IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

Case Number: A35/2024

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

20.05.2026 [redacted]

DATE SIGNATURE

In the matter between:

T M CHAUKE INC. **APPELLANT**

And

SANDILE SUNDAY LUBISI **RESPONDENT**

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an appeal against the whole judgment handed down by the Mbombela Regional Court Magistrate, N A Khumalo, on the 14th March 2024.

BACKGROUND

[2] The appellant was appointed as attorneys of record for the Road Accident Fund (the RAF). Acting on instructions from the RAF to appoint counsel, the appellant briefed the respondent to represent the RAF in various matters. The brief set out the nature and scope of the instructions, as well as the terms governing payment.

[3] The terms governing payment read as follows:

"1.1 As you are well aware, the appellant has a framework for counsel's fees. Should you require a copy of such framework, we shall gladly furnish you herewith on request.

1.2 Payment of your invoice will be made as soon as possible after receipt of payment thereof from our client RAF, from our side we undertake to as soon as reasonably possible after receipt of your tax invoice submit same to our client for consideration, approval and payment.

1.3 Should these conditions not be acceptable to you, this instruction should be returned to us. Acceptance by you of this instruction will be regarded as acceptance of the above conditions".

[4] The respondent duly rendered legal services in the matters for which he had been briefed and subsequently submitted invoices for those services. Following the appellant's failure to settle the invoices, the respondent instituted action by issuing summons. The appellant entered an appearance to defend the claim. The appellant raised a special plea of non-joinder of the RAF and further pleaded that the debt was not due and payable. The appellant relied on the abovementioned terms of payment and insisted that payment would only become due and payable once the RAF has made payment. The court *a quo* dismissed the special plea and granted judgment in favour of the respondent after considering the evidence. The appellant now appeals against the entirety of that judgment.

JUDGMENT OF THE COURT *A QUO*

[5] After noting that (a) the respondent performed in accordance with the briefs; (b) payment was outstanding on the briefs in question, the court *a quo* considered the appellant's defence that the respondent accepted the briefs fully aware of the suspensive condition that he would

get paid once the appellant receives payment from the RAF. The court *a quo* then framed the question for determination as 'who was responsible for payment of the respondent's fees'.

[6] Relying on section 34(2)(a)(i) of the Legal Practice Act the court *a quo* stated that:

> "…. This indicates a referral advocate only consults and engages with clients or members of the community through their instructing attorney. The instructing attorney acts as a link between the two. As a facilitator, the instructing attorney is a point of contact between the two. It would be ludicrous to expect of council to demand payment for services rendered from the client. Any suggestion that it should be the case is not supported by any legal basis. Over and above, it is contrary to the provision of the Code of conduct as well as the Legal Practice Act.

The bottom line remains that the plaintiff defendant, and was never paid. We all know who is obligated to pay for such professional services. It is the defendant's responsibility to make such payments".

[7] The court *a quo* found that the appellant was liable to pay the amount claimed by the respondent and ordered the same.

GROUNDS OF APPEAL

[8] The judgment of the court *a quo* was assailed on several grounds. Essentially, the appellant contended that the court a quo erred in concluding that the appellant was liable to pay the amount claimed by the respondent despite the debt not being due and payable.

LEGAL FRAMEWORK

[9] Section 34(2)(a)(i) of the Legal Practice Act provides that advocates may render legal services for a fee upon receipt of a brief from an attorney.

ANALYSIS

[10] It is trite that an appellate court will not lightly interfere with the factual findings of a lower court. However, where there has been a material misdirection or where the findings of the court *a quo* are clearly wrong, interference is justified. S V Hadebe 1997 (2) SACR 641 (SCA).

[11] The court *a quo* firstly had to deal with the special plea raised by the appellant that the respondent failed to join the RAF, which it correctly dismissed. Regarding the merits, the appellant's defence to the respondent's claim was that the debt was not due and payable. In this regard, the appellant relied on the terms of payment contained in the briefs sent to the respondent, which essentially stated that the payment of the respondent's invoice would be made as soon as possible after receipt of payment from the RAF.

[12] It was not in dispute that the respondent rendered legal services and that the invoices remain unpaid. Although the appellant argued that the RAF ought to have been joined, the gist of the appellant's defence was that it was not obligated to pay the debt because the suspensive condition had not yet been fulfilled. The respondent argued that the debt was due and payable, and that the appellant, not the RAF, was liable to pay it.

[13] The court *a quo* misdirected itself by focusing on who was liable to pay the respondent's fees rather than determining whether the debt was due and payable. The latter enquiry is central to the dispute between the parties, as liability for payment can only arise once it is established that the obligation has accrued and is enforceable.

[14] Instead of undertaking this analysis, the court posed the wrong question. In doing so, it presupposed that the debt was already enforceable. Had the court properly directed itself to the correct enquiry, it would have considered whether the agreed conditions had been fulfilled and whether the debt had become due. This constitutes a material misdirection which led the court to an incorrect conclusion. Consequently, this court is at large to interfere.

MERITS

[15] The appellant contends that the conditions set out in the briefs constituted a valid agreement binding on the respondent. The respondent admits he was aware of the conditions set out in the briefs but denies they are binding on him. The respondent contends that this type of agreement is not sanctioned by the LPC or the General Council Bar (the GCB). I therefore

deem it necessary to first deal with whether the GCB and/or the LPC prohibit advocates and attorneys from entering into payment agreements.

Do the LPC and the GCB prohibit payment agreements by counsel and attorneys?

[16] The respondent relies on Rule 7.7.10 of the GCB Rules, which provides that "[A]n attorney who may be unable to pay fees due by him when the payment is due subrule 7.7.2 above, may apply to the Bar Council for an extension of time. The Bar Council will grant an extension of time only in special circumstances. Mere inability to pay is insufficient, as it is presumed that attorneys cover themselves before they brief counsel". Properly construed, Rule 7.7.10 applies only once the fees are due.

[17] The respondent further relies on Rule 7.6 of the GCB Rules, which provides that counsel may, as a condition of accepting a brief, require the instructing attorney to pay counsel's account either in advance, at the end of the month in which the account is rendered, or within 30 days after the end of that month. The Rule permits counsel to enter into an agreement with an attorney regarding payment terms.

[18] Similarly, Clause 18.18 of the Code of Conduct for Legal Practitioners recognises that the payment of counsel's fees may be governed by an agreement between the parties. It provides that an attorney must pay timeously, in accordance with any contractual terms or, absent such terms, in accordance with the standard terms of payment, the reasonable charges of any legal practitioner whom he or she has instructed to provide legal services to or on behalf of a client.

[19] The respondent's argument is premised on the standard terms of payment applicable between attorneys and advocates. However, the Code recognises payment agreements between attorneys and advocates and requires timeous payment in accordance with agreed terms where such terms exist.

[20] Clause 30.1 of the Code of Conduct provides as follows:

> "If an attorney offers a brief to counsel which is already marked with a fee, counsel upon acceptance of the brief tacitly agrees to that fee; if counsel chooses to refuse the brief on those terms, counsel and the instructing attorney must expressly agree in writing or by email to a different fee, otherwise, if counsel performs the work mandated by the brief, the initial marked fee shall bind counsel".

[21] It is well established that a tacit agreement may arise from conduct that is unequivocally consistent with an intention to be bound. Clause 30.1 of the Code of Conduct embodies this principle in the specific context of marked fees, namely that counsel who accepts a brief tacitly agrees to the fee endorsed thereon, unless such terms are expressly rejected and varied. While the present matter does not concern a marked fee, the underlying principle is equally applicable.

[22] The brief *in casu* expressly provided that, upon acceptance, counsel would be bound by the suspensive conditions relating to payment, and further stipulated that, should those conditions not be acceptable, the brief was to be returned. The respondent nonetheless accepted the brief and proceeded to perform the work mandated therein. Such conduct is unequivocally consistent with acceptance of the terms of the brief and inconsistent with any rejection thereof. In these circumstances, a tacit agreement arose, notwithstanding the absence of an express written acceptance.

[23] Clause 18.18 *supra* draws a clear distinction between payment regulated by contractual agreement and payment regulated by standard terms. Where parties have agreed on the conditions under which payment becomes due, as in this case, those contractual terms govern their relationship. Standard terms of payment apply only in the absence of such an agreement.

[24] The respondent's contention that the GCB Rules and the Legal Practitioners' Code of Conduct prohibit fee agreements between counsel and an instructing attorney cannot be sustained. Properly construed, the Rules and the Code recognise that parties may regulate the terms and timing of payment under a contract. In the present matter, the parties agreed that payment would be made once the RAF had paid the appellant. It should be noted that there was no application to set aside this contract or to declare it invalid. For this reason, even if my interpretation above is wrong, the terms of the contract remain valid and intact. Having accepted the brief on those terms, the respondent cannot now seek to rely on the standard terms of payment.

[25] The further contention that such an agreement is not binding because it was not sanctioned by the LPC or the GCB is equally unpersuasive. Neither the Code of Conduct nor the GCB Rules relied upon by the respondent prohibit counsel and an instructing attorney from agreeing on payment terms for counsel's fees.

Is the debt due and payable?

[26] I now turn to the central issue for determination: whether the debt was due and payable at the time the respondent issued the summons. As already mentioned, it is undisputed that the respondent rendered legal services and has not been paid. The appellant's evidence was that, in terms of the agreement, the respondent would receive payment once the RAF has paid, and that payment has not yet been made.

[27] The respondent argued that the appellant had failed to provide proof thereof and submitted that the appellant bore the onus of proving non-payment by the RAF. In my view, that submission is misplaced. A party that asserts that a suspensive condition has been fulfilled bears the onus of proving such fulfilment. Accordingly, it was for the respondent, who sought to enforce the obligation to pay, to establish that the condition upon which enforceability depended had been fulfilled.

[28] The appellant contends that the debt was not due because it had not yet been paid by the RAF. On the other hand, the respondent argues that the debt became due upon delivery of the invoices. The respondent's contention cannot be sustained since payment by the RAF constituted a suspensive condition for the appellant's obligation to pay.

[29] The terms of the brief expressly provided that payment to the respondent would arise only once the appellant had been paid by the RAF. The appellant's obligation to pay was contingent upon the fulfilment of that condition. The consequence thereof is that the respondent's claim was premature and he had not established a complete cause of action.

[30] In Mia v Verimark Holdings (Pty) Ltd (522/08) [2009] ZASCA 99 (18 September 2009), Wallis AJA confirmed the legal effect of a suspensive condition as follows:

"Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms."

CONCLUSION

[31] In the absence of evidence that the RAF had effected payment, and in light of the appellant's assertion that such payment had not occurred, the suspensive condition remains unfulfilled. Until such fulfilment, no enforceable obligation arises. (see Design and Planning Service v Kruger 1974(1) SA 689 (T) at 695 C). The debt is therefore not due and payable. The respondent's claim ought to have been dismissed.

In the result I make the following order:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and substituted with the following:

'The plaintiff's claim is dismissed with costs.'

[redacted]

P D KEKANA

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

I agree

[redacted]

T V RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION

Date of hearing: 24 April 2026

Date of judgment: 20 May 2026

Counsel for the Plaintiff: Adv. J Muzimba

Instructed by: T M Chauke Incorporated

Counsel for the Respondent: Adv. S Makhanya

Instructed by: Mashiteng Speelman Inc. Attorneys