

IN THE HIGH COURT OF SOUTH AFRICA
TRANVAAL PROVINCIAL DIVISION

16/8/2005

UNREPORTABLE

In the matter between

Case no: 21862/2004

SARAH RAMO GALE MASEKOAMENG

Plaintiff

and

MILDRED GRISELDA SEKELE

First Defendant

TAR ATTORNEYS

Second Defendant.

ROAD ACCIDENT FUND

Third Defendant.

JUDGMENT

HARTZENBERG ADJP.

[1] This is an exception by the second defendant against the plaintiff's particulars of claim on the basis that they do not disclose a cause of action against the second defendant. The plaintiff, in her capacity as mother and natural guardian of Lethabo Stella Masekoameng and Thapelo Philemon Masekoameng ("the minor children") claims payment of an amount of R118 417,53 or that amount less the second defendant's costs from the first defendant, and/or the second defendant and/or the third defendant. The first defendant seems to be a close relative of the plaintiff. The second defendant is a firm of attorneys that represented the first defendant when she instituted a claim against the third defendant, the Road Accident Fund ("the fund").

[2] Although the word "partner" clouds the issue I accept that the plaintiff alleges that the minor children have a valid claim for loss of support against the fund and that the first defendant assisted by the second defendant instituted such a claim against the fund (paragraph 6). It is alleged that the first defendant did not have legal standing, authority or a mandate from the plaintiff to lodge a claim on behalf of the children and that the second defendant ought to have advised the first defendant accordingly (paragraph 7). The third defendant settled the claim and paid the amount of R118 417,53 to the first and the second defendants (paragraph 8). In the alternative it is alleged in paragraph 8 that the third defendant negligently paid the amount out. The first defendant refused to pay the amount of R118 417,53 to the plaintiff (paragraphs 10 and 11). The first defendant was enriched at the expense of the minor children in the amount of R118 417,53 (paragraph 12). The plaintiff has suffered damages in the aforesaid amount (paragraph 13). The body of the particulars of claim concludes that "the defendant" is indebted to the plaintiff, but despite demand fails and/or refuses to pay the amount to plaintiff (paragraph 14).

[3] Judgment is sought against the first- and/or the second- and/or the third defendant. Prayer 1 is a prayer for statement and debatement of the second defendant's fee account in respect of the claim. Prayer 2 is for payment of R118 417,53 alternatively for that amount less the second defendant's reasonable fees.

[4] Although nothing turns on it, no foundation has been laid for the statement and debatement of the second defendant's fees. There is no allegation of a dispute about the fees or refusal by the second defendant to disclose the amount of there fees or an allegation that the fees were unreasonable. What their fees were wi\l be contained in their file. If they are party to the proceedings the file is certainly the subject of discovery in terms of rule 35. Even if they are not party to the proceedings someone in the firm can be *subpoenaed* to bring the file to court. If someone is unhappy with the fees it can be taxed by the taxing master or by the Law Society. There is just no foundation to have the second defendant joined as a party in order to debate the reasonableness of their fees.

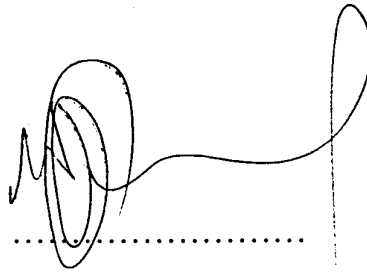
[5] The way I read the particulars of claim it is the plaintiffs case that the first defendant received the amount of R118 417,53 assisted by the second defendant. It is the first defendant who refuses to pay the amount to her. It is the first defendant who has been enriched at the

expense of the children. There was no contractual link between the plaintiff and the second defendant. If the plaintiff's claim is based upon delict it lacks necessary averments. The plaintiff's claim is then one for damages. It is not alleged that the second defendant had a duty of care to the plaintiff to safeguard the interests of the children. It is not alleged that the second defendant breached that duty but more importantly no basis is laid upon which it can be found that the acts or omissions of the second defendant caused any possible damage that the plaintiff may have suffered. The third defendant made a payment to a party who was not entitled to it. No basis is laid for a possible finding that the payment to the first defendant affords the fund a defence against the legitimate claim of the plaintiff on behalf of the children and more importantly no conduct by the second defendant is alleged that caused the fund to pay to the first defendant. But even if it is to be accepted that the pleadings aver that the second defendant's conduct establishes a defence for the fund against the plaintiff there is still no basis to find that it is not the first defendant who is to pay the money to the plaintiff. There is no allegation that the first defendant is unable to pay the amount as she has been excused.

[6] In my view the exception is well taken and must succeed.

The following order is made:

1. The exception succeeds with costs
2. A declaratory order issues to the effect that the plaintiffs particulars of claim do not disclose a cause of action against the second defendant.
3. Leave is given to the plaintiff to file amended particulars of claim within 15 days of this order, if so advised.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a dotted line.

W J HARTZENBERG

ACTING DEPUTY JUDGE PRESIDENT