IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORA

29/6/2016
Case Number: 18545/2012
Not reportable
Not of interest to other judges
Revised.

In the matter between:

SATARA ONTWIKKELAARS (EDMS) BPK Plaintiff

and

PIERRE KRYNAUW Defendant

JUDGMENT

Canca AJ

INTRODUCTION

[1] On 30 March 2012, the plaintiff instituted action against the defendant seeking, *inter olio,* damages against him in respect of two separate amounts, (a) R1 120 970.70 and (b) R50 000.00 together with interest on the said amounts at the rate of 15,5% per annum *a tempore moro.*

[2] The claim is founded on professional negligence. The plaintiff contends that the

defendant failed to perform a mandate he received from the plaintiff with the skill, knowledge and diligence expected of an average practising attorney.

[3] The defendant opposes the action. He contends that, on the evidence, there is no basis upon which it can be found that the plaintiff suffered damages as a result of the breach of the mandate.

[4] The plaintiff is a limited liability company duly registered in terms of South Africa's Company Laws and appears to have been formed for the specific purpose of acquiring and then developing a housing development on Erf […] Montana Extension 76, Registration Division JR, Gauteng Province. The development is known as Towerflult.

[5] The plaintiff's shareholders and directors are Dr Theron, a specialist medical practitioner and his wife, both of whom had no previous experience in property development. The plaintiff relied on the expertise of Dr Theron's friend, Mr Crouse, a former bank manager with construction experience, to project manage the development on its behalf. Crouse's services were later dispensed with when the development experienced certain difficulties. The legal aspects of the development, including the drafting of the various agreements, were contracted to an attorney Vermaak. He was recommended to the plaintiff by Crouse.

[6] The defendant, an attorney practising as such in Doringkloof, Pretoria, was approached by the plaintiff in March 2007 for legal advice after the plaintiff dispensed with the services of Vermaak during October 2006.

[7] The defendant accepted the plaintiff's instructions to:

7.1. advise it in respect of any negligence on the part of its erstwhile attorney, Vermaak (the allegation being that Vermaak had failed to recover monies payable to the plaintiff);

7.2. determine whether the plaintiff could recover the sum of Rl 120 970.78 from various purchasers of plots in Towerfluit or from Vermaak;

7.3. take the necessary steps to recover the money from whomever was liable; and

7.4. recover the sum of R50 000.00 from Vermaak which the plaintiff had allegedly loaned and advanced to Vermaak.

[8] The plaintiff contends that the defendant breached the mandate in that he failed to: (a) advise the plaintiff whether it could recover the R1 120 970.78 from the said purchasers or from Vermaak, (b) institute action against anybody for the recovery of the aforesaid amount owed to it and (c) recover from Vermaak the R50 000.00 it had

loaned and advanced to him. The failure to do what was required of him amounted to negligence and as a result it suffered damages in the total amount of R1 170 970.78,so the contention continued.

[9] A brief synopsis of the facts leading up to the institution of the action is now appropriate.

BACKGROUND FACTS

[10] In order to repay its mortgage bond in the shortest possible time and to make the development attractive to potential purchasers, the plaintiff sold the plots in Towerfluit, allegedly *sans* profit, at the relatively low price of R60 000.00. A suspensive condition to the sale agreement obliged a purchaser to enter into a building contract with R & T Developers (PTY) (Ltd) ("R & T") for the construction of a dwelling on the plot.

[11] During 2005 certain purchasers of the plots concluded addenda to the building contracts. The aim of the addenda was to amend the building contract by deleting the existing paragraph 3.3 thereof and substituting same with a new paragraph 3.3.

[12] Paragraph 3 of the building contract dealt with payment of the contract sum. The following is an example of the original paragraph 3.3:

> *"3.3 The parties hereby confirm that an amount of R218 250.00 is included in the Contract Price, which amount was included for payment of the costs of the Project Manager [the plaintiff] or nominee to be appointed by the EMPLOYER [the purchaser]. The CONTRACTOR hereby declares that it is not entitled to the said amount of R218 250.00 and that it will not request payment of the said amount by way of a progress payment or in any other way, but that the EMPLOYER shall be the only person authorised to request payment thereof from the Mortgagee in order to pay the said amount to the aforesaid Project Manager or nominee."*

[13] The relevant portion of the new paragraph 3.3 set out in the addendum reads as follows:

"*Paragraph 3.3 of the building agreement is deleted and the following is substituted in its place:-*

> *"3.3 The parties hereby confirm that an amount of R.____ is included in the Contract Price, (the EMPLOYER [the purchaser] shall only be liable, subject to the further provisions of the building agreement, to pay the contract price) which*

amount was included for payment of the development costs (installation of Municipal Services), in an amount of R80 000.00 (EIGHTY THOUSAND RAND), the balance being management and professional fees and the like, of SATARA ONTWIKKELAARS (PROPRIETARY) LIMITED or NOMINEE. The Contractor [R&T] hereby declares that it is not entitled to the said amount of R_____ and that it will not request payment of the said amount by way of a progress payment or in any other way, but that SATARA ONTWIKKELAARS (PROPRIETARY) LIMITED or NOMINEE shall be the only person authorised to request payment thereof from the Mortgagee in order to pay the said amount to the aforesaid SATARA ONTWIKKELAARS (PROPRIETARY) LIMITED or NOMINEE. The said SATARA ONTWIKKELAARS (PROPRIETARY) LIMITED by its signature hereto, hereby accepts the benefits that accrue to it in terms of this provision."

2.

The remainder of the terms and conditions of the building agreement shall remain in full force and effect."

[14] In terms of both the old and new paragraph 3.3, the contractor, R & T, declares that the amount reflected therein was not due to it but belonged to the plaintiff. Dr Theron who testified that the plaintiff had not made a profit from the sale of the plots, stated that it was envisioned that it would make its profit from a percentage of the amount set out in paragraph 3.3.

[15] At some point during the course of the development, R & T experienced difficulties in executing its mandate as builder of the dwellings, resulting in numerous unhappy homeowners. R&T's services were subsequently terminated during 2006 and one of its sub-contractors, Excalibur Bauers ("Excalibur") took over as the main contractor. However, Excalibur insisted that the full outstanding balance of the building contract price (which would have included the amount set out in the addenda) be paid to It and not the plaintiff. The plaintiff agreed to this condition thereby effectively ceding its right to claim the amounts set out in the addenda from those homeowners Excalibur had taken over the building of their houses.

[16] Approximately 26 of the homeowners who concluded the addenda failed or refused to pay the plaintiff the amounts set out therein with the result that the plaintiff suffered the alleged damages of R1,120 970.78. The names of these homeowners and the amounts owed by each one of them are set out in annexure "C" to the particulars of claim. It is not clear from annexure "C" how the amounts set out therein are arrived at.

Annexure "C" merely consists of: the title, initials and surname of a homeowner; the unit or plot number and what is headed "Balance to be paid". It is the total of these so-called balances that make up the sum of R1 120 970.78.

[17] The plaintiff alleges that it lent Its erstwhile attorney, Vermaak, an amount of RSO 000.00 during December 2005 which he refused to repay. Vermaak had allegedly also disbursed trust funds without the plaintiff's permission. His mandate was terminated by the plaintiff during October 2006 apparently due to an irreparable breach of trust between the two.

THE LAW

[18] It is trite law that the liability of an attorney to his or her client for damages resulting from that attorney's negligence is on a breach of the contract between the parties. *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (AD) at 142-143. It is also trite that in order to succeed in a claim for damages, the client must meet the threshold requirements set out in Amler's Precedents of Pleadings 7th Edition, Harms, at page 59 as follows:

"The client must allege and prove:

(a) *The mandate;*

(b) *Breach of the mandate;*

(c) *Negligence in the sense described above (viz. failure* to *exercise the required skill, knowledge and diligence expected of an average attorney);*

(d) *damages, which may require proof of the likelihood of success In the aborted proceedings. Dhooma v Mehta 1957 (1)SA 676 (DJ at 678 E-F.*

(e) *that damages were within the contemplation of the parties when the contract was concluded. Bruce NO v Berman 1963 (3) SA 21(T) at 23 G-H."*

[19] The defendant did not testify and consequently the only evidence before me is the uncontested evidence of Dr Theron who testified on behalf of the plaintiff. Although his memory was sketchy when it came to detail, particularly on how the amounts set out in the addenda were calculated, possibly due to him not having been actively involved in managing the development, I consider Dr Theron to have been a credible and reliable witness.

[20] During argument, the defendant conceded the mandate, the breach thereof and by implication his negligence, as he could and should, as a practising attorney, have been

able to properly advise the plaintiff on the way forward. Alternatively, he should have implemented the advice obtained from counsel.

[21] Three of the threshold requirements which the plaintiff had to prove in order to succeed in its claim have therefore been met. It can also not be seriously argued that damages, not necessarily in the amount claimed, were not within the contemplation of the parties in the event of a breach of the mandate by the defendant when the mandate was accepted by him. This then leaves the question of whether or not the plaintiff has proved its damages and if so, whether the damages claim would have been successful had Vermaak or the defendant proceeded in terms of their respective mandates. See *Dhooma v Mehta* in paragraph 18 above.

[22] The defendant contends that the plaintiff has, on the evidence, failed to prove that it has suffered damages in the amount alleged or at all, as a result of him breaching the mandate.

[23] It is convenient to the first deal with that part of the claim relating to the alleged loan of R50 000.00

THE LOAN

[24] The relevant portion of the particulars of claim with respect to the loan agreement reads as follows;

8.

"Op 6 December 2005 het die eiser die bedrag van R50 000.00 uit geld wat deur Vermaak in trust gehou is namens die eiser aan Vermaak geleen.

9.

Die bedrag van R50 000.00 was op aanvraag deur Vermaak aan die elser terugbetaalbaar. "

[25] Mr Griessel, for the defendant, contended that: (a) the plaintiff did not suffer damages due to the defendant's failure to recover the sum of RSO 000.00 from Vermaak based on the loan agreement as, on the evidence, no such agreement was ever concluded. In support of this contention, Mr Griessel relied on Dr Theron's concession during cross examination that the sum of RSO 000.00 was in fact not a loan but rather the amount paid by Vermaak, on behalf of the plaintiff, for the purchase of shares in an entity called Golden Falls Trading 445 (PTY) Ltd. There was therefore no loan agreement between the plaintiff and Vermaak and had the defendant taken steps

to enforce the alleged loan agreement, such action would have been unsuccessful.

[26] I agree with Mr Griessel. The plaintiff neither pleaded nor proved that it was entitled to the R50 000.00 on any basis other than in terms of a loan agreement. Consequently, any steps that the defendant would have taken to recover that amount in terms of the mandate would have been unsuccessful.

[27] I accordingly find that the plaintiff has failed to prove that evidence exists upon which it would have been successful with its claim in respect of the loan. The claim in respect of the R50 000.00 therefore stands to be dismissed.

THE CLAIM FOR R1 120 970.78

[28] The grounds for this claim are set out as follows in the particulars of claim:

> *“6.1 Sekere van die kopers wot addenda met R&T gesluit het, het geweier of versuim om die dedrae verskuldig aan die eiser te betaal of te laat betaal, en het die eiser skade gely in die bedrag van R1120 970.78.*
>
> *6.2 'n Skedule wat aandui hoe voormelde bedrag saamgestel word, word hierby aangeheg as aanhangsel NC".”*

[29] The defendant pleaded to these paragraphs as follows:

> *"AD PARAGRAWE 6.1 EN 6.2 DAARVAN*
>
> *Behoudens om te erken dot 'n document wot gemerk is aanhangsel* "C" *aageheg is tot eiser se besonderhede van vordering word die restant van die inhoud van hierdie paragrawe met indegrip van een en elke ander bewering daarin gemaak en verder met inbegrip van die inhoud van aanhangsel “C" tot die besonderhede van vordering ontken asof met spesifieke teenwerping hier herhaal en word eiser tot bewys daarvan geplaas."*

[30] In respect of the claim for R l 120 970.78 ("the Addendum Claim"), the defendant puts forth two defences. Firstly, he contends that the plaintiff has neither pleaded nor proved that this claim could not have been enforced after termination of the defendant's mandate. Secondly, the defendant contends that, even if the Addendum Claim could have been enforced after termination of his mandate, the plaintiff has failed to prove that it would have been successful or that there was any likelihood of such success had the defendant instituted the claim in terms of his mandate.

[31] In support of the first contention, the defendant argued that it has not been shown, either in the pleadings or during the testimony on behalf of the plaintiff, that the claim

prescribed or when prescription would have commenced to run. If the claim was enforceable after the defendant's mandate was terminated during December 2010, then the plaintiff should have instructed another attorney to prosecute the claim, so the argument continued.

[32] Mr Kruger, for the plaintiff, correctly in my view, countered this contention by arguing that the defendant had not pleaded prescription nor was the prescription point put to the plaintiff. It is trite that new matter cannot be introduced in reply (although there are certain exceptions)[1] or from the bar and certainly not during argument save that a point of law can be raised at any time before judgment. Jafta J in *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as Amicus Curiae)* 2014 (10) BCLR 1195 (CC) at para 202-203 and 210-220 confirmed that a party must plead its cause of action in the court *a quo* so as to warn the other parties of the case they had to meet and the relief sought against them. Accordingly, in my view, there is no merit in the defendant's prescription point and his first contention cannot be upheld.

[33] The second issue which requires attention is whether the plaintiff has proved that the Addendum Claim would have been successful or that there was a likelihood of success had the defendant prosecuted the claim in terms of his mandate. This, according to Mr Griessel, involves proving that there was evidence upon which the plaintiff would have been successful and that such evidence was readily available to the defendant.

[34] The defendant contends, *inter alia,* that:

34.1. the plaintiff failed to prove that addenda were concluded by each of the homeowners referred to in annexure "C" to the particulars of claim. Mr Griessel relied on the concessions of Dr Theron during his testimony that he had no personal knowledge of whether addenda were concluded by each of persons listed in annexure "C" as they were concluded by Crouse on behalf of the plaintiff. Crouse was not called to testify on behalf of the plaintiff and only two addenda were adduced in evidence. These were in respect of units 13 and 30. Also, only two building contracts were adduced in evidence and these were in respect of unit 13 and unit 16 but the latter one was inchoate due to the non-fulfilment of suspensive conditions. There is no evidence that the building

[1] The Master v Slomowitz 1961(1) SA 669 T at 673H-674A.

contract in respect of unit 16 was ever re-instated.

34.2. insofar as the addenda constitute amendments to the building contract, the addenda, which contain a clause reading "... *the EMPLOYER (the homeowner) shall only be liable, subject to the further provisions of the building agreement, to pay the contract price...",* would be of no consequence in the absence of the building contracts in question. In order to determine whether any amount is payable by the homeowner in terms of the addendum, regard needed to be had to the building contract as well as the purchase price stipulated therein. Absent the building contract, it was impossible to determine whether any amount was payable by the homeowners in terms of the addenda, so the contention continued.

34.3. even if the building contracts and addenda were concluded in respect of each of the plots listed in annexure *"C:',* the plaintiff failed to prove that the suspensive conditions attached to the building contracts were fulfilled. Therefore, the plaintiff failed to prove that the relevant building contracts and the amendments thereto became of force and effect, Mr Griessel argued.

34.4. the plaintiff failed to prove that it performed its obligations in terms of the addenda, which would entitle it to claim payment of the addendum amount. See paragraph 11above which sets out what the addendum amount is in respect of. Mr Griessel relied on the fact that no evidence was adduced to the effect that project management fees were rendered by the plaintiff from June 2006 for this stance by the defendant.

34.5. the plaintiff failed to prove that there was any negligence on behalf of Vermaak, on the basis of which the addendum claim could be enforced against him and finally,

34.6. the plaintiff failed to prove how the amounts reflected in annexure *"C"* are calculated.

[35] Mr Kruger argued that the quantum of the plaintiff's claim could not be seriously disputed as the compilation of its claim as set out in annexure "C" was never challenged as being incorrect. It was the uncontested evidence that annexure "C" came from attorney Vermaak, who had sent letters of demand on the plaintiff's behalf to the various homeowners in amounts that corresponded to the figures in annexure "C", so the argument continued. Mr Kruger also contended that annexure "C" was the best evidence available of the amount the plaintiff had lost and that I was, based on the

dictum of Wessels JA in *Mouton supra* at 147 D-F, entitled to estimate the damage suffered by the plaintiff. It was not necessary for the plaintiff to prove its case with absolute exactness. It only had to prove that there was a reasonable prospect that it would have succeeded in its claim against the original defendants, so the contention continued.

[36] I am unable to agree with Mr Kruger.

[37] The defendant, as can be seen from the contents of his plea in paragraph 29 above, expressly disputed the contents of annexure "C". It was then up to the plaintiff to prove the allegations contained in its particulars of claim. The only evidence tendered in support of the Addendum Claim was annexure "C" which plaintiff sought to convince me was the best evidence which it could adduce.

[38] As stated in paragraph 16 above, the amounts making up the Addendum Claim are globular and fall under a heading titled "Balance to be paid". It is not shown nor has the plaintiff adduced evidence as how the respective amounts in annexure "C" were calculated or how they were allocated to the various homeowners.

[39] Whilst it is true that there are several decisions in which it has been held that a Court will come to a plaintiff's aid in a case of uncertainty where he or she has led the best evidence available, I am not convinced that the best evidence has been led in this matter. *De Klerk v Absa Bank Ltd & Others* 2003 (4) SA 315 SCA at 333H.

[40] Dr Theron conceded that he could not testify whether or not those amounts were correct. Calling Crouse as a witness, as he was intimately involved in the management of the development and was the one who obtained annexure *"C:'* from Vermaak, might have shed better light on how those amounts were arrived at. One assumes that he, as the project manager, would have interrogated the figures or would have known who the recalcitrant homeowners were and how much they owed plaintiff. However, even if Crouse was for some reason unable to testify, then, to my mind, spread sheets setting out how those "balances" were arrived at would probably have been better evidence than annexure "C". It is also not clear how many of the persons listed in annexure "C" fell within the group of homeowners whom Excalibur had taken over the construction of their houses. If some or all of them fell within the aforesaid group, then the plaintiff would not have been entitled to all or part of the amounts set out in the Addendum Claim as it had ceded its right thereto to Excalibur.

[41] The plaintiff faced a further hurdle which, in my view, he has failed to surmount. The plaintiff had to prove that it would have succeeded in its claim against either

Vermaak or the affected homeowners. There was no evidence of negligence on the part of Vermaak adduced by the plaintiff. Although there was evidence that Vermaak sent out letters of demand to the various homeowners listed in annexure "C" in the amounts set out therein, I did not understand the reason for termination of his mandate to have been his failure to prosecute the plaintiff's claim. Rather, the relationship probably soured, as stated in paragraph 17 above, due to the irreparable breach of trust between them. I am therefore unable to find that, on the evidence, the plaintiff would have succeeded with the Addendum Claim against Vermaak.

[42] In the light of the defendant's contentions set out in sub- paragraphs 34.1 to 34.5 above (which were not seriously challenged during argument) and the fact that the plaintiff ceded (or waived) its right to claim or keep payment of the addendum amounts to Excalibur, I find that the plaintiff has failed to prove that sufficient evidence existed which could reasonably have been obtained and adduced by the defendant had he performed his mandate and on which evidence the plaintiff would have been successful with the Addendum Claim.

[43] In the result, I order as follows:

The plaintiffs claim is dismissed with costs.

_____

MP CANCA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

APPEARANCES:

For The Plaintiff	:	Mr TP Kruger SC
		Mr C Rip
Instructed by	:	JW Botes Incorporated
		Sliver Lakes,Pretoria
For The Defendant	:	Mr JS Griessel
Instructed by	:	Gildenhuys Lessing Malatji Attorneys
		Pretoria

Dates Heard	:	19, 20, 21 April 2016
Date of Judgment	:	...June 2016