



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

NOT REPORTABLE

Case No.: 3374/2024

In the matter between:

SIPHO GCORA

Plaintiff

and

ASCON ENGINEERING CC

First Defendant

GONASAGREE MATHURA

Second Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment in which the plaintiff, Mr Gcora, seeks payment of R1 172 297,75 (one million one hundred and seventy two thousand two hundred and ninety seven rand and seventy five cents) for professional services rendered to the first defendant, Ascon Engineering CC (Ascon). He issued summons

against both defendants, who have entered an appearance to defend and delivered a plea. The second defendant, Ms Mathura, is the sole member of Ascon, and, although Mr Gcora sought summary judgment against the defendants, the particulars of claim do not reveal whether judgment is sought against them jointly, jointly and severally, or in the alternative.

[2] Mr Gcora alleged that in February 2022, at Gqeberha “the Defendants engaged the professional services of the Plaintiff to represent the First Defendant in a dispute against the Nelson Mandela Bay Municipality (the Municipality) arising from a tender contract concluded between the First Defendant and the Municipality ‘*for the construction of minor sewerage infrastructure*’.”

[3] The dispute resolution process envisaged required the issue to be referred first to adjudication, facilitated by an independent adjudicator who would ultimately issue a binding adjudication decision and, thereafter, in the event of either party being dissatisfied with the decision, or requiring the decision of the adjudicator to be made an arbitral award, to arbitration. It was agreed between the parties that Mr Gcora would be remunerated for his services to Ascon in the dispute at a rate of R950.00 per hour. As the dispute progressed, he submitted invoices which were duly paid. At the conclusion of the adjudication process the adjudicator ruled that the municipality was liable to Ascon in the amount of R11 722 975.59, which was immediately due and payable. The municipality was dissatisfied with the adjudication and referred the matter to arbitration to challenge the decision. Ascon responded with a referral of its own to seek an arbitral award confirming the decision of the adjudicator.

[4] The material portion, for purposes of the summary judgment, of Mr Gcora’s particulars of claim thereafter record:

- ’12. On 9 June 2022, following the referral of the Dispute by both the First Defendant and the Municipality to arbitration, the First Defendant proposed to the Plaintiff that the Plaintiff agree to accept payment of a

fee amounting to 10% (ten per cent) of any amount awarded and paid to the First Defendant in the Dispute going forward as his fee for services rendered.¹

13. The Plaintiff agreed to the Defendants' proposal and proceeded to represent the First Defendant in the aforesaid arbitrations.
14. The Municipality ... withdrew the arbitration referred by it seeking to set aside the adjudication decision whilst the arbitration proceedings instituted by the First Respondent for the adjudication decision to be made an arbitral award proceeded and ultimately resulted in an arbitral award to the effect that the amount of R11 722 975.59 which was found to have been immediately due and payable to the First Defendant in the adjudication decision was indeed immediately due and payable to the First Defendant.
...
16. On 18 August 2023, the Municipality ... paid to the First Defendant the amount of R11 722 975.59 which had been found to have been immediately due and payable to the First Defendant in the adjudication outcome.
17. Upon receiving the aforesaid sum of R11 722 975.59 from the Municipality on 18 August 2023, an amount of R1 172 297.56, being 10% of R11 722 975.59, immediately fell due and payable to the Plaintiff in fees for services rendered, as per the parties' subsequent agreement.
18. On 19 August 2023, the Defendants ... terminated the Plaintiff's mandate to act for the First Defendant in the Dispute.

¹ The plaintiff did not comply with rule 18(6) in that the particulars of claim do not disclose whether the alleged agreement was oral or in writing or partly oral and partly in writing. It does not disclose who, on behalf of Ascon, concluded the agreement nor where it was concluded.

...

24. The Plaintiff's attorneys addressed a further letter to the Defendants' attorneys on 13 August 2024, *inter alia*:

...

- 24.2 Demanding immediate payment by the Defendants to the Plaintiff of the sum of R1 293 190.75, comprising the following:

24.2.1 R1 172 297.56, being 10% of the amount received by the Defendants from the Municipality in terms of the adjudication outcome; and

24.2.2 Interest at the rate of 11.25% per annum from 18 August 2023, amount to R120 893.19.

...

