REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32049/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

16/5/2019
DATE

RT SUTHERLAND

In the matter between

GORDON MASHIGO **APPLICANT**

and

MOTHLE JOOMA SABDIA INCORPORATED **RESPONDENT**

J U D G M E N T

SUTHERLAND J:

[1] The applicant, Advocate Gordon Mashigo, sues the respondent, Mothle Jooma Sabdia Incorporated, a firm of attorneys for R110 000.00 in fees, alleged to be due and payable. The debiting of the fees is common cause but the respondent refuses to pay based on two defences; first none of the fees are yet due and payable and second, certain of the fees are unreasonable. The respondent goes further to contend that there was at all material times full knowledge by the applicant of a dispute of fact about the terms of the agreement as regards when fees would become due and payable, and the determination of the reasonableness of fees cannot be achieved on affidavit but requires oral interrogation. In consequence it is argued that the matter ought not to have been brought by way of application but should rather have been brought by way of an action.

[2] The allegation of a material dispute of fact is vividly illustrated: the applicant alleges the terms of payment were 97 days after the presentation of a monthly fee list to the respondent, whereas the respondent alleges that the terms of payment were that fees would be payable only after the clients, all organs of state, had paid the respondent. The applicant counters this allegation by conceding that in respect of road accident fund (RAF) litigation the parties indeed had an agreement that fees became payable only after the RAF had put the respondent in funds, but that this arrangement did not extend beyond the RAF. The respondent answers by saying that the arrangement applied to both RAF and organs of state.

[3] Prima facie, that is indeed a material dispute of fact which cannot be resolved on affidavit. The applicant, however, contends that on the principle in *Plascon Evans*[1], the assertion of the respondent can be refuted as being devoid of truth or reliability on its own terms. This contention rests on a letter from the respondent to its client, SALGA, of 21 June 2018. The applicant had, as a result of alleged frustration in waiting to be paid by the respondent, directly approached the client to enquire whether payment of the fees had been made, disclosing that he had yet to be paid. SALGA in turn questioned why the applicant had not been paid when SALGA had paid the respondent's bill. This provoked a reply on behalf of the respondent written by Sian Butterworth, described as an Associate in the respondent firm, and thus, an attorney. In this letter Butterworth refutes the claim that the applicant has a cause to be aggrieved because the so-called unpaid fees were not yet due. She writes:

> "It is apposite to highlight that in Adv Mashigo's previous invoices in this matter, the payment date is 97 days as agreed between MJS and Adv Mashigo. There was no agreement between the parties to shorten the period. We note 97 days from the date of the said invoice is yet to expire."

[4] It is argued that this piece of common cause evidence is sufficient to rule out the denial of a different term of the agreement. However, the deponent to the respondent's affidavit Mr Mothle, the ostensible senior partner of the firm, says that Butterworth made a mistake in the letter because she was ignorant of the true agreement between the respondent and the applicant. There is no confirmatory affidavit from Butterworth, who is said to have left the firm soon afterwards.

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD)

[5] A number of obvious questions spring at once to mind. How could Butterworth, who ostensibly was the professional dealing with the client, SALGA, make such an error? How could she compose her fee notes if ignorant of the fees arrangements with counsel? Is the absence of Butterworth's corroboration sinister? Moreover, why has the respondent, in countering the applicants claim not produced its accounts reflecting a course of conduct corroborative of the term of the agreement which it alleges?

[6] Nonetheless, it remains plain that this is the type of dispute of fact that is not capable of being cleared up with oral evidence. The respondent's contention that this issue cannot be resolved on affidavit is sound. For that reason the application must fail, this outcome was plain from the outset. The parties should go to trial to resolve the matter.

[7] As regards the defence about the fees being unreasonable, owing to the fact that the resolution of the matter on the question of the dispute of fact about the term of the contract disposes of the matter, I deem it appropriate to say no more about the second issue. I do so also because, it seems to me, that because of further litigation over this latter issue, no less than over the term of the agreement, I should not inadvertently pre-empt the contentions which may be debated therein, especially about the legal significance of the role of the Bar Council in the regulation of fees.

[8] A remaining issue is the propriety of a claim for R110 000.00 in the High Court. The court where this claim belongs is in the Magistrates' Court. Curiously, the applicant had initially sued on action in that court, and after a summary judgment application had resulted in leave to defend being granted, chose to withdraw that case

and afresh initiate these proceedings in the High Court. No cogent grounds exist to have done so. The motivation was explained to me from the bar as being that the High Court offered a more expeditious route. That perspective may be one justified by the facts of Magistrates' Court litigation dynamics but is nonetheless not a justifiable reason. Such a practice of preferring the High Court to the Magistrates' Court in which to litigate has been severely criticised recently in *Nedbank v Thobejane and similar matters* 2019 (1) SA 594 (GP). Such difficulties as may discourage use of the Magistrates' Court must be addressed by resolving them not by avoiding them.

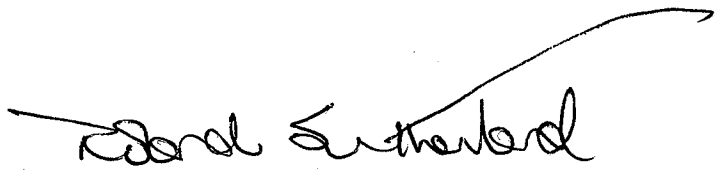
[9] In order to expedite the resolution of this matter and do justice to the parties, I shall refer this matter to trial in the Johannesburg Magistrates' Court. The costs of the abortive High Court proceedings I shall order to be reserved for that Court to decide, after the merits of the respective claims have been adjudicated. An assessment can then be made about the reality of the disputes of fact and whether it has a bearing on an appropriate costs order in the circumstances.

The Order

(1) The application is referred to trial in the Court of the Magistrate for the District of Johannesburg.

(2) The applicant shall file and serve particulars of claim within 30 days of the date of this order.

(3) The costs of the High Court proceedings shall be reserved for a decision by the Magistrates' Court.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 14 May 2019

Date of Judgment: 20 May 2019

For the Applicant: Adv KT Mokhatla

Instructed by Motsoeneng Bill Attorneys

For the Respondent: Adv MH Nieuwoudt

Instructed by Mothle Jooma Sabdia Incorporated