



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 649/12

In the matter between:

L.R. MAMBA AND ASSOCIATES

Plaintiff

And

MPHETSENI CO-OPERATIVE SOCIETY LIMITED

Defendant

Neutral citation: *L.M. Mamba and Associates vs Mphetseni Co-operative Society Limited (649/12) [SZHC 30] 19th February 2016)*

Coram: **MAPHALALA PJ**

Heard: **10th September, 2015**

Delivered: **19th February 2016**

For Plaintiff: **Advocate M. Mabila
(appearing for L.M. Mamba & Associates)**

**For Defendant: Mr. A. Lukhele
(Dunseith Attorneys)**

Summary: Civil Procedure – Application for Summary Judgment – for payment of professional and / or legal service (and disbursements) – Defendant has only raised a point **in limine** – that the Plaintiff’s claim is premature – however, Defendant has already paid part of the fees – as a result, Plaintiff contends that the claim is now peremptory – this court is of the view that the Plaintiff’s contentions are correct - grants the Application for Summary Judgment with costs.

JUDGMENT

The Application

[1] Before Court for decision is an Application for Summary Judgment where the Plaintiff has instituted an action in which it is suing the Defendant for the payment of professional and / or legal services (and disbursements thereon) which it rendered to it at its instance and request, which amounts Plaintiff avers are now due owing and payable and Defendant has refused and / neglected to pay despite demand.

[2] Plaintiff in its Particulars of Claim filed has outlined the sequence of events constituting the cause of action between the parties. The background of the matter as gleaned in the said Particulars of Claim are as follow:

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During March /April 2008 the defendant, acting its duly authorised representatives and executive committee engaged the services of the

plaintiff to represent it and make representations and applications on its half to various statutory bodies and Government officials for the consent and approval of the conversion of certain leases to subdivided portions and the registration of these as sub-divisions of Farm 1150 in order to facilitate the transfer of the resultant portions into the individual names of the defendant's members.

4

It was an implied term of the instructions that the plaintiff would be entitled to be paid a reasonable fee for its professional services and recompensed for all necessary disbursements made on the defendant's behalf.

5

The plaintiff duly performed in terms of the aforesaid instruction between the years 2008 and 2011 until its mandate was terminated by the defendant on the ground that the defendant's members no longer wished to continue with the exercise.

6

Plaintiff's reasonable charges for the professional services rendered and disbursements made is the sum of E284 382.00 as set-out annexure "A" hereto.

[3] The relationship between the parties is that Plaintiff was an attorney for the Defendant rendering various services thereto.

[4] The Plaintiff in the Particulars of Claim claims for the following:

(a) Payment of the sum of E284 382.00

- (b) **Interest thereon at the rate of 9% per annum calculated from 9 January, 2012.**
- (c) **Costs of suit**
- (d) **Further and / or alternative relief.**

[5] Plaintiff on the 2 June, 2015 filed a Notice of Application for Summary Judgment seeking orders as outlined above in the Particulars of Claim in paragraph [4] **supra**. An affidavit in support of the said Application deposed by Mr. Lindifa R. Mamba of L.R. Mamba Associates is filed thereto.

The Opposition

[6] The Defendant has filed an opposing affidavit of one Mathew Felafutsi Mabuza who is the Vice Chairman of the Defendant's company.

[7] In paragraph 5.3 of the said affidavit the Defendant avers the following:

5.3 I further challenged the computation and accuracy of the sum of E284,382.00 (Two Hundred and Eight Four Thousand Three Hundred and Eighty Emalangi) and point out that same has not been taxed by the Taxing Master of this Honourable Court.

[8] The Plaintiff then filed a Replying Affidavit in accordance with the Rules of this court.

The Arguments

[9] The court then heard arguments of the attorneys of the parties who filed Heads of Arguments. I shall in brief outline the salient features of such arguments in the following paragraphs of this judgment.

(i) Plaintiff's arguments

[10] The gist of the Plaintiff's argument is that Defendant's affidavit resisting Summary Judgment has been rendered academic and / on moot consequent upon the Defendant effecting various payments to the Plaintiff in liquidation of the debt and the undertaking to pay as reflected in Annexure "LM", which is a common cause fact.

[11] In this regard the attorney for the Plaintiff canvassed various arguments at paragraphs 5, 6, 7 and cited a **plethora** of decided cases being the Supreme Court case of **I.C.H. Data Systems and Three others vs Nedbank (Swaziland) Limited and Another Civil Appeal Case No. 60/2014, Governing Body, Geldenhuis and Neethling Beauthin 1918 AS 426 and at 426, Revonia Primary School and Another vs MEC for Education, Gauteng Province and Others 2013 (1) SA 632 SCA at page 24** to the following:

"Courts will generally decline to entertain litigation in which there is no live or existing controversy. That is principally for the benefit of the court so as to avoid it being called to pronounce upon abstract propositions of law that would amount to no more than advisory opinions."

[12] Finally, it is contended for the Plaintiff that it should be noted that there are no triable issues raised by the Defendant to require that the matter be referred to trial as on the fact as set out in current pleadings there is irresoluble dispute of facts which requires the aid of oral evidence to be determined.

(ii) The Defendant's arguments

[13] According to the arguments of the Defendant in the Heads of Arguments filed is that the claim by the Plaintiff is for professional fees and disbursements has allegedly rendered at Defendant's instance. That the amount of E284 382.00 has not been agreed.

[14] Further at paragraph 3 thereof it is contended that the Plaintiff's claim is premature as the amount has not been **agreed nor the amount taxed**. Therefore, the Plaintiff's claim must on that score be dismissed. In support of the arguments this court was referred to Rule 68 of the High Court Rules and the case of **Aircraft Comphertious Centre (Pty) Limited and Rassouw and Others 2004 (1) SA. 123 SW1 169 A- C** and the High Court case of **Advocate Ernest Thwala / Titus Mlangeni t/a Mlangeni and Company (Civil Case No. 48/01)**.

[15] Furthermore, it is contended for the Defendant that the authority of those who instructed the Plaintiff to carry out such professional work has been put in issue. That Defendant has set out a valid and **bona fide** defence.

[16] Finally, that the Plaintiff's Application should be dismissed and Defendant given leave to defend.

The Court's analysis and conclusions thereof

[17] Having considered all the papers filed by the parties and the arguments of the attorneys of the parties I am inclined to agree with the arguments of the Plaintiff's attorney. It is common cause between the parties that Defendant has effected a number of payments to the Plaintiff regarding the amount which is the subject matter of the Application for Summary Judgment. It may well be that Defendant contested the claim as found at paragraph 4.2 to 4.5 of the affidavit resisting Summary Judgment. However, what boggles the court's mind is why Defendant then effected payment of the various amounts to Plaintiff as shown in the papers. By doing so, the conduct of the Defendant falls within the pervue of peremption. In terms of this doctrine when a litigant, particularly a Defendant, has effected payment in respect of the suit against it, is deemed to have accepted the Plaintiff's claim.

[18] In this regard I find the **dictum** in the case of **Hlatshwayo vs More and Teas 1912 AD 242** apposite where the following was stated:

“--- the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate.”

[19] Furthermore, in my reading of all the papers in this case Defendant has no prospect of success at trial. The debt has been partially paid and purported opposition has become moot. The matter has thus become preempted and should for this reason be dismissed.

[20] In the result, for the foregoing reasons the Application for Summary Judgment is accordingly granted with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE