


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 5515/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
08/10/2019	
DATE	SIGNATURE

In the matter between:

ISMAIL, ADIL

Applicant

and

DE BROGLIO ATTORNEYS

Respondent

JUDGEMENT

CARSTENSEN AJ:

- [1] The applicant seeks leave to amend its particulars of claim by replacing the existing particulars with an entirely new set of particulars. In an interlocutory application in terms of Rule 30(2), which was heard on 2 August 2018, the applicant was given leave to file a notice of application to amend its particulars within thirty (30)

days of the order and ordered to pay the costs of that application.

[2] The applicant was injured in a motor vehicle accident on 8 November 2007 and a claim was lodged against the Road Accident Fund ("RAF"). This resulted in the applicant being awarded an amount, by agreement between the applicant and the RAF, of R1 450 000.00 plus costs. The order, dated 12 October 2014, directed that the amounts be paid into De Broglio Incorporated's trust account then be transferred into a trust created under the provisions of the Trust Property Control Act 57 of 1988. The applicant's attorneys were obliged to pay the amounts to the trustee net of a R50 000.00 once off payment to the applicant, the past medical expenses, disbursements and attorney's costs. The order also recorded that: *"There is no contingency fee agreement in existence between the Plaintiff and her Attorneys"*.

[3] The applicant at the time was represented by his legal guardian, his sister.

[4] De Broglio Attorneys, the respondent in this matter, prepared a Rule 68.7 Accounting Statement which showed income received of R1 853 831.40, which consisted of the R1 450 000.00 capital and R403 831.40 party and party costs paid by the RAF into the attorney's trust account.

[5] The statement also showed disbursements, including for example counsel, experts, cost consultants, of R410 576.95; attorney's fees of

R288 258.77; VAT on the attorney's fees of R40 356.23, an amount which was paid to the applicant of R50 000.00. The amount which was paid into trust was shown to be R903 755.45 and later a further amount was paid into trust in the amount of R160 884.00, totalling R1 064 639.45.

[6] Consequently the total amount paid out of the account was R1 853 831.40, exactly the amount which was received into the account.

[7] Notwithstanding the above, the applicant, as plaintiff, instituted action against the respondent, as defendant, claiming payment of the sum of R355 360.55 which consisted of the R288 258.77, VAT of R40 356.23 and an amount of R6 745.55 for disbursements.

[8] The applicant/plaintiff's cause of action is essentially that:

[8.1] the plaintiff's attorneys were De Broglio Attorneys;

[8.2] the court order referred to above was granted;

[8.3] the trust has been terminated and the accounts closed;

[8.4] *"The Plaintiff disputes the Defendant's legal fee(s) and disbursements charged for his RAF matter that was finalised on or around 13 October 2014, where despite paragraphs 7 and 10 of the Court Order:*

- *an unitemised amount of R328 615.00 (including VAT*

of R40 356.23) was deducted by the Defendant from the Plaintiff's awarded delictual damages as a legal fee; and

- an additional amount of R6 745.55 was deducted by the Defendant from the Plaintiff's awarded delictual damages, for disbursements pertaining to the Plaintiff's RAF matter over and above the R403 831.40 that was taxed and awarded on a party and party cost to the Defendant by the RAF."*

[9] There is no allegation in the particulars of claim that the respondent was not entitled to fees at all. It seems that some confusion has arisen in the applicant's mind between the fact that the RAF was ordered to pay his legal costs, whereas the respondent has charged disbursements and legal fees. It appears from the statement referred to above, which was attached to the particulars of claim that the respondent has accounted for all income and expenditure. The respondent did receive an amount of R403 831.40 in party and party costs from the RAF, but the respondent's disbursements were the amount of R410 576.95 and legal fees, including VAT amounted to R328 615.00. Consequently, the total fees and disbursements due to the respondent were R739 191.95, yet it only received R403 831.40 from the RAF.

[10] The second aspect of confusion in the mind of the applicant and his

attorneys appears to have arisen due to the fact that the court order reflects that there is no contingency fee agreement, whereas in a letter by the respondent to the applicant's attorneys dated 29 June 2017, the respondent states that they charged "*R33 885.00 less than we were entitled to in accordance with the Contingency Fee Act agreement that was entered into*".

[11] Notwithstanding the fact that there was a contingency fee agreement concluded, it appears that the parties agreed that they would not rely on such agreement, which agreement was reflected in the court order.

[12] In any event, there is no basis to suggest in the particulars of claim that the respondent was not entitled to fees at all.

[13] In fact, the court order makes it clear that the respondent was not entitled to charge in terms of the contingency fee agreement, but is clearly entitled to charge fees and, in terms of the court order, was entitled to retain their fees and only pay an amount net of those fees to the trust.

[14] I agree with the respondent's counsel, Mr Serfontein that in an instance where a contingency fee agreement is invalid or not to be relied upon, as in this case, then under the common law the attorneys are only entitled to charge a reasonable fee in relation to the work performed and a taxation of the bill of costs is the method

whereby the reasonableness of those fee is assessed.¹

[15] As stated above, there is no statement, allegation or averment in the particulars of claim that De Broglio Attorneys, the respondent, were not entitled to charge a reasonable fee for the work performed.

[16] In the result the proposed particulars of claim are, in my view, excipiable and lack the averments which are necessary to sustain an action.

[17] In general, an amendment should not be allowed where the introduction into pleadings would render such pleading excipiable.² In addition, Ms Nwaila who appeared for the applicant, could not refer to any exceptional circumstances in this case (as referred to in the authorities) for reasons which might render another course desirable.

[18] In the light of my view set out above, it is not necessary to deal with the other objections which the respondent has to the applicant's amendment.

ORDER

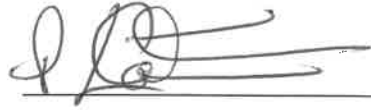
[19] In the result, I make the following order:

[19.1] the application by the applicant dated 11 September 2018 to amend its particulars of claim is dismissed;

¹ Tjatji v Road Accident Fund and two similar cases 2013 (2) SA 632 (GSJ) at para [26]

² Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC 2003 (6) SA 289 (W) at 2393

[19.2] the applicant is to pay the respondent's costs on the party and party scale.



PL CARSTENSEN

[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

DATE OF HEARING: 2 September 2019

DATE OF JUDGEMENT: 08 October 2019

APPEARANCES:

COUNSEL FOR APPELLANT: Attorney K Nwaila

INSTRUCTED BY: Nwaila Attorneys Inc; 063 235 0249;
keamogetse@nwailaattorneys.co.za

COUNSEL FOR RESPONDENT: Adv EF Serfontein

INSTRUCTED BY: De Broglio Attorneys Inc; 011 788 7274; info@onlinelaw.co.za