



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED <i>AK</i>
	
SIGNATURE	DATE <i>30-01-2025</i>

CASE NUMBER : 2477/2021

In the matter between:

SIEBERHAGEN PIETER

APPLICANT

And

NKOSI ATTORNEYS AND ASSOCIATES

1ST RESPONDENT

MR VUSI SINKY NKOSI

2ND RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be on the 30th January 2025. @ 10h00

JUDGMENT

MASHAMBA AJ

INTRODUCTION

1. The Applicant is an admitted advocate of the above honourable court, who brought an application for summary judgment against the first Respondent, a law firm with its offices in Mbombela, Mpumalanga Province, together with the second Respondent, the sole director of the first Respondent, an admitted attorney of the above honourable court ("the Respondents").
2. The Applicant alleged that he received a brief from the Respondents, to perform legal services on behalf of the Respondents' clients. The Applicant seeks payment for the legal services rendered. The Applicant averred that the Respondents owe him the amount of **R 449 600.00**, with interest, and further that the Respondents should pay the amount due to him, jointly and severally, the one paying the other to be absolved.
3. The Respondents have opposed the application for summary judgment. The application was heard on the 05th December 2024.

BACKGROUND FACTS

4. The Applicant made two claims against the Respondents. The first claim allegedly arose during the period 16 October 2020 to the 01 December 2020, when the Applicant alleged to have received a partly oral and partly written mandate or instructions from the Respondents, to render his legal services in respect of a liquidation application on behalf of the Respondents' client, Above Average Investments Corporation 20 CC (the corporation).

5. The Applicant issued three invoices for payment to the Respondents at the conclusion of his instructions. The Applicant also alleged that the amount of R 396 750.00¹ was due and payable by the Respondents in terms of the brief. The Respondents have paid the total amount of R 130 000.00 from the three invoices and the remaining balance in the amount of R 266 750.00 is due for payment. The Respondents had alleged that the Applicant performed work which was not as per their instructions but that the Applicant received instructions directly from the Respondent's client, the corporation.
6. The Respondents received an offer in the amount of R 150 000.00 from Mbungela Attorneys, after the negotiations ensued between Mr Mbungela and Mr Mdluli who was acting on behalf of the said corporation. The Respondents further alleged that the offer included the amount of R 50 000.00 for attorney's fees and R 100 000.00, for counsel's fees. The Respondents also alleged to have discussed the offer with the Applicant, who accepted the offer in "full and final settlement" of his three invoices. Therefore, the amount of R 100 000.00 was paid to the Applicant in "full and final settlement" of his legal fees performed on behalf of the Respondents' client, the corporation.
7. The second claim allegedly arose during the period 18 January 2021 to 17 February 2021, when the Applicant allegedly received partly oral and partly written mandate or instructions from the Respondents to render legal services, this was an urgent application for anti-dissipation and asset preservation application, in the matter where

¹ Updated bundle, page 26-31

the First Respondent was the applicant and the said corporation and Four Others were the respondents. At the end of the instruction the Applicant issued two separate invoices in the total amount of R 182 850.00 which amount remains outstanding, owing and due for payment by the Respondents². The Respondents disputed the above claim, and argued that the Applicant had no formal written brief, therefore, summary judgment should be refused.

8. The two abovementioned claims were combined and calculated together as an amount due and payable by the Respondents. The total amount allegedly owed by the Respondents, is equal to R 449 600.00, for the alleged legal services rendered.
9. The Respondents failed and neglected to pay the amount of R 449 600.00 despite demand from the Applicant. In order to recover the outstanding amount due against the Respondents, the Applicant opted to issue summons. The aforesaid summons was issued on the 13th July 2021 and served upon the Respondents on the 23 July 2021. Subsequent to the Respondents' receipt of the summons, and on the 28th July 2021, the Respondents entered their notice of intention to defend. On the 02nd September 2021 the Applicant served the Respondent with the notice of bar, giving the Respondents 5 (five) days to serve their plea from the date the notice received. The Respondents' plea was served on the 08th September 2021 on the Applicant.
10. Subsequent thereto, the Applicant submitted that the plea does not raise a *bona fide* defence, but that the defence was made merely for the purposes of delaying finalisation of the Applicant's claims. On the 29th September 2021, the Applicant

² Updated Index, page 32-33

launched the application for summary judgment in terms of rule 32(b)³ where the Applicant has alleged that the Respondents did not raise triable issues and that the Respondents have no *bona fide* defence.

11. On the 04th October 2021, the Respondents, served the notice of intention to oppose the application for summary judgment, in terms of rule 32 (3)(b) and further served their answering affidavit on 08 June 2022. The Respondents alleged that they have a *bona fide* defence and that their defence have not been raised merely to delay finalisation of the Applicant's claims.

LEGAL QUESTIONS

12. The court is called upon to decide on two legal questions:

- (a) Whether the Respondents have mounted a *bona fide* defence against the Applicant's claim; and
- (b) Whether the Respondents have raised a triable issue(s).

LEGAL PRINCIPLES

Rule 32 of the Uniform Rules of Court

13. In terms of rule 32(1) of the rules, the Plaintiff may, after the Defendant has delivered a plea, apply to court for summary judgment on each of such claim in the summons as is only on (a) liquid document (b) for a liquidated amount in money, (c) delivery of specified movable property, (d) for ejectment. Rule 32(b) further states that the Plaintiff

³ Uniform Rules of Court of South Africa, as amended on the 01 July 2019 (the rules)

may in an affidavit, verify the cause of action and the amount claimed, and identify any point of law relied upon and facts upon which the Plaintiff bases his claim. The Plaintiff should explain briefly why the defence as pleaded does not raise any issue for trial.

14. In terms rule 32(3) (b), the Defendant may in an affidavit, satisfy the court that he has a *bona fide* defence against the plaintiff's claim. The Defendant's affidavit should disclose fully the nature and grounds of the defence and material facts relied upon.

Code of Conducts for Legal Practitioners

15. The Code of Conduct for legal practitioners was published in terms of Section 36(1) of the Legal Practice Act⁴, 2014 and states the following;

"28.1. Counsel shall ordinarily only accept a brief given in writing or by email, but in circumstances of urgency counsel may accept an oral brief but must insist on receipt, as soon as practicable, of a written or emailed brief, failing which counsel shall in writing or by email confirm the terms of the oral brief.

30.2. Counsel shall, at the time of accepting a brief, stipulate to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee, para 30.2.

30.3. Counsel shall, in respect of every brief, expressly agree with the instructing attorney on the fee or the rate of fees to be charged, unless there is a tacit understanding between

⁴ Act 28 of 2014 (as amended)

counsel and the instructing attorney about the fees or the rate of fees usually charged by counsel for the particular kind of work mandated by the brief.

30.4 *Counsel who is briefed under circumstances of urgency which are such that an agreement on the fees or the rate of the fees to be charged cannot reasonably be concluded immediately when the brief is offered, must take reasonable steps to agree on a fee as soon as possible thereafter."*

Case Laws

16. In respect to the meaning of liquid document, see., ***Nedcor Bank Ltd vs LISINFO 61 TRADING (PTY) LTD***, (case no: 924/20015), a judgment by Moosa J in the Cape of Good Hope Provincial Division of the High Court, Furthermore, see ***Blakes Maphanga v Outsurance***⁵, The two decisions make it clear that without an agreement or taxation by the taxing Master, counsel's invoice can neither be liquid nor liquidated. There is no allegation in the particulars of claim that the amounts were agreed on, or that the impugned bill of costs or fees were taxed to constitute a liquid document.
17. In the case of ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***⁶, the approach adopted was as follows:

"An applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".

⁵ 2010 (4) SA 232 (SCA); (2010) 3 All SA 383 (SCA) para:13 and 17, Malan JA

⁶ 2008 (3) SA 371 (SCA) at para 12

RESPONDENTS' DEFENCE

18. The Respondents submitted that they did not give a formal written brief to the Applicant nor his Junior Counsel. The second Respondent has alleged that he was invited to the meeting for consultation by the junior counsel, Adv Tsambo and found the Applicant, his junior counsel and Mr Mdluli, who was acting on behalf of the said corporation. The second Respondent further submitted that when he arrived at the meeting, the Applicant had already been in consultation with the client, Mr Mdluli and already dictating to his secretary without a brief. The Respondents were instructed to oppose liquidation application against the said corporation. The Respondents disputed the Applicant's contentions that he had a partly oral and partly written brief and argued that there was no written brief given to the Applicant.
19. The Respondents further indicated that Junior Counsel, Adv Tsambo, did not issue his brief against the Respondents because he was aware that both counsels had no formal written brief.
20. The Respondents further argued that there is no proof of written brief, therefore, the trial court would have a privilege to examine whether there was a brief or not. The Respondents further argued that the issue is not whether the Applicant did or did not do the work as alleged, but is whether such work was done as per the Respondents instructions. The Respondents submitted that they did not give a formal written mandate to the Applicants to perform or render services not empowered to.

21. The Respondents contended that the letter sent to standard bank is not a written brief nor an acknowledgment of debt⁷ as alleged by the Applicant. The Respondents had submitted that considering the above facts, they have a *bona fide* defence against the Applicant's claims.
22. The Respondents submitted further that there are triable issues in this matter, as there are dispute of facts which can only be resolved by way of oral evidence.

DISCUSSIONS AND THE COURT'S FINDINGS

23. In consideration of the Application for summary judgment, this court has to examine whether the Applicant successfully made out his case in terms of rule 32 of the rules. The Applicant alleged that he has received partly oral and partly written brief from the Respondents and that he performed legal services in terms of the brief. The Respondents disputed to have given a formal written brief to the applicant.
24. The Applicant issued five invoices to the Respondents for payment. The invoices present different work the Applicant has done as per the alleged instructions from the Respondents. The fee agreement is inconspicuous as the Applicant relied on oral agreement between the parties before the commencement of their working relationship. The Respondents denied to have entered in to any fee agreement with the Applicant. The Applicant did not refer this court to any formal written fee agreement nor formal written brief between him and the Respondents.

⁷ Updated Index, page 92

25. The Applicant argued that the correspondence letter sent to Standard Bank by the Respondents, to freeze Above Average Investment Corporation 20 CC's account, due to their failure to pay the Respondent's legal fees, including the Applicant's invoices⁸, prove that the Applicant was briefed by the Respondents. The Applicant has argued that the letter is succinct proof that the Respondents acknowledged that he is indebted to the Applicant. The court has after perusal of the referred letter, concludes that the letter does not present a fee agreement nor acknowledgement of debt between the parties.
26. The Respondents did not deny that the Applicant have performed certain legal services to Above Average Investment Corporation 20 CC but denied to have briefed him for the work as appears in the Applicant's invoices against them. I am of the view that before this court there is a triable issue to be determined by the trial court through oral evidence. The trial court will have an opportunity to hear oral evidence and to consider all discovered documents in order to determine and finalise the parties dispute in this matter.
27. The lack of fee agreement and written formal brief will make it difficult to grant summary judgment in favour of the Applicant.
28. The untaxed counsel's invoices are not a liquid document and unless the parties have fee agreement or the counsel's invoice is taxed or confirmed by a taxing master. The court has considered the case of *Blakes Maphanga v Outsurance*⁹ referred in

⁸ Ipid

⁹ *ipid*

paragraph 16 in *supra*, where the Supreme Court by Malan JA, mentioned that without agreement between the parties or taxation, counsel's invoice can neither be liquid nor liquidated.

29. The court in Maphanga's case highlighted rule 32 of the rules, principles to be followed in order to satisfy the court in granting summary judgment. The Respondents, door to defend a matter cannot be closed, unless the Applicant has complied with all the requirements in terms of the of Rule 32. The court is of the view that the Respondents has a *bona fide* defence raising a triable issue and that his defence was not meant to unduly delay the finalisation of the Applicant's claims, aforementioned.

COSTS

30. Both parties requested costs in their favour. The court is of the view that the issues of costs should be in the cause.

ORDER

31. I therefore, make the following order:

1. The application of summary judgment is refused.
2. Costs shall be in the cause.


E MASHAMBA

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES

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