

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 9013/2022

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

Date

Signature

In the matter between:

KAINOS MEDICO LEGAL SERVICES

APPLICANT

And

VAN JAARVELD ATTORNEYS

RESPONDENT

Summary: Summary judgment. The respondent raised technical defences which are bad in law. The defence of supervening impossibility is not available to the respondent. There are no triable *bona fide* defences and an intention to defend was

solely entered for delay purposes. The respondent is truly indebted to the applicant. Held: (1) Summary judgment granted with costs.

REASONS FOR THE ORDER

CORAM: MOSHOANA, J

Introduction

[1] On 12 February 2024, this Court made an order granting the applicant a summary judgment. This Court ordered that reasons for the order shall be provided on a fourteen-day written request. Although no written request was received, this Court is constitutionally obliged to provide the parties the reasons for its order. What follows hereunder are the reasons for the order.

Background facts and evidence

[2] Owing to the narrow fulcrum upon which this application oscillated, it is unnecessary for the purposes of these reasons to punctiliously narrate all the facts appertaining this matter. The essential facts are that during the period March 2014 to June 2019, the applicant, Kainos Medico Legal Services (Pty) Ltd (Kainos) rendered various medico-legal services at the specific instance and request of the respondent, Van Jaarsveld Attorneys (Jaarsveld). Having rendered the services, Jaarsveld became indebted to Kainos and the debt was due and payable. On 20 September 2019, Kainos and Jaarsveld concluded a written acknowledgement of debt (acknowledgement) in respect of the debts owed to Kainos resulting from various services rendered to Jaarsveld. In terms of the acknowledgement, Jaarsveld acknowledged that it was indebted to Kainos in the amount of R798 149.20. The parties agreed that the debt shall be defrayed through eight instalments.

[3] It was further agreed that should Jaarsveld default on the payment terms, the full outstanding amount would become due and payable. Jaarsveld defaulted and fell into arrears. Owing to that default, Kainos instituted an action in July 2022 and demanded payment of R454 220.00, being for services rendered, together with interest and costs. Jaarsveld entered an appearance to defend and also delivered a plea. Whereafter, in terms of the new rule 32 of the Uniform Rules, Kainos launched the present application seeking a summary judgment. The application was heavily opposed by Jaarsveld. Ultimately, the application emerged before me in the opposed motion roll. After hearing submissions, this Court made an order to be endowed with reasons herein below.

Analysis

[4] It must be stated upfront that it was not, even during argument, in dispute that Jaarsveld is indebted to Kainos. After an action was instituted, Jaarsveld in consideration of the indebtedness continued to make certain payments. As at the time of the hearing of the present application, the indebtedness was reduced to an amount of R360 991.00¹. Jaarsveld raised various preliminary legal objections (points *in limine*) to the present application. As it shall be demonstrated below all those points are bad in law and do not constitute a *bona fide* defence in law against the claim of Kainos. The main defence raised by Jaarsveld is one of supervening impossibility, which as submitted extinguishes the contractual obligations in the acknowledgement of debt. In due course, this Court shall discuss this defence.

[5] Turning to the preliminary objections, the first of which is that the present application was defective in that it was not supported by an affidavit as required by rule 32 (2) (a) of the Uniform Rules. The contention of Jaarsveld is that regard being had to the signatures of the deponent and the Commissioner of Oaths, there is doubt that when the affidavit was commissioned to the deponent and the Commissioner were together. Jaarsveld went to the lengths of procuring the

¹ This being the amount for which judgment was entered against Jaarsveld.

services of an expert to advance this argument. This is a highly technical legal objection. There can be no doubt that the present application is supported by an affidavit. This Court is satisfied that the document titled '*affidavit in support of summary judgment*' is an affidavit contemplated in the rule in question. Smuts J in *Nkondo v Minister of Police and another (Nkondo)*² pitch-perfectly stated the following:

“As stated, it is not a *sine qua non* for the validity of an affidavit that the commissioner of oaths who administers an oath should state in so many words that he has done so. If it can be gathered from the document as a whole that the oath was in fact administered, that will be sufficient compliance with reg 4 (1)

[6] When regard is had to the impugned document as a whole, certainly an oath was administered. The suggestion that the signatures appeared to have been superimposed casts an aspersion on Jan Gideon Roux (Roux), a member of the reputable South African Institute of Professional Accountants (SAIPA). Above his signature and stamp occurs words that *this affidavit was signed and sworn* before him at Kempton Park. The expert engaged by Jaarsveld, based on the exercise of comparing handwritings and inscriptions on the impugned document, speculates that the deponent was not before Roux.

[7] Smuts J continued in *Nkondo* and stated that:

“A fact which lends stronger support to the argument that it can be inferred from the document as a whole that an oath was administered is the fact that in the certificate the word “affidavit” appears. As an affidavit is a written statement confirmed on oath it can be argued that the commissioner of oaths is saying by implication that an oath was administered by him.”

² 1980 (2) 362 (O).

- [8] Unlike in *Nkondo*, in *casu*, the certificate by Roux do state that the affidavit was sworn and signed before him. Accordingly, the objection was doomed to fail highly technical as it was.
- [9] The second legal objection is similarly highly technical as well. This Court has no doubt in its mind that a proper party, with the necessary *locus standi*, is before Court. *Locus standi* simply means the right or capacity to bring an action. The summary judgment application was brought by Kainos and it being a legal *persona*, it resolved that its sole director must launch any proceedings on its behalf. This legal objection is doomed to fail as well. The third legal objection is that the deponent to the affidavit does not verify the amount claimed as required by rule 32 (2) (b). At paragraph 7 of the impugned affidavit the deponent stated that she can confirm that Jaarsveld is indebted to Kainos for the amounts stipulated in annexure A to the particulars of claim. This allegation remained uncontroverted. The annexure A is the acknowledgement. Again the fact that the acknowledgement was concluded remained uncontroverted. Accordingly, it cannot be said that the deponent did not verify the amount owed. This legal objection is equally unsound in law and is thus rejected.
- [10] In summary, it must be emphasised that all the above highly technical defences were aimed at impugning the application itself and do not disclose a *bona fide* defence to the claim of indebtedness. It has been held that purely technical defences do not qualify as a *bona fide* defence to the claim.³ Quintessentially, if the points were upheld, all it would mean is that this Court would refuse to entertain the present application because it will be one that is defective. Such would not mean that Jaarsveld will be given a further ride in delaying the claim to a point of a full trial of issues. These defences have nothing to do with the triability of issues within the context of applications of this nature.

³ See *Liberty Group Ltd v Singh* 2012 (5) SA 526 (KZD) at 537G-538G.

[11] This Court now turns to the solitary defence alleged to be a *bona fide* defence in law. An inability to pay is not a valid defence in law.⁴ Before considering the defence of 'partial supervening impossibility' as raised by Jaarsveld, it is important to highlight the fact that the claim of Kainos is one of payment of money for services performed at the instance and request of Jaarsveld. Thus, the *bona fide* defence must be directed to such a claim. An acknowledgement seeks to only admit indebtedness. Kainos has not instituted an action for breach of contract. In a typical breach of contract claim, upon repudiation an aggrieved party makes an election either to cancel an agreement and sue for damages or hold the other party to an agreement and seek specific performance. Kainos is not claiming damages nor specific performance but the payment of money for services performed, the indebtedness of which has been admitted by Jaarsveld. The purpose of the acknowledgement in this matter is to simply turn the amount owed into a liquid amount. A liquid amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment.⁵

[12] The fundamental error committed by Jaarsveld is to treat the claim as one that is contractual in nature. The acknowledgement supports the fact that the amount for services rendered has been agreed upon and that any default renders the full amount due and payable. It is not in dispute that Jaarsveld defaulted. The defences mounted by Jaarsveld are those relevant to a breach of contract claim. Allegations that there was common assumption relates to the acknowledgement as opposed to the provision of services at the instance and request of a party. Similarly, the supervening impossibility defence is aimed at the contract of acknowledgement as opposed to the services rendered. In the nature of the defence of supervening impossibility it extinguishes contractual obligations. Assuming that the contractual defences are upheld, all it would do is to extinguish or alter some or all of the legal obligations arising from the acknowledgement of indebtedness which would only render the claim for services rendered no longer

⁴ See *Wilson v Bained W N* (76) 74.

⁵ See *Botha v Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD).

liquid. However, that would not alter the fact that Kainos performed services and that payment for those services is due and payable.

[13] Instead in its plea, Jaarsveld admits that the indebtedness arose as a result thereof that Kainos rendered services by providing medico-legal reports in respect of several actions against the Road Accident Fund. Nowhere in the papers before this Court does Jaarsveld dispute that services were rendered at its special request and instance. All the authorities relied on by Jaarsveld in relation to the defence of supervening impossibility are unhelpful to it. Howbeit, it has not been shown by Jaarsveld, that there was a supervening impossibility in law. A supervening impossibility does not equate an inability by one party to the agreement to meet the contractual obligations. Summary judgment, in the light of the new rule is no longer to be considered as an extraordinary remedy. At the time of considering the application, a Court is favoured with a plea, which would clearly spell out a *bona fide* defence. In terms of rule 22 (2) and (3) of the Uniform Rules, a defendant shall either admit or deny or confess and avoid all the material facts alleged or state which of the facts are not admitted and to what extent, and shall clearly and concisely state all the material facts upon which he relies. Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted shall be deemed to be admitted. Armed with such a powerful document in the litigation process, a failure of justice become lessened.

[14] In summary, all the preliminary legal objections aimed at imperilling the vitality of the present application for summary judgment are bad in law. The defences directed at the contract of acknowledgement are a misdirection since the claim of Kainos is not a contractual claim *per se* but a claim for services rendered at the special instance and request of Jaarsveld. Nevertheless, the claim of Kainos is not predicated on any underlying contract justifying the performances of the services. Purely technical defences like common assumptions could be directed at a claim predicated on the underlying service contract. Jaarsveld did not launch a counterclaim seeking for instance a rectification of any underlying service agreement. The fact that services were performed and that Jaarsveld is indebted

to Kainos is admitted. Accordingly, truly Jaarsveld does not have a *bona fide* defence in law against the claim of payment for services rendered. It was for all the above reasons that this Court made the order mentioned at the dawn of these reasons.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant:	Ms C Barrerio
Instructed by:	Coombe Commercial Attorneys, Pretoria.
Attorney for the Respondent:	Mr T Roos
Instructed by:	Roos Van Dyk Attorneys, Pretoria
Date of the hearing:	12 February 2024
Date of Reasons:	13 February 2024