

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 25/04/2008
CASE NO: 31496/2004

UNREPORTABLE

In the matter between:

LEIGH WILLIAM ROERING N.O

PLAINTIFF

And

HENRI COETZEE

DEFENDANