REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No.: A455/2002

In the matter between:

FRANCOIS VAN DER WERF Appellant

and

SCHREUDERS ATTORNEYS Respondent

JUDGMENT DELIVERED: 30th OCTOBER 2003

MLONZI,AJ

Introduction

This is an appeal against the judgment of a magistrate for the District of Namaqualand held at Springbok in which he granted summary judgment against the appellant for the sum of R4717.60 with costs on 4th October 2001.

Mr. A R Newton appeared for the appellant.
Mrs. E S Grobbelaar appeared for the Respondent.

Background to the matter

During August 2001, respondent, a firm of attorneys caused a simple summons to be issued against the appellant for the sum of R4717.60. In the summons the respondent claimed payment for the balance of the amount of professional fees due to the respondent. The claim allegedly arose out of professional services rendered to the appellant at the special instance and request of the appellant during 2000 to 2001.

Appellant defended the matter and requested further particulars in terms of Rule 15(1) of the Magistrate's Court Rules. Respondent applied for summary judgment, which was opposed by the appellant. After hearing argument, the magistrate granted summary judgment with costs. Subsequently the appellant noted an appeal on the following grounds:

'1.1 Om te bevind en te aanvaar dat die eis op 'n gelikwideerde geldsom berus;

'1.2 Op die kennismane van feite uit die rekeningstaat gelewer deur Sonnenberg Hoffman Galombik met betrekking tot dienste gelewer aan Francois Van Der Werf;

'1.3 Deur te bevind dat appellant nie kan steun op skrywe gedateer 24 Mei 2001 ontvang van respondent spesifiek met verwysing na ons afgehandelde rekeningstaat.'

Issues.

During argument further grounds of appeal have been canvassed and argued without any application made nor an order granted to amend the notice of

appeal. Respondent contented firstly that the appellant could not canvass and argue further additional grounds of appeal without having been granted leave to do so on a proper application before Court.

The second issue raised is with regard to condonation. Respondent argued that appellant failed to file heads of argument and also failed to move an application for condonation. From the affidavit filed by appellant's attorneys, it appears the delay was due to lack of financial instructions. Respondent contends in his argument that costs occasioned by the removal of the matter from the roll on 30th June 2003 should be granted in his favour.

Applicable law.

It is trite law that the appellant is confined to the grounds of appeal set out in the notice of appeal. When new or additional grounds are sought to be relied upon, an appropriate application to amend must be filed and leave to that effect granted by the Court upon exercise of its discretion. In this matter no such application has been filed. Consequently it follows that this Court cannot decide this matter on the grounds raised in the heads of argument by appellant's counsel.

This Court will confine itself to the grounds of appeal as set out on the notice of appeal.

In this regard I deal first with the contention that the Court *a quo* *erred* in concluding that the respondent's claim is founded on a liquidated document. This ground must be seen in the context of the points raised in 1.3 in the notice of appeal, that the Court *a quo* in concluding that the appellant could not rely on the letter dated 24 May 2001, addressed to him by the respondent. *Ex facie* the simple summons, respondent claimed a balance of the amount of money, which was due by the appellant for professional services rendered by the respondent at the request of the appellant. In the application for summary judgment the supporting affidavit thereto says no more than the formalities prescribed by Rule 14(2) (a) of the Rules of the Magistrates' Court. Therefore nothing verifies the course of action, meaning, on the face of the verifying affidavit, the requisite verification has not occurred.

Appellant in his opposing affidavit of the summary judgment is somehow cryptic and does not give much detail of his defence. Nevertheless he attaches a letter dated 24 May 2001 addressed to him by the respondent, in which he stated the

following:

> "Ons verwys na bogemelde aangeleentheid en heg hierby aan, ons afgehandelde rekeningstaat en tjek ten bedrae van R7521.36 wat ons vertrou u in orde sal vind. Ons bedank u vir instruksies hieromtrent en gaan nou voort om hierdie lêer te sluit."

Application of law to facts

The reasons furnished by the magistrate in terms of Rule 51(8) of the Magistrates' Court Rules do not state why he found appellant's founding affidavit not to have disclosed a *bona fide* . It is neither clear nor succinct as to what facts the magistrate relied upon to satisfy this Court that he did in fact bring an intelligent and judicial consideration of whether or not there is a *bona fide*defence disclosed by the appellant. The magistrate, however, appears to have taken into account the statement of account which was sent by a firm of attorneys, Sonnenberg Hoffman and Galombik of Cape Town on 26th April for the amount of R5848.20. The amount appears to have been reduced by R1000.36 thus leaving an amount of R4717.60.

This particular statement, which the magistrate appears to have relied on, was filed by the respondent as the reply to the applicant's request filed in terms of Rule 15(1) of the Magistrates' Court Act.

It would appear that the magistrate refers to this statement of account when he states in his finding that the respondent's claim is founded on a liquidated claim. Otherwise there is no other indication as to how he would have come to that conclusion as the simple summons issued only bore a mere bare allegation.

Rule 14 (5) of the Magistrates' Court Act reads:

> "No evidence shall be adduced by plaintiff at the hearing of the application nor shall any person giving oral evidence at such hearing be cross-examined by the plaintiff, but such person may after examination by the defendant be examined by the Court."

The attachment of a letter or other document to the application for summary judgment amounts to evidence, which is not, permitted by Rule 14 (5). This is a view held by Leon and Milne JJ in Venter v Kruger 1971 (3) SA 848 (N) at 851 C.:

> "There are a number of decisions with respect both to a similar Supreme Court Rule and to the previous Rule of the Magistrates' Court which makes it clear that in an application for summary judgment a plaintiff

should not give evidence as to the facts supporting his case in his affidavit."

In this regard see inter alia, Wright v McGuinness1956 (3) SA 184 (C) at 187; Kosack & Co (Pty) Ltd. v Keller and Another1962 (1) SA 441 (W) at 443-4; South Africa Trade UnionAssurance Society Ltd. v Demott Properties (Pty) Ltd. & Others (3) SA 601 (W) at 602. It therefore seems to me to be plain that the magistrate erred in having regard to the letter to which I have referred. That letter constituted inadmissible evidence, which should have been disregarded. Similarly he ought to have disregarded those portions of the plaintiff's affidavit which do not comply with the Rule."

In Leynac Distributors Ltd. v Hoosain and Another 1994 (4) SA 524 D at 527G, Howard J, in an application for summary judgment, concerning the meaning of liquidated amount in money, approved the test laid down by Corbett J (as he then was) in Botha v Swanson & Co (Pty) Ltd. 1968 (2) PH F85 (L) viz.

"That a claim cannot be regarded as one for "a liquidated amount in money" unless it is based on a obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere

calculation."

In First National Bank of SA LTD v Myburg and Another 2002 (4) SA 176, Moosa J at 183 held that

"A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment."

See also Lester Investments (Pty) Ltd. v Narshi 1951 (2) SA464 (C.); Fatti's Engineering Co (Pty) Ltd. v Vendick Spares (Pty) Ltd. 1962(1) SA 736 (T); Commercial Bank of Namibia Ltd. v Trans Continental Trading (Namibia) 1992 (2) SA 66 (M) at 72 – 3; First National Bank of SA Ltd. V Myburgh 2002 (4) SA 176 C at 181 E – H

Finding

In this matter if I look at the simple summons alone, I cannot see how I can come to a conclusion that the amount claimed is a liquidated amount in the absence of specific averments in this regard on the summons. Applying the test that the claim cannot be regarded as one for a liquidated amount of money unless it is based on an obligation to pay an agreed sum if money or is expressed that the ascertainment of the amount is a mere matter of calculation. I hold that the magistrate was wrong to rely on the particulars supplied in terms of Rule15 (1) to

decide the application for summary judgment. In my view, this amounted to him allowing evidence by the plaintiff in an application for summary judgment, contrary to the provisions of Rule 14(5) referred to above.

Rule 14(2)(b) specifically states that if the claim is founded on a liquidated document, a copy of such document shall be filed with application for summary judgment. There was no liquid document.

Evidently the respondent did not intend to rely on the statement of account for purposes of this application. Therefore the magistrate should not have relied on the statement of account filed entirely for a different purpose to decide the summary judgment application.

In his opposition, the appellant filed a letter, which is dated, 24 May 2001,dealing with *bona fide*defence. On the basis of it, the letter thanked the appellant for having instructed the respondent and also refunded him a cheque of R7521, 26. The said letter concludes that his file was being closed. *Prima facie*one would be entitled in the circumstances to conclude that at least at that stage the respondent could not have refunded the appellant any money and close his file if

the appellant remained indebted to it.

For purposes of summary judgment my view is that a *bona fide* defence was disclosed. The magistrate does not in his judgment give any reasons why this letter is not a sufficient basis upon which a *bona fide* defence is established, neither does he reject this evidence as inadmissible or incompatible with the claim alleged in the simple summons. All that the appellant was required to do was to set out facts, which, if proved, would constitute a good defence. Such defence need not be looked at with the same strictness as a pleading in an action. Thus, in my judgment, the magistrate erred in granting summary judgment on the face of what appellant had placed before him.

It follows, therefore, that the appeal must be upheld. I make the following order:

1. The appeal succeeds. Judgment in the court a quo is hereby set aside in place thereof substituted by the following:

1.1 Application for summary judgment is refused.

1.2 Defendant is granted leave to defend the matter."

2. Costs order of this appeal to be costs in the cause. Costs occasioned by the wasted costs in respect of the matter, which was struck off the roll on the 29th November 2001, to be borne by the appellant.

MLONZI, AJ

MOOSA, J: I agree and it is so ordered.

MOOSA, J