromisi Attorneys

For Respondents:

Adv. Mhelembe

Instructed by:

Tshabangu Attorneys

Date of the hearing:

8 October 2024

Date of judgment:

06 November 2024