IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

CASE NO.: 39721/2021

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

23/09/22

SIGNATURE DATE

In the matter between:

S J VAN DEN BERG ATTORNEYS **Applicant**

and

LIEZEL TSIHLAS **Respondent**

JUDGEMENT

MFENYANA AJ:

Facts

[1] This is an application for summary judgement. The facts leading to the application emanate from an oral agreement in terms of which the applicant rendered

legal services to the respondent in divorce proceedings which had been instituted by the respondent against her erstwhile husband. The divorce action was instituted in 2015. On 14 May 2019 the respondent terminated the applicant's mandate. At that stage the matter was still pending before court. It was finalised on 30 May 2019 when the court granted a divorce decree incorporating the settlement agreement.

[2] On 10 August 2021 the applicant issued a summons against the respondent claiming payment of an amount of R762 642.61 together with interest and costs. According to the particulars of claim and the taxed bill of costs annexed thereto, the amount represents the taxed bill amount in the sum of R1 008 631,61 less an amount of R245 989 for amounts due to the respondent in respect of a rule 43 application for maintenance *pendente lite*, and vehicle service fees owed by the applicant to the respondent's brother. The deduction of these amounts was in accordance with an agreement of the parties to that effect.

[3] On 24 November 2021 the respondent filed her plea. The essence of the respondent's defence as set out in the plea is that the applicant had breached the agreement in that it failed to provide professional services on various occasions, to the extent that on one occasion the respondent had to represent herself in court and argue a postponement. She further states had it not been for the applicant's unprofessional services, she would have received much more than she did from the settlement of the matter. In paragraph 2.4.4 the respondent states:

> "*2.4.4 on reasonable terms, and had the plaintiff discharged its obligations under its mandate, would have resulted in the defendant receiving between R10 000 000.00 and R15 000 000.00 more than she did in respect of a capital settlement and R1 000 000.00 more than she did in respect of maintenance."*

[4] As a result of the applicant's alleged failures as stated, the respondent pleads that she is excused from making payment to the applicant and is entitled to payment of damages from the applicant once she has quantified same, and subsequent to which she will file a counterclaim. It is on the basis of that plea, the salient points of which have been summed up above, that the applicant brought the present

application, contending *inter alia*, that the plea discloses no valid defence and has been entered solely for purposes of delaying the proceedings.

[5] The application is opposed by the respondent.

Condonation

[6] The respondent's affidavit resisting summary judgement was delivered two days out of time. To this end the respondent has filed an application seeking condonation for the late filing thereof advancing reasons for that omission. The delay although not significant, was occasioned by the respondent's attorney falling ill and her desire to resolve the issue with the applicant. The applicant has not opposed the application. While it is trite that condonation is not for the mere taking, I am satisfied that there is no prejudice that has been suffered by the applicant on occasion of the late filing of the affidavit. The interests of justice dictate that the delay be condoned. On these bases I am inclined to condone the late filing of the respondent's affidavit.

The defendant's defence/s

[7] The defendant pleads that she mandated the applicant to render legal services to her in respect of a matrimonial matter between herself and her erstwhile husband. She further pleads that the applicant had an obligation towards her to render the said legal services in a professional, timeous, and proper manner and to do this the applicant had to ensure that the services were provided by a professional in the same position as the plaintiff or a practising attorney. She contends that the applicant breached this obligation, failed to attend to the matter in the way that it should have been attended to, and further failed to advise her appropriately against signing the settlement agreement. In this regard, I hasten to point out that at the time the respondent signed and concluded the settlement agreement she was no longer represented by the applicant having terminated its mandate some two weeks prior thereto.

Legal framework

[8] The summary judgement process is designed to provide a plaintiff, who has an incontestable claim, with a speedy remedy, without the burden of dilatory tactics by the defendant. In determining whether a court should grant or refuse an application for summary judgement, the court "must consider whether (i) the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (ii) whether on the facts so disclosed the defendant appears to have… a defence which is both *bona fide* and good in law."[1]

[9] What is required is for the respondent to persuade the court that if what she has alleged were to be proved at trial, it would constitute a *bona fide* defence to the plaintiff's claim. This is a trite principle as more fully set out in *Maharaj v Barclays National Bank Ltd*.[2]

[10] In its founding affidavit, the applicant contends that the defences raised by the respondent are bad in fact and in law, and do not raise any triable issue. Accordingly, the applicant contends that the respondent has no *bona fide* defence to the applicant's claim and has delivered the plea solely for the purposes of delay. The applicant further contends that the respondent's defence albeit not so pleaded, is a defence of estoppel which cannot stand, as all it says is simply that the respondent is excused from making payment. While what the respondent alleges in her plea is that the applicant is precluded from claiming any payment from her, she has not specifically raised the defence of estoppel. What may be of some comfort to the applicant and the respondent alike is that the respondent both in her affidavit resisting summary judgement, and in argument, refutes the applicant's understanding of her defence. She avers that the applicant has misconstrued her defences and that what she relies on is that the applicant is precluded from seeking performance in respect of the contract between them as he breached that contract. This is nothing short of estoppel, but it has not been specifically pleaded as already intimated above, and to the extent

[1] *Maharaj v Barclays National Bank Ltd, 1976 (1) SA 418 A at 426B-C:*
[2] *Supra, note1*

that this defence is not raised, the applicant is not precluded from claiming against the respondent on that basis.

[11] The applicant further states that the respondent's reliance on a possible counterclaim is not a valid defence and that the counterclaim is based on alleged professional negligence which resulted in her suffering damages. The truth of the matter is that as the matter stands, there is no counterclaim. The respondent is yet to prove the damages she has allegedly suffered. There is nothing preventing the respondent from formulating the intended counterclaim. It can therefore not avail the respondent to merely make a bald statement that she has suffered damages, while the grounds on which such damages are founded have not been properly set out in her counterclaim.

[12] To bolster its defence the respondent sought to rely on *H I Lockhat (Pty) Ltd v Domingo* and contended that a defendant in a summary judgement application may rely on an intended counterclaim in an unliquidated amount. I am afraid that this does not assist the respondent. First, the trite principle is that a counterclaim for unliquidated damages may be advanced where the plaintiff's claim is for goods sold and delivered. The other reason is that reliance on an intended counterclaim does not exonerate the respondent from meeting the standard requirement for summary judgement, in particular, that the defence must be *bona fide* and good in law. The effect of this is that the basis of the counterclaim must be sustainable in law whether or not the claim has been quantified.

[13] In her affidavit resisting summary judgement, the respondent avers that the reason she has not filed a counterclaim is that the applicant has denied her proper access to documents held by the applicant which are necessary to quantify her claim. According to the respondent these are documents requested by her in her discovery notice in terms of rule 35 (11), (12) and (14). A closer look at the said discovery shows that what the respondent requested access to in terms of the discovery notice are contents of her divorce file which is in the possession of the applicant. The evidence further shows that the applicant replied to the notice in December 2021. The rule 35 notice delivered by the respondent has nothing to do with the quantification of the said counterclaim. In fact, I might even venture to say that the quantification of the alleged damages rests solely with the respondent as the basis she has provided is that her

erstwhile husband's estate was worth more than the applicant discovered. It follows therefore that where the basis for the claim is not *bona fide*, no amount of quantification can salvage that claim. In this regard, the matter at hand is distinguishable from the matter relied on by the respondent. In *Chemfit Technical Products (Pty) Ltd v Soil Fumigation Services*[3]

> "The defendant, in raising a counterclaim, should provide full particularity of the material facts upon which it is based. This means that he must be as comprehensive as when advancing only a defence. The court must be placed in a position to properly be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced bona fide. The necessary elements of a completed cause of action must be included. The counterclaim must, moreover, be based on facts and not on the deponent's belief."[4]

[14] The respondent further argues that as a result of the applicant's unprofessional services, she ended up receiving less than she should have received from settlement of the matter. She therefore contends that she is excused from making any payment to the plaintiff, presumably until she has quantified the damages she has suffered as a result of the plaintiff's alleged breach, which damages, the respondent argues, will form the basis of her counterclaim. Even then, she contends that that will entitle her to set off the ostensible damages from the fees claimed by the applicant. On that basis she contends that she is entitled to payment by the applicant. As alluded to, the nature and amount of these damages are still to be claimed.

[15] As voluminous as the respondent's affidavit resisting summary judgement is, the bulk of it relates to specific instances of professional negligence / unprofessional conduct as contended by the respondent, culminating into the respondent signing the settlement agreement. She states in paragraph 15.11.4:

> "Accordingly, in relying on the negligent, reckless and irresponsible advice, signed the agreement and acted to my grave detriment."

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[3] *13424/02) [2002] ZAGPHC 40 (3 December 2002)*
[4] *at p.5, para 8-18*

[16] What this suggests is that the respondent signed the settlement agreement on the advice of the applicant who was not her legal representative at the time, and as grave as that 'detriment' may have been, it did not propel the respondent to seek any legal recourse against the applicant. The respondent had at that stage terminated the applicant's mandate, and on the respondent's own admission, on the basis of the very conduct complained of. It cannot therefore be that the respondent, having identified the applicant's shortcomings as she alleges, terminated its mandate as a result, could thereafter turn around and follow the same advice she had rejected. Indeed, were this to be the case she would be the author of her own calamity. This defence can simply not stand. What the respondent seeks to do is to create some form of dispute that is not sustainable in law. That dispute cannot be said to be a genuine dispute either. What it does is to create confusion and is mischievous and opportunistic. It is bad in law.

[17] The remainder of the affidavit deals with the 'anticipated counterclaim' which has already been dealt with above.

[18] The respondent further contends that the applicant's insistence in bringing the present application despite the defences raised by the respondent in her plea, amounts to abuse of the process of the court. I disagree. If one cuts to the bone of the issue in this matter it is clear that the applicant's case is unassailable. In my view it is the respondent who has abused the process.

[19] It was submitted on behalf of the applicant that all the court has to concern itself with are the four corners of the papers and could disregard the opposing affidavit. Mr Keet further submitted that the relationship between the parties lasted a period of four years before settlement agreement was concluded and that if the respondent was dissatisfied with the services as she alleges, she should have terminated the mandate a long time ago. He therefore contended that the respondent's defence is not *bona fide*.

[20] On the other hand, Mr Nieuwenhuizen submitted on behalf of the respondent that the respondent had raised a valid defence to the applicant's claim. He contended that in terms of the Law of Agency, the test is whether the applicant complied with the

terms of his mandate. He further argued that the applicant had no excuse not to appear in court regardless of not being placed in funds. He relied on the judgement in *Sayed NO v Road Accident Fund*[5] where the court stressed that an attorney who wishes to cease acting on behalf of a party in any proceedings had a duty to formally withdraw by filing a notice of withdrawal. While this is so, my difficulty with this proposition is that it is neither of the parties' case that the mandate which might have necessitated a withdrawal was terminated by either of the parties. Essentially, in my view, the issue of withdrawal is neither here nor there. It is a side issue that does not take the respondent's case any further. It is also not the respondent's case that a proper discharge of the mandate depended on whether the applicant secured the desired outcome for her. The applicant's contention that she may have suffered damages is therefore unsustainable and bad in law. In any case, any amount ultimately received by the respondent was an amount she agreed to of her own accord as she had terminated the applicant's mandate.