26. Despite demand, as aforesaid, the Defendant (*sic*) has to date failed, refused or neglected to pay the aforesaid sum to the Plaintiff.

WHEREFORE the Plaintiff claims:

- (a) Payment of the sum of R1 172 297.56 being the Plaintiff's outstanding fees;
...'

[5] As adumbrated earlier the defendants have delivered a plea. In their plea over they allege that Ascon, represented by Ms Mathura, engaged the plaintiff to represent Ascon. Ms Mathura also entered a special plea (the first special plea) in which she recorded:

'2. It is the First Defendant that-

2.1 has a dispute with the Municipality; and

2.2 received payment from the Municipality in respect of an adjudication award; and

2.3 is allegedly liable to the Plaintiff on the Plaintiff's version.

3.

3.1 The Second Defendant's purported obligation to the Plaintiff for the liabilities of the First Defendant, require a Suretyship, in writing, in accordance with the provisions of the General Law Amendment Act.

3.2 No such Suretyship was ever executed by the Second Defendant.'

[6] In respect of the agreement alleged in paragraph 12 of the particulars of the plaintiff's claim the defendants contended, in their plea over:

"16. AD PARAGRAPH 12

16.1 The First Defendant admits that it agreed to pay the Plaintiff 10% of any amount recovered in an arbitration beyond the amount of the Adjudication Award.

16.2 The express agreement between the Plaintiff and the First Defendant was that if the First Defendant received an Award and payment beyond the extent of the Adjudication Award, relying on the Plaintiff's professional services, the First Defendant would pay to the Plaintiff 10% of any such amount '*going forward*' as his fee for services rendered".

[7] They also entered a special plea (the second special plea) in which they said:

“5.2 At the time the Adjudication Award was issued, according to the Plaintiff, the agreement in place was that the First Defendant would pay the Plaintiff R950,00 per hour.

5.3 The alleged agreement of 9 June 2022, ... was allegedly concluded after the Adjudication Award and according to the Plaintiff, amounted to an agreement that going forward, the First Defendant would pay the Plaintiff 10% of *‘any amount awarded and paid to the First Defendant in the dispute going forward as his fee for services rendered’*.

5.4 The 10% agreement alleged by the Plaintiff was concluded after the Adjudication Award and was in respect of *‘the dispute going forward’* and was not retrospective to an award made prior thereto.”

[8] The Defendants contended, accordingly, that the averments set out in paragraph 12 did not disclose a cause of action.

[9] In summary, it was common cause on the pleadings that Mr Gcora was engaged to represent Ascon in the adjudication process at an agreed rate of R950.00 per hour, and that he had submitted invoices in respect of those services which were paid. The pleadings reflect that an arbitral award had been made confirming the liability of the municipality to Ascon which had been duly paid on 18 August 2023. Mr Gcora’s cause of action herein lies in the alleged contractual agreement set out in paragraph 12 of the particulars of claim². As I have said, the conclusion of an agreement is common cause, but there is a material dispute as to what the agreement was.

The summary judgment

² Quoted at para 4 above.

[10] A plaintiff seeking summary judgment is required, together with the application for summary judgment, to file an affidavit made by the plaintiff, or by any other person who can swear positively to the facts. The deponent to such an affidavit is required to verify the cause of action and the amount of the claim, if any, to identify any point of law relied upon, and the facts upon which the plaintiff's claim is based. They are also required to explain why the defence, as pleaded, does not raise any issue for trial.³ A court must be satisfied that each of these requirements has been fulfilled before it can hold that there has been proper compliance with rule 32(2)(b).⁴ If, ex facie the affidavit, the requisite verification has not occurred summary judgment cannot be granted.⁵

[11] In order to meet the requirement a plaintiff must verify all the facts supporting his cause of action.⁶ In *Swartzberg*⁷ the affidavit had stated that 'the defendant is indebted to the plaintiff in the amount set out in the plaintiff's particulars of claim for this action'. In this regard Margo J held that 'the portion of the plaintiff's affidavit quoted above is fairly capable of meaning that the deponent intended to verify not only the amount but also the facts set out in the plaintiff's particulars of claim in the summons. Accepting that the language used may be forced into yielding such a meaning, I am still left in doubt as to whether or not that is indeed the meaning intended. ... In some of the decided cases it has been said that it is enough if the verification on oath refers to the averments and confirms the correctness thereof. In the present case the plaintiff's case does not even pass that test.'⁸

³ Rule 32(2)(b).

⁴ See *Erasmus: Superior Court Practice* (2nd ed) at D1-402G, and the authorities referred to therein at fn 4.

⁵ *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Limited* 1959 (3) SA 362 (W) at 366C-D; *Visser v De La Rey* 1980 (3) SA 147 (T) at 150D-F; *Absa Bank Limited v Coventry* 1998 (4) SA 351 (N) at 353D-E; and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at 123I-J.

⁶ *All Purpose Space Heating Co. of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 563; and see *Northern Cape Scrap & Metals (Edms) Beperk v Upington Radiators & Motor Graveyard (Edms) Beperk* 1974 (3) SA 788 (NC); *Dowson & Dobson Industrial Ltd v Van der Werf and Others* 1981 (4) SA 417 (C) at 426-8.

⁷ *Barclays National Bank Ltd v Swartzberg and Others* 1974 (1) SA 133 (W).

⁸ At 134F-H.

[12] That brings me to the supporting affidavit in the present application for summary judgment which appears to me to fall into the same category. Ms *Olowookorun*, who appeared on behalf of Mr Gcora, was constrained to acknowledge that there was no express verification of the cause of action or the facts on which the claim is based in the affidavit. Mr Gcora deposed to the supporting affidavit. He confirmed that the facts deposed to are within his personal knowledge and proceeded to record that he had instituted a claim for payment of a liquidated amount of R1 172 279.56, and that defendants had entered an appearance to defend, and filed a plea. Later he said:

‘In compliance with Rule 32(2)(b), I hereby state that in my opinion, the first and second defendants have no bona fide defence and the notice to defend has been entered solely for purposes of delay.’

[13] Ms *Olowookorun* was constrained to submit that these averments were adequate to verify the cause of action and the facts on which it is based. The submission is clearly wrong. As I have said, the cause of action is an alleged contractual liability arising from the disputed agreement set out in paragraph 12 of the particulars of claim. Nowhere in the supporting affidavit is there any suggestion of the verification of the correctness of the pleaded case nor is there any reference to the alleged agreement. In that respect the application is clearly materially defective.

[14] In *Shackleton*⁹ Wallis J held, correctly, that ‘the proper starting point is the application. If it is defective, then *cadit quaestio*.’ That is the end of the matter, and, accordingly, summary judgment cannot be granted. It is not strictly necessary to deal further with the arguments raised. However, it is not the only shortcoming. As the matter has been fully argued before me I shall address some of the further issues raised.

[15] I revert to rule 32(2)(b) and the requirement for Mr Gcora to explain briefly, in the supporting affidavit, why the defence as pleaded does not raise any issue for trial. Ms

⁹ At 122 I.

Mathura, as adumbrated earlier, entered a special plea in which she denied liability for the obligations of Ascon, and in her plea over she explained that she had acted merely as a representative of Ascon in engaging the services of Mr Gcora. In the supporting affidavit for summary judgment Mr Gcora did not attempt to engage with the merit of the defence or the bona fides thereof. Rather, he contented himself by saying that, even if the special plea were to succeed, it would not bar his claim against Ascon. In that respect he is correct. However, that is no answer to the special plea. In this respect, too, the application is materially defective. In any event, the first special plea does raise a valid defence in law for Ms Mathura, if proved at the trial.

[16] I pause to record that during argument, and in the heads of argument filed on behalf of Mr Gcora, much was made of Ms Mathura's role as sole member of Ascon in the interaction with Mr Gcora. I was referred to *Makate*¹⁰ where it was held that the only allegation that the plaintiff has to prove, and thus aver, in order to prove the ostensible authority of an agent, is that the principal created an appearance that the agent had the power to act on the principal's behalf, whereafter, the principal is not at liberty to deny such agency due to a lack of authority.

[17] This is, of course, correct, but the matter related to ostensible authority to act on behalf of another. It is irrelevant to this matter as it is Ms Mathura's case that she was authorised to, and did, act on behalf of Ascon in engaging the services of Mr Gcora. It does not follow that the authority to represent Ascon brings about a liability on the part of Ms Mathura.

[18] In respect of the second special plea, Mr Gcora's only response was that the defence was 'technical'. That is not an explanation as to why it does not raise an issue for trial. For all these reasons the application for summary judgment is fatally defective and cannot succeed.

¹⁰ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

[19] I turn to the merits of the defence raised in the plea over. As I have explained, Mr Gcora's cause of action is a contract. It has not been alleged whether the contract is oral or in writing, but no written portion has been referred to. I shall assume, for purposes of the present judgment, that an oral agreement is relied upon. The terms of the agreement are in dispute and there is no suggestion, in the supporting affidavit for summary judgment, of any ground upon which it may be found that the dispute raised is not bona fide. In the event that Ascon is able to establish that its version of the terms of the agreement is correct it would constitute a valid defence in law. What the terms of the agreement in fact were can only be decided upon evidence. Accordingly, I am of the view that both the defendants should be granted leave to defend the action.

Costs

[20] In the defendants' affidavit resisting the application for summary judgment they sought an order for costs *de bonis propriis*, on a scale as between attorney and client, against Ms *Olowookorun*. Ms *Morris*, who appeared on their behalf, did not persist in the prayer. She did, however, seek an order for costs on a scale as between attorney and client as against Mr Gcora.

[21] A court hearing an application for summary judgment may make an order for costs as to it may seem just.¹¹ Where summary judgment is refused and leave to defend is given the usual order for costs is that the costs should be costs in the cause. This, however, is not an inflexible rule. Rule 32(9)(a) provides, inter alia, that where a plaintiff makes an application for summary judgment in circumstances where, in the opinion of the court, he knew that the defendant relied on a contention which would entitle them leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client.¹²

¹¹ Rule 32(9).

¹² See also *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B; and *CitiBank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (T) at 190A-E.

[22] I have set out the material portion of the pleadings earlier. The defence raised by Ms Mathura in the first special plea is not complex. Mr Gcora made no contrary averment in the particulars of his claim, nor did he attempt to engage with the defence in the supporting affidavit. Notwithstanding the misguided arguments relating to authority, it seems to me that Mr Gcora knew, or ought to have known, that Ms Mathura contends that she had acted merely as an agent for Ascon and that she would, accordingly, be entitled to leave to defend.

[23] As Mr Gcora's claim is contractual he bears the onus to establish the agreement and the terms thereof. An unequivocal dispute relating to the terms of the agreement has been pleaded and the effect of Ascon's version of the agreement gave rise to the second special plea. As I have said, the only response to the second special plea was that it was technical in nature. That is not a response on which to found an application for summary judgment. The factual dispute relating to the terms of the agreement was not addressed at all in the supporting affidavit. I am, accordingly, persuaded that in the case of Ascon, too, Mr Gcora knew of the pleaded case which must necessarily give rise to leave to defend. I consider that this is a proper case to award costs against him, at this stage, on a punitive scale, but I do not think that it is justified to prevent him from pursuing his claim pending payment of the costs. To do so would, in my view, be an unjustified infringement with his right of access to the court.

[24] Accordingly, the following order is made:

1. The application for summary judgment is dismissed.
2. The defendants are given leave to defend the action.
3. The plaintiff is ordered to pay the costs occasioned by the application for summary judgment on a scale as between attorney and client, such costs to include the costs reserved at the postponement of the matter on 8 April 2025.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Ms B Olowookorun
Instructed by: Bukky Olowookorun Attorneys
GQEBERHA

For 1st & 2nd Defendants: Ms K Morris
Instructed by: Friedman Scheckter
GQEBERHA

Date Heard: 29 April 2025

Date Delivered: 13 May 2025