REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO: 45084/13

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

....
DATE SIGNATURE

In the matter between:

PHYLLIS MABASA Applicant

and

MMELA FINANCIAL SERVICES (PTY) LTD First Respondent

PHUTEGO TRUST Second Respondent

SELWADI EMMANUEL N.O.
(…….) Third Respondent

BANE TODD
(…….) Fourth Respondent

MATLALA, MARY-ANNE PHUTI N.O.
(…….) Fifth Respondent

CLAIMS ADMINISTRATION AND RECOVERY SERVICES (PTY) LTD (formerly LBMJ) Sixth Respondent

ABSA BANK LIMITED Seventh Respondent

GUARDRISK INSURANCE LIMITED Eighth Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] On 29 November 2013 the applicant launched this application on an urgent basis for orders –

1.1 Dispensing with the forms and service modes prescribed by the Rules of this Court and to dispose of this matter as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court;

1.2 Declaring that the applicant is entitled to the payment of the consultancy fee by the first and/or sixth respondents in the amount of R10 323 622,00 from the amount of R11 696 313,00 due to be transferred and paid to them by the eighth respondent;

1.3 That the sixth respondent is hereby forthwith interdicted and restrained from in any way accessing and dispensing of the amount of R11 696 313,00 once same is transferred and paid by the eighth respondent into the sixth respondent's bank account with the seventh respondent;

1.4 That the first respondent be restrained and interdicted forthwith from in any way accessing and dispensing of the above said amount of R11 696 313,00 once same is transferred and paid by the eighth respondent into the sixth respondent's bank account with the seventh respondent;

1.5 Authorising the eighth respondent to forthwith deduct the amount of R11 696 313,00 payable to the sixth respondent and forthwith pay over the amount of R10 323 622,00 to the applicant;

1.6 Alternatively, ordering the sixth respondent to itself, forthwith pay to the applicant the consultancy fee of R10 323 622,00 immediately upon receipt of payment of the amount of R11 696 313,00 from the eighth respondent;

1.7 Further alternatively, that the eighth respondent be authorised to forthwith withhold payment of the amount of R11 696 313,00 to the sixth respondent and/or the first respondent until the dispute between the applicant and the first and sixth respondents regarding payment of the consultancy fee to the applicant would have been finalised;

1.8 Further alternative to paragraphs 3, 4, 5 and 6 above, directing the sixth respondent to pay directly to the applicant any amount of the consultancy fee that is found to be due, payable and/or agreed upon or not in dispute in terms of the Consultancy Services Agreement between the parties;

1.9 That the first and sixth respondents and/or any of the other respondents pay the costs of this application if they opt to oppose same, on a scale as between attorney and client; and

1.10 Granting the applicant such further and/or alternative relief as this Court may deem meet.

[2] All the respondents herein noted their intentions to oppose the application on 2 December 2013. The first to sixth respondents filed a joint answering affidavit. On the date of argument of this application on 11 December 2013, the seventh respondent caused it to be put on record that they will abide the ruling of this Court. As a consequence, should the applicant be substantively successful in this application, and costs are awarded against the unsuccessful parties, the seventh respondent will not be part of such costs order.

THE PARTIES

[3] The applicant is an adult female insurance and risk consultant residing at [……].

[4] The first respondent, Mmela Financial Services (Pty) Limited ("*Mmela Financial Services*") is a limited liability company and insurance broker, duly registered and incorporated in terms of the company laws of the Republic of South Africa, and conducting business as an insurance broker, with its registered address situate at [……..].

[5] The second respondent, Phuthego Trust is a trust entity duly registered with the Master of the High Court of South Africa under registration number 1095/11, duly represented by its trustees as would appear hereunder; cited herein insofar as it may have interest in this matter and which has as its registered address, R [……..].

[6] The third respondent, Selwadi Emmanuel, is an adult male insurance manager, cited herein in his capacity as trustee of the second respondent, with Identity Number [……] as well as insofar as he may have interest in this matter, and residing at S […….].

[7] The fourth respondent, Bane Todd, is an adult male teacher and director of the sixth respondent and also a trustee of the second respondent, cited herein in his representative capacity, with Identity Number [……], and insofar as he may have interest in the matter; ordinarily resident at [……].

[8] The fifth respondent, Matlala Mary-Jane Phuti, is an adult female insurance consultant with Identity Number […….], cited herein in her capacity as trustee of the second respondent, and insofar as she may have interest in this matter; ordinarily resident at […….].

[9] The sixth respondent, Claims Administration & Recovery Services (Pty) Ltd (formerly LBMJ Recovery Services (Pty) Ltd), is a limited liability company duly registered and incorporated as such in accordance with the company laws of the Republic of South Africa ("*RSA*"); cited herein in its capacity as the representative of the Mdau Insurance Brokers, and conducting the business of an insurance broker, with its registered address situate at […….].

[10] The seventh respondent, Absa Bank Limited, is a banking institution duly established and registered as such in accordance with the Banking Laws of the RSA; cited herein insofar as it may have interest in this matter; with its registered address being situate at […….].

[11] The eighth respondent, Guardrisk Insurance Limited, is a company duly established and registered as such in accordance with the company laws of the RSA; carrying on business as an insurance company; with its registered address situate at […….].

NATURE OF THE PROCEEDINGS

[12] This is an interdictory and ancillary relief by the applicant against the respondents as set out in the Notice of Motion. The dispute arises out of an oral consultancy services agreement entered into by and between the applicant, acting in person and the first and second respondents, represented thereat by Mohobi Ramatsitsi ("*Ramatsitsi*") and/or Todd Bane ("*Bane*").

[13] The applicant claims that the amount of R10 323,00 is due and payable to her by the first and/or second and/or sixth respondents in respect of completed and successful consultancy services, and that the respondents are unlawfully or maliciously refusing or neglecting or procrastinating in paying her which may lead to her financial ruin soon.

URGENCY

[14] Counsel for the respondents argued that the matter should be struck off the roll for lack of the requisite urgency.

[15] After listening to argument and submissions from both sides, perusing the papers herein and considering this aspect, I am of the view and finding that this matter is urgent in the requisite degree, thus being justifiably set down in the urgent court.

INTERDICTORY RELIEF SOUGHT

[16] The respondents have not argued that the requirements of the grant of an interdict have not been made out herein by the applicant. That regardless, I have considered the papers filed and argument submitted on behalf of the applicant. I am satisfied that the requirements for the grant of an interdict have been met.

GENERAL BACKGROUND AND FACTUAL MATRIX

[17] The stories told by both sides herein are diametrically opposed and/or mutually destructive. They evidenced at the end of the day disputes of fact that cannot be resolved on the papers alone. They need to be referred to either evidence or full trial.

[18] I will come back to this aspect after setting out the respective sides' versions.

APPLICANT'S VERSION

[19] According to the applicant in early 2010, Ramatsitsi, the Managing Director of the first respondent approached the applicant with a proposal that the latter enter into a consultancy agreement with the first respondent wherein she was to act as their insurance consultant on an insurance project which the first respondent had with the National Treasury Department of the Government of the RSA. This exploratory approach was followed by a formal

meeting between the two at the Mugg & Bean restaurant at Mulbarton, Johannesburg South during the same month of December 2010.

[20] It was at this meeting where or that Ramatsitsi told the applicant that the first respondent had won a tender bid with reference number RT 68/2010 from the Treasury of the RSA for the provision of finance and administration of Credit Life Insurance on subsidised motor vehicle fleets purchased by employees of the Government. The tender was for a period of five years, ending or terminating by effluxion in September 2014. It was a transversal contract utilised by employees of all Government Departments without reservation as well as the Departments themselves.

[21] According to the applicant further Ramatsitsi further told her that in terms of the project the first respondent was required to provide short-term insurance on motor vehicles purchased by the State employees on subsidies granted to them by the Government as well as provide credit life insurance cover on the lives of each employee purchaser as security for due performance of cover until the employee has paid off the motor vehicle.

[22] The first respondent had based its premium quotation on figures worked out by Centriq Insurance Company ("*Centriq*") at the rate of R2,50 per R1 000,00 on the total price of each vehicle insured. At the end of it all the commission to be earned was 7,5% of the total values of those vehicles insured and their owners.

[23] As the first respondent was not entirely happy with this commission as it effectively translated in it getting only 18c from each R2,50, with the balance being pocketed by Centriq. Ramatsitsi then reportedly made an offer to the applicant that she act as their consultant, the primary task being to research and come up with a dispensation that can result in higher profit than the Centriq scheme.

[24] It was a further term of that proposal or offer that should the applicant secure a scheme which would yield a profit share with an underwriter on the basis of 50-50% profit sharing ratio, the first respondent would pay her a consultancy fee of R3 million from its 50% share of the profit. Furthermore, in the event of profit gains ultimately secured in the scheme the applicant should research being higher than 50% or less than the 50% ratio, the consultancy fee payable to her would be adjusted *pro rata*, based on the total percentage payable to the first respondent. In particular, in the event the applicant managed to secure a profit margin of 100% for the first respondent, her consultancy fee would increase to R6 million.

[25] The applicant accepted the offer or proposal to so act as the first respondent's consultant. She set upon doing research in the execution of her part of the contract or agreement. During that research process she discovered that the arrangement proposed or sought by the first respondent of a profit sharing scheme between a broker and an underwriter had been outlawed by the Financial Services Board ("*FSB*").

[26] She went in and looked for an alternative avenue that would bear similar results to avoid a breach of contract with the first respondent. She came up with a scheme or arrangement based on a cell-captive structure in terms whereof the first respondent would achieve the same or even better results. This was so because the first respondent did not have an insurance licence and also was not by law permitted to act as both broker and underwriter or insurer at the same time. Ramatsitsi accepted the new plan on behalf of the first respondent.

[27] The structure, shape and purpose of a cell-captive scheme entailed the following:

27.1 A corporate entity which is separate and distinct from the first respondent had to be formed. This new entity would in turn rent an insurance licence from a registered insurance company to enable it to underwrite the risk on the credit life insurance policies for the buyer Government employees in line with the tender award project.

27.2 Then another insurance company with an insurance licence would be approached to re-insure the risk, i.e. the corporate entity would be underwritten by this other insurance company as a risk. In that way a cell become established within which the corporate entity is captured and allowed to underwrite the credit

life insurance policies as if it was itself the initial insurer or underwriter.

27.3 The insurance company that directly underwrites the risk would declare and pay dividends on a quarterly, half yearly or annual sequence or basis, depending on the choice agreed on, directly to the new entity formed except that in the period running up to the formation and commencement of operations by that entity, the dividends would be paid to the first respondent. Insofar as the withdrawal of funds is concerned, the capital requirements of the cell are subject to the level of risk within the cell and as a principle, the higher the total premium, the higher the capital requirements will be. Furthermore, the insurance company that insures or underwrites the risk would calculate the required level of capital in the cell on a monthly basis, and the surplus from the process or sale can either be left in the cell-captive or withdrawn as dividends paid to the entity formed at the agreed upon frequency or intervals. Technically, once a profit sharing payment is made to the entity, it may do as it wishes with the money.

[28] Based on the aforegoing and the acceptance of the cell-captive structure or scheme by the first respondent, a separate and distinct entity was to be formed. This was the birth or creation of the sixth respondent.

[29] Ramatsitsi made available an entity going by the name of LBMJ Recovery Services (Pty) Ltd in July 2011. This entity was changed to Claims Administration and Recovery Services (Pty) Ltd (sixth respondent) on 11 April 2013. Ramatsitsi had co-owned this entity with the fourth respondent.

[30] To bring her plans to fruition the applicant facilitated the formation of a trust entity being the second respondent, Phuthego Trust in January 2011. The third to fifth respondents became the trustees thereof. The second respondent then in turn took over ownership of LBMJ (currently the sixth respondent) in July 2011, when it was made available. Since LBMJ was not registered as a financial Services Provider ("*FSP*") and did not have an insurance licence, it rented one from an entity known as Mdau Insurance Brokers ("*Mdau*") so that it could operate as a FSP for purposes of the cell-captive structure or scheme, effectively acting as a representative of Mdau in return for a rental amount of R3 000,00. An entity by the names of Phakama was then engaged to underwrite the administration of the credit life insurance policies on behalf of the sixth respondent in return for a fee in that regard.

[31] The applicant emphasised that from the aforegoing, it became an express alternatively implied, alternatively tacit term of the consultancy agreement that once the cell-captive structure is completed and operational, the new entity being the sixth respondent (formerly LBMJ) would replace the first respondent as the party contracting with the applicant in terms of the consultancy agreement and would from there onwards, become the responsible party for the payment of the consultancy fee to her.

[32] The applicant encapsulated the actual and full nature and operation or operational modalities in a document annexed to the Founding Affidavit as Annexure “B”, which was made available to Ramatsitsi and the first respondent on 2 March 2012.

[33] Further and in the course of executing her mandate by making the cell-captive structure work, the applicant approached Liberty Life Insurance Company and the latter agreed to become the re-insurer of the risk, being the sixth respondent under the licence of a related underwriter, Guardrisk Insurance Ltd (the eighth respondent) at a fee rate of 36c per R1 000,00 on the total price of each motor vehicle purchased. The applicant personally approached the eighth respondent who agreed to insure and underwrite the risk. In that manner, Liberty Life and the eighth respondent created a cell within which the sixth respondent was captured and enabled to become an insurer (or underwriter) under the licence of Guardrisk Insurance (the eighth respondent).

[34] One of the outcomes of the cell-captive structure was that in the three months period before it became fully operational, Liberty Life acted as the provisional insurer (or underwriter) and the credit life scheme was, during that period, placed in the category of a funeral policy scheme which yielded higher returns than originally projected or anticipated. The profit payments or dividends from that period were paid directly into the first respondent’s bank account. This effectively yielded the first respondent higher profit gains on a non-sharing basis. It was a clean 100% or more profit made. The applicant

consequently claims and argued that in terms of their consultancy agreement she was entitled to at least R6 million and a further *pro rata* share for higher returns received from Liberty Life through the eighth respondent. She employed an actuary who computed her entitlement at the amount of R10 323 622,00 which, despite demand, the respondents failed, neglected or refused to pay to her. She argued that since the inception date of the cell-captive structure or scheme, once the sixth respondent was established in July 2011, it immediately replaced the first respondent and became the direct beneficiary or payee entitled to the payment of dividends from the eighth respondent and it is obliged to pay the applicant its consultancy fees. The sixth respondent has also failed or refused to honour its obligations towards the applicant, thus breaching their agreement. It has retained all the dividend it received when Liberty Life was still the payer and has failed or refused to pay the applicant her dues in consultancy fees since its formation after July 2011.

[35] The applicant further argued that the sixth respondent has further not made and is not willing or prepared and/or is actually refusing to make any undertaking and firm commitment to pay such consultancy fees from the dividends already received from the eighth respondent and/or Liberty Life, which latest payments were expected in the days immediately following the institution of these proceedings.

[36] Counsel for the respondents bluntly stated in court during argument that the respondents were refusing to pay the applicants although they have already received dividend payments from the eighth respondent. When I

asked what the reason was for this, he stated curtly that the applicant must wait her turn to be paid.

[37] It deems to be mentioned at this stage that the respondents acknowledged or conceded that the applicant is entitled to be paid the sum of R6 million although they call it a bonus. According to the applicant further, the latest payments awaited or expected are for the past six months.

[38] The actuarial calculations made by Messrs Gerard Jacobson Actuaries are attached to the Founding Affidavit as Annexure “C”.

RESPONDENT

[39] According to the respondents, especially the first to sixth respondents, the applicant was a full-time employee of the first respondent, appointed on 2 January 2011. There is a letter attached to the respondents’ Answering Affidavit marked Annexure “O” which the respondent rely upon as the “*contract of employment*” between the applicant and the first respondent. Unfortunately, this is only a letter offering the applicant employment as the Chief Operating Officer (“*COO*”) of the first respondent. It is also not signed – be it by the first respondent’s representatives or by the applicant. There is no response to the “*offer*” by the applicant. Whatever it is, this document has no legal basis. It is an offer that ostensibly never went beyond its maker. It is no employment contract.

[40] According to the respondents, LBJM Recovery Services (Pty) Ltd was the brain child of the first respondent established as an insurance supplier company which was later converted by it into an insurance product company. As this entity did not have the right or capacity to underwrite and insure, the first respondent took advantage of its relationship with the eighth respondent – being its registered broker – and their negotiations led to the cell-captive scheme or arrangement idea.

[41] The end result would be as follows:

41.1 An administrator would collect premiums from clients.

41.2 An entity called Phakama would deduct its fees from the total income.

41.3 A so-called risk based premium would then be paid to the cell-captive of which eighth respondent and LBMJ Recovery Services (Pty) Ltd would be shareholders of the cell-captive.

41.4 The first respondent would then in turn be paid a brokerage fee of 7,5% of the risk premium while the cell-captive will receive the total premium. The understanding according to the respondent was that the first respondent does not draw an income directly from LBMJ Recovery Services (Pty) Ltd.

[42] At this stage, according to the respondents, the third respondent was employed as the first respondent's Sales and Compliance Manager. According to them further, all the suffling and negotiations that ultimately led to the coming into being of the scheme of things currently operative started and became realities before the applicant was appointed as the first respondent's Chief Operations Officer ("*COO*") – meaning that the cell-captive idea was developed and nurtured, not by the applicant but by among others, Ramatsitsi, the third respondent in consultation with employees of ISS Comply Services, particularly the latter's Mr Chris van der Walt.

[43] I do not propose to elaborate on the finer details of what the respondents, through Ramatsitsi as confirmed in confirmatory affidavits, expatiated on. Suffice to state that the totality of whatever picture emerged at the end of the day pointed to massive disputes of fact that cannot be determined on the papers alone. The dispute or issues in dispute should thus be resolved by either evidence on them specified or to trial. Evidential mechanisms like those set out in milestone cases like the *Plascon-Evans* case cannot avail any of the parties herein.

[44] Counsel for the respondents strongly submitted that the applicant's case is founded on false foundations coupled with self-created urgency.

ANALYSIS

[45] I thoroughly checked authorities and the law relating to urgency and have arrived at a conclusion that there is no self-contrived or self-created or artificial urgency here. The circumstances of this case justified its enrolment in the Urgent Court.

[46] Furthermore, the respondents do not dispute that the applicant is entitled to at least R6 million from the moneys she is owed. This is what the applicant has asked for in prayer 1.8 above. The respondents confirm this in their answering affidavit.

[47] It is my finding that there is nothing in the papers or anything said in argument to suggest that this entitlement is not due and payable, more so that there is evidence that the money for it has been received by the respondent(s). While it is so that the disputes of fact relating to the balance due to the applicant should be dealt with further, it is my further finding that the applicant should be paid the R6 million not in dispute forthwith.

[48] I have considered issues of whether this matter should be referred to evidence on a specific point(s) or straight to trial.

[49] After perusing the affidavits filed of record herein as well as factoring what was stated by both parties in argument, it is my considered view and finding that the matter should be referred to trial. It is my further view that the

parties have within them the wisdom to settle issues herein but are protracting litigation to put each other or the other party in its place. That is my personal view. If the parties feel they are sufficiently financially endowed to continue litigating against each other over these issues, so be it. It is their own decision. Mine is just to make it possible for them to do so. All the risks are theirs.

COSTS

[50] At a glance, one may say that it will not be in the best interests of justice to order any of the parties to pay the costs of this application this far as the issues to be resolved in the full trial are so intertwined that the entire issue of costs should be decided by the court dealing with the trial. If they decide to settle their disputes in-between, they can settle the issue of costs in their settlement.

[51] Normally successful parties are awarded costs of the litigation. However, courts have a discretion to decide, based on the facts of a case, to whom costs should be awarded.

[52] In this case, the respondents knew throughout that there was no dispute over the R6 million that is due and payable to the applicant. Yet, they, i.e. those that were in the know and knowledge, did not put this aspect out of dispute. Even during argument their counsel conceded that the applicant was entitled to the above amount yet still argued that the entire application be

dismissed, based on one or other technical point that has nothing to do with justice between man and man.

[53] It is thus my view and finding that the costs attaching to a proportionate part of the dispute should be awarded to the applicant at this stage.

[54] The R6 million due and payable to the applicant represents roughly 60% of the total claim. As such the applicant should be awarded 60% of the costs of litigation up to this stage. If the parties wish, to continue litigating over the balance, then they would know that they are grappling with each other with a costs purse of only 40%.

ORDER

[55] In the circumstances of this case, the following order is made:

55.1 The sixth respondent and/or any other of the respondents who may be in possession of or in charge or control of the resources in issue here is/are ordered and directed to pay to the applicant an interim amount of R6 million (R6 000 000,00) directly and forthwith;

55.2 The sixth respondent directly and all the others who opposed this application are ordered to pay 60% (sixty percent) of the costs to the applicant;

55.3 The above payments to be the joint and several liability of the respondents, the one paying the others being absolved;

55.4 All other issues raised here in except the one dealt with in paragraph 55.2 above are referred to trial;

55.5 The applicant's finding affidavit incorporating the replying affidavit to stand as summons;

55.6 The applicant to serve her declaration within 30 (thirty) days of date of this judgment;

55.7 The respondents to respond appropriately within the normal time frames laid down;

55.8 The parties to do all that is required and expected of them until the matter is set down for trial.

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N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

FOR THE APPLICANT

INSTRUCTED BY	DENGA INCORPORATED PRITCHARD STREET JOHANNESBURG TEL NO: 011 492 0037

FOR THE RESPONDENTS

INSTRUCTED BY	SNYMAN ATTORNEYS HOUGHTON, JOHANNESBURG TEL NO: 011 532 8803
DATE OF HEARING	DECEMBER 2013
DATE OF JUDGMENT	28 FEBRUARY 2014