



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del>
(3)	REVISED.
12 / 08 / 2016	
DATE	SIGNATURE

CASE NUMBER: 31533/15

12/8/2016

In the matter between

In the matter between

**MOLAI MG**

**PLAINTIFF**

And

**PULE INCORPORATED**

**DEFENDANT**

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**JUDGMENT**

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**MAKAMU AJ:**

[1] The Plaintiff in this matter seeks to be paid some money after professional services were rendered in representing the RAF on instructions of the Defendant, however there is no dispute that there are some monies owed to the Plaintiff by the defendant.

[2] The first bone of contention is whether the parties had a contract in place if so whether it was verbal or tacit (implied) kind of contract. The Plaintiff is a practising Advocate who started his practice in 2010 and he has since been instructed by the Defendant who is a firm of Attorneys to represent the Road Accident fund.

[3] The Plaintiff does not remember whether they had verbal agreement or tacit agreement but from his recollection ,when he started to take instructions from the Defendant, when he finalise a matter he would allow ninety (90) days for the Defendant to get its bill to be taxed and they paid him his invoices that he issued.

[4] The practice of receiving instructions, do the work and get paid went well since 2010 until around 2012 when payments did not come as they used to, however he continued to render services on behalf of the Defendant until in 2015 when he realised that his bill ran to about R317 409.00 and was not paid. He tried to demand payment but he would be referred to the accounts department where he could not receive joy, until he decided to take action against the Defendant.

[5] 5.1. The first issue was: terms of agreement between the plaintiff and the defendant, and when do the plaintiff's invoices due and payable by the defendant.

5.2. The second issue is amount that is due and payable by the defendant to the plaintiff.

[6] The plaintiff stated in his evidence that there was verbal agreement but he was not certain if it was verbal agreement or tacit agreement and it became clear that he would need to amend his particulars of claim as follows: " The Plaintiff and the Defendant entered into a verbal and/or tacit agreement in terms of which the Defendant was going to pay the Plaintiff his fees within reasonable time upon finalisation of the matter and/or finalisation of the part of the matter and after the Defendant has taxed his bill together with the bill of the Plaintiff."

The Plaintiff understood reasonable time to mean ninety (90) days after the bill has been taxed in accordance with the rules of Pretoria Bar although he was not a member of Bar Association.

[7] On the other hand the Defendant agreed that there was verbal agreement however the parties agreed in terms of that verbal agreement that payment would be only due and payable when the Defendant receives payment from Road Accident Fund. The Defendant avers that the parties agreed tacitly by

conduct and/or verbally that the plaintiff would receive payment upon receipt of payment by the defendant from the Road Accident Fund.

[8] The averment by the Defendant is no different from that of the plaintiff save for the conditions.

[9] It stands to reason that the Defendant could not have an open ended agreement in regard to the condition that after it has been paid by the Road Accident Fund.

[10] There is no doubt that there was an agreement between parties and there is no need for an argument in that regard, the only dispute is the condition attached by the Plaintiff and the Defendant.

[11] The defendant claimed that it could be liquidated if it was to pay advocates account before it is paid by the Road Accident Fund, as it is heavily dependent on the RAF, yet expect the advocates to survive without payment for long periods of time.

[12] In *Electronic building Elements v Huang* 1992 (2) SA 384 (W) the Court said *"If the parties choose to exclude from legal enforceability any arrangements arrived at between them , then it can become no more than a moral obligation or an obligation of honour, but unenforceable in a court of law"*. Can one say

the parties intended to exclude their agreement from enforceability in a court of law?

If the contract was tacit agreement in *Standard bank of SA Ltd v Ocean Commodities Inc.* 1983 (1) 276 (AD) the court said. " In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*".

[13] The question is: is it practical to pay the advocates only after Road Accident Fund has paid the Defendant on which there was no certainty as to when the Fund will pay.

[14] The Defendant stated that there are two matters where the Plaintiff was paid before the RAF paid them but that was a gesture of goodwill. This was in contradiction with the Defendant's policy of paying advocates only after having received payments from the Road Accident Fund.

[15] The Defendant argued on their heads of argument that the plaintiff failed to prove the terms of the agreement as pleaded in its particulars of claim. A plaintiff cannot allege a verbal or tacit agreement as the basis of his cause of action and succeed in the absence of proving the terms of that verbal or tacit agreement

The defendant also agreed that there was verbal agreement but cannot now say what the plaintiff is saying cannot be true yet in the past the defendant paid the plaintiff without issues of the Road Accident Fund having not paid the Defendant.

[16] The averment by the defendant is not practical and feasible for the practice of the advocate to survive if he is to be paid as and when the fund has paid the Defendant.

[17] The defendant claims that sometimes they do not know whether the Road Accident Fund allowed the amount payable to the advocate as per his invoice, yet the plaintiff argued that in terms of section 78(4) of Attorneys Act, 53 of 1979 says *"any practising attorney shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust saving or interest bearing account referred to in subsection (2) or 2(A) and of any interest on money so invested which is paid over or accredited to him"*.

[18] The plaintiff argues that the defendant was and is required by law to keep records of information relating of their firm's trust account. However the defendant argues that some of the payments from the Road Accident fund are not accompanied with trigger note so as to identify what has been allowed and what has not been allowed by RAF and this is contrary to proper accounting practice of the attorneys account.

[19] The defendant argues further that since on the plaintiff's own version there was no discussion (verbal declarations) regarding payment terms, it cannot be that a verbal agreement was concluded in the terms alleged by the plaintiff.

The above argument cannot hold water as the defendant in the past paid without raising the challenges brought about by the actions of the RAF, such agreement was ratified by the conduct of both parties, and the terms as averred by the Defendant were not communicated to the Plaintiff, according to the Defendant's witnesses' testimonies.

[20] The defendant argues further in their heads of arguments that the plaintiff amendment to say there was tacit agreement does not help the plaintiff but makes matters worse, yet it is the defendant's version that indeed there was verbal agreement and when the situation changed there was no communication to the plaintiff regarding that change since the last time they have been paying him regularly.

The defendant admitted that there was no direct communication with the plaintiff regarding payment terms and that does not make the plaintiff to be at fault by expecting payment.

On the other hand the defendant stated that the plaintiff did not communicate the general practice that he knew to the defendant, so it is clear and confirmed by evidence by both parties that there were no declarations in regard to the terms of payment, by either party.

[21] Evidence of both witnesses for the defendant have no recollection discussing payment terms with the plaintiff so there is no way he could have known their challenges yet he conceded that if there was communication and explanation of the situation regarding delayed payment or reduced payment he could have understood and hold the defendant not responsible for the shortfall or delayed payment.

[22] The plaintiff argues that there could be no agreement that the defendant will only pay the plaintiff after it has received payment from RAF, what if the RAF does not pay yet the plaintiff rendered his services? The defendant would still be liable for payment taking into account that there is no agreement between RAF and the plaintiff but the agreement is between the defendant and the plaintiff. If the RAF does not pay the defendant it will be up to the defendant to take action against RAF for non-payment and not the plaintiff.

[23] The defendant argued on their heads of arguments, *"that on the basis of the plaintiff's evidence regarding the disputed payment term should be rejected. The accepted evidence on behalf of both parties is that there is no agreement regarding payment terms. That being so, his claim should be dismissed"*.

This argument stand to be rejected as the defendant agrees that there are payments still outstanding in favour of the plaintiff, he cannot wait indefinitely for the payment yet he completed the assignment long time ago, which makes the period to be unreasonable.

[24] The defendant cannot rely on its own policy which is not binding to the plaintiff and expect the plaintiff to comply with its policy yet do not want the plaintiff to be bound by the rules of the Pretoria Bar Association, it does not make sense.

[25] The defendant argued further that there are two mutually destructive evidence by the plaintiff and the defendant and in my view they support each other, that there was no verbal agreement regarding payment terms. The only difference is as to when the payment should be effected. That does not mean that the plaintiff should not be paid. Some of the payments were in excess of two years and it is up to the defendant to take it up with their own client being the RAF to expedite payments so that they may also be able to meet their obligations to the advocates (Plaintiff)."

I was referred to the case of national Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) "where the court stated that in deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities."

[26] It is indeed correct that the plaintiff was a truthful witness, so was the witness for the defendant. It does not mean that plaintiff should not be paid and the challenges of the defendant cannot be remedied by not paying the plaintiff but should pursue RAF for the delayed payments.

[27] One pressing issue is the amount owed to the plaintiff. He sued for an amount in excess of R317 000, however he admit that the defendant made some payments since the commencement of this action and it significantly reduced the amount owed to a total of approximately R211 661.00. unless the defendant has come to a different figure.

The Defendant does not dispute the outstanding amount save to say some of the invoices have not been fully paid by the Fund and the Plaintiff is prepared to write off the difference provided there is proof of such short fall, by the fund

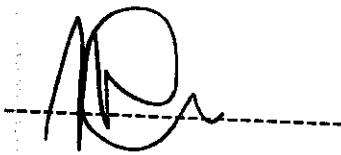
[28] The Defendant wants the Plaintiff to take their word without providing proof as they stated that the Fund is not sending them trigger notes all the time to establish what has been allowed and what has not been allowed.

It is puts the Plaintiff under difficult situation to compromise and accept what they say because there has been an impulse caused by non-payment over a period of time. The Defendant should make it their business to be as transparent as possible to the Plaintiff to remove any doubt about their word.

In the premises the plaintiff has proved his case and I make the following order.

**Order**

1. Judgment in favour of the Plaintiff is hereby granted in the amount to be determined after taxation within 60 days.
2. Interest on the amount at the rate of 10.5% from date of summons to date of payment
3. Costs of the suit.

A handwritten signature in black ink, appearing to be 'M S Makamu', is written over a horizontal dashed line.

**M S MAKAMU**

**ACTING JUDE OF THE HIGH COURT**

**DATE OF THE JUDGEMENT : 12/08/2016**

**PLAINTIFF'S COUNSEL : ADV M G MASHABA**

**Instructed By : KOKELA ATT**

**DEFENDANT'S COUNSEL : ADV L C SEGEELS**

**Instructed By : PULE INCORPORATED**