[21] He states that the applicant wants to justify why he did not perform his duties and relied on his assistant who is a non- practising attorney. He says the crux of the matter is that the applicant did not do a diligent job in its handling of the divorce matter and the only question is whether as an agent, the applicant did what it was mandated to do. He agreed with Mr Keet that the court had only to consider what is pleaded. The difficulty that the respondent faces is that what she has pleaded is that she mandated the applicant to represent her in the divorce action and perform functions ancillary thereto. This, the applicant did. What the respondent considers to be the terms of that mandate is no more than her expectations of how the services should have been rendered and the amounts she expected to receive.

[22] It may be that there is case to be made for how the litigation in the divorce action was conducted by the applicant. It may also be that the respondent ended up getting less than what she had anticipated. What the respondent does not say is that the settlement agreement was concluded outside of the applicant's mandate as she had already terminated his services at the time. In that event, the respondent's contention that the applicant failed to properly advise him against signing the settlement

[5] *2021 (3) SA 538 (GP)*

agreement is without merit. In any case that is not a matter for the summary judgement court to determine. What the summary judgement court is concerned with is whether the defendant, based on the facts she has disclosed, has raised an issue which if presented at trial, would constitute a triable issue.

[23] I agree with the respondent that all she is required to do is to satisfy the court that she has a *bona fide* defence and is not required to prove that defence. She is however required to satisfy the court that the defence she has raised constitutes a triable issue. In the absence of that, summary judgement should be granted. In my view the respondent's defences fall short of this requirement.

[24] In *Jili v FirstRand Bank Ltd*[6] the Supreme Court of Appeal (SCA) held:

> "Although Breitenbach v Fiat SA (Edms) Bpk has made it plain that a court should exercise a discretion against granting such an order where it appears that there exists 'a reasonable possibility that an injustice may be done if summary judgment is granted', the context in which that was said indicates that this precaution applies in situations where the court is not persuaded that the plaintiff has an unanswerable case. It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment."[7]

[25] What is clear from the evidence before this court is that the respondent does not deny that the applicant rendered legal services to her, at her instance until she terminated the mandate. She does not deny that the applicant represented her in a rule 43 application for maintenance *pendente lite* as a result of which she was awarded a maintenance order. She further does not dispute that the applicant represented her from the commencement of the divorce proceedings until two weeks prior to the granting of the divorce decree which incorporated a settlement agreement. Her

[6] *(763/13) [2014] ZASCA 183 (26 November 2014)*
[7] *at para 13 - 14*

discontent solely rests on the quality of the services provided by the applicant, which she contends amounts to a breach of the agreement between her and the applicant.

[26] As far as the taxed bill of costs is concerned, it was submitted on behalf of the applicant that having opposed the taxation of the bill of costs on the basis that there was no written mandate signed by the parties, the respondent had raised no further objections to the fees. The bill was taxed, and the scale of costs reduced to party and party in light of the respondent's objection. This, therefore entitled the applicant to the fees as allowed by the taxing master. I agree.

Conclusion

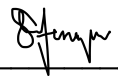
[27] I am in the circumstances satisfied that there is no evidence that the respondent could adduce at trial to substantiate the claim that the services rendered by the applicant are not worthy to be compensated for.

[28] I do not agree with the respondent that the applicant is precluded from claiming payment for the services it provided merely on the basis that the respondent is, after the fact, dissatisfied with the services. I further do not agree that the respondent is excused from paying for the services it received as reflected in the taxed bill of costs. That in my view would amount to self-help for which the respondent now seeks an endorsement by this court. It cannot be.

Order

[29] In the circumstances I make the following order:

(i) The late filing of the respondent's affidavit resting summary judgement is condoned.
(ii) The application for summary judgement is granted.
(iii) The respondent shall pay the costs of the application.



S.M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Applicant	: Adv. D Keet
Instructed by	: SJ Van den Berg Attorneys
For the Respondent	: Adv. H P Van Nieuwenhuizen
Assisted by	: Adv. N S Nxumalo
Instructed by	: Steve Merchak Attorney
Heard on	: 2 March 2022
Judgement handed down on	: 23 September 2022