IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 045931/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

11 November 2024

DATE SIGNATURE

In the application between:

MAKONYE LESLEY SELLO	**APPLICANT**
and	
PULE INC	**FIRST RESPONDENT**
ITUMELENG NONDWANA.	**SECOND RESPONDENT**
PULE NKOSI SIMPHIWE	**THIRD RESPONDENT**
THOBEJANE WALIE POELO.	**FORTH RESPONDENT**

JUDGMENT

NHARMURAVATE AJ

Introduction

[1] This is an opposed summary judgement wherein the Applicant is a practicing advocate namely Lesley Sello Makonye brought against the Respondents who were the instructing Attorneys under the style name Pule Incorporated for the payment of his fees as an advocate amounting to R 358 258.49 together with interest and costs on Attorney and client scale.

[2] The Respondents are opposed to the summary judgement sought. The Respondent Counsel Mr Mtshali at the outset submitted that he will not be persisting with the points *in limine* raised in his papers resisting summary judgement. He will only be relying on his main argument.

[3] The application is discussed briefly below.

Background Facts

[4] The Applicant was briefed as an advocate around August 2019 inclusive of May 2020.The Applicant was briefed to render services to the First Respondent in return for payment. The parties signed an agreement that the Applicant would render services to the Respondents, and he would issue out an invoice. Thereafter the Respondents would be personally liable for the Applicant's fees which was conditional upon the Respondents being paid by their client.

[5] It is not in dispute between the parties that indeed the Applicant executed the instruction as briefed and thereafter he caused an invoice to be sent to the Respondents in respect of his fees. The Applicants fees remain outstanding for more than four years.

[6] The Respondents opposed the summary judgement sought based on the agreement between the two parties that the Applicant signed. The Respondents argued that there were triable issues between the parties in that the Respondents have not received payment from client (the Road Accident Fund) which will put them in a position to be able to pay the Applicant. The Respondents argued that their plea filed demonstrates that they have a *bona fide* defense.

[7] Mr Kooverjie for the Applicant argued that the Applicant's fees were due and payable and in terms of the Legal Practice Act 28 of 2014, an Advocate may only render legal services in expectation of fees, commission, gain or reward upon receipt of a brief from an Attorney, this was not disputed by the Respondents.

[8] In supporting of his argument Mr Koorverjie for the Applicant highlighted paragraph 27.4 of the Code of Conduct which states that:

"*Counsel shall receive fees charged only from or through the instructing attorney who gave the brief of counsel, except where such attorney, for reasons of insolvency, or for any other reason, is unable to pay, in which circumstances, with leave from the Provincial Council, counsel may receive the fees due from another source in discharge of the indebtedness of the attorney.' (own underlining*)

[9] Mr Kooverjie also highlighted a few cases to support his argument one of them being Solomon and another v Junkeeparsad[1], wherein the court had to determine whether the privity of contract exists as between the advocates and the attorney or whether it lies between the advocate and the attorneys' clients. The court held that the Attorney would always be liable for the fees charged by an advocate whom he or she has instructed.

[10] In rebuttal, Mr Mtshali for the Respondents argued that the parties had an agreement that payment will be effected to the Applicant upon the Road Accident Fund paying them. The Respondents have not been paid by the Road Accident Fund therefore the Applicants debt was not due and payable. Further, he argued that the defense raised regard being had to the contract between the parties displayed a *bona fide* and it also raised triable issues between the parties which deserved a proper trial.

[1] 2022 (3) SA 526 (GJ)

ANALYSIS OF THE MATTER

[11] The uniformed rules of court specifically rule 32 provides that:

"*Summary judgment*

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment; together with any claim for interest and costs.

(2) (a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may —(a) (b) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[

[12] The object of rule 32 is to prevent a defendant, who cannot set up a bona fide defence or raise against the plaintiff's case an issue which ought to be tried in

order to delay the granting of the plaintiff's rights[2]. This rule allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial.

[13] The relationship between the Applicant and the Respondents is contractual in nature and is further regulated by the Legal Practice Act read together with the code of conduct for legal practitioners. Section 18.18 of the code of conduct provides that an attorney must pay timeously in accordance with any contractual terms the reasonable charges of an advocate. The Respondents argued that they have not been paid by the Road Accident Fund And one of the terms of the contract was that they would pay the applicant upon payment being made. In my view the argument raised by the Respondents demonstrates a *bona fide* defense.

[14] In …..Binns-Ward J considered the effect of a plea preceding an application for summary judgment. He held as follows that:

"[*15] …. Under the previous regime, a plaintiff might bring the application in the genuine belief that the defendant had entered an appearance to defend only for the purpose of delay, only to learn that the defendant was able to make out a bona fide defence when the defendant's opposing affidavit was delivered. …Under the new rule, a plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the pleaded defence is not bona fide; in other words, by showing that the plea is a sham plea.[3](own emphasis)*

[15] The terms of the agreement between the parties are common cause[4]. When the Applicant took the brief he understood that he would only get payment upon the Respondents being paid by their client. The Respondent's argument that they have not received payment from the Road Accident Fund which has caused a hindrance in paying the Applicant was not successfully rebutted by the Applicant in its papers. The rule requires that the Applicant must be able to demonstrate

[2] Meek v Kruger 1958 (3) SA 154 (T)

[3] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) at para 13.

[4] Pacta sunt servanda ("agreements must be kept.") is a fundamental principle of law which holds that contracts are binding upon the parties that entered into them.

that the Respondents' pleaded defense was *mala fide.* The Applicant did not demonstrate the *mala fides* but conceded that there was such an agreement but raised further anomalies to the agreement which in my view can be challenged in a trial.

[16] In my view, since the agreement is acknowledged by the Applicant then the defense pleaded is *bona fide*. The defense raised by the Respondents is not a sham and was not entered into for the purposes of delaying the Applicants matter. The Respondents have been successful in demonstrating a *bona fide* defense in their papers resisting summary judgment. An explanation was provided that in the past few years the Road Accident Fund has been experiencing several issues which have caused difficult administrative issues between the various law firms which were performing work for it. This led to various litigation against the Road Accident Fund which has created a serious backlog in the administrative channels which has adverse consequences for law firms such as the First Respondent. This has led to difficulties in the First Respondent receiving payment for the applicant. This could not be refuted by the Applicant.

[17] Summary judgment procedure was not intended to "*shut (a defendant) out from defending*" unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. This rule was not intended to shut out a defendant who can show that there is a triable issue applicable to the claim from laying his defence before the court[5].

[18] In my view, this court cannot ignore the terms of the agreement entered between the parties. This court cannot summarily grant a judgement as the Respondents have raised triable issues which it deserves to defend during a trial. The argument raised by the Applicant that the professional relationship and the

[5] Uniformed rules of court commentary

interactions between the between him and the Respondents were subject to the Legal Practice Act 28 of 2014 read together with code of conduct which means that both parties are bound by the provisions of the Legal Practice Act (LPC) and the code of conduct which prohibits parties from entering into any agreement which is contrary to the provisions of the aforesaid act and code of conduct.

[19] In my view, the argument raised by the Applicant is a clear demonstration that the parties need to proceed to trial to vindicate their issues properly. Simply because what is before this court is a summary judgement application, it is not an application wherein the Applicant seeks to nullify the agreement entered in line with the provisions of the LPC Act read together with the code of conduct. The test for a summary judgement application is crisp that is if the defendant's plea is bona fide and not entered for the purposes of delaying the matter.

[20] The rule was not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. In the *Maharaj* v *Barclays National Bank Limited*[6] case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and *good in law*. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings.

[21] Corbett JA in the *Maharaj*[7] case held that the summary judgement remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and where the defendant fails to set up a bona fide defence. The amendment of the rule in 2020 regarding summary judgments directs that a summary judgment will only be granted where the defense that is pleaded by the Respondent is not *bona fide*. In my view the defense pleaded is *bona fide* and

[6] 1976 (1) SA 418 (A) at 423 H
[7] 425G–426E

the matter deserves to be fully defended by the Respondents as reliance is placed on a contract which is binding on the parties.

[22] This was reaffirmed by the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture.* [8] Considering that summary judgment procedure is aimed at preventing a defendant from raising sham defences and thereby delaying the plaintiff from enforcing its rights. It is not intended to deprive a defendant with a triable issue, or a sustainable defence, the opportunity to fully ventilate the dispute at a trial. In the circumstances, the principle referred to by Corbett JA that a court "look at the matter 'at the end of the day' on all the documents that are properly before it", [9] applies in this instance to a Respondent's affidavit.

[23] Therefore the defence raised by the Respondent is not a sham .

CONCLUSION

[24] In my view, the Applicant did not successfully engage the contents of the plea to substantiate his averments that the defence is not *bona fide* and that it has been raised merely for purposes of delay. The Respondents were successful in their argument resisting summary judgement and were able to demonstrate a *bona fide* defense and accordingly should be permitted to defend the action in its entirety.

[25] Tritely, the court hearing the application for summary judgment may make such order as to costs as, it may deem just. When summary judgment is refused and leave to defend is given, the usual order for costs is that costs should be costs in the cause. I have no reason herein to deviate from the norm.

[26] I therefore make the following order :

[8] 2009 (5) SA 1 (SCA).
[9] Maharaj v Barclays National Bank Limited at 423 H.

1. The application for summary judgment is refused.
2. The Respondent is granted leave to defend the action.
3. Costs in the cause.

NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant : Adv R Kooverjie
Instructed by. : Du Bruyn & Morkel Attorneys

For the Respondents. : Adv L Ntshangase
Instructed by. : Pule Inc

Date of Hearing : 10 September 2024
Date of Judgment: 11 November 2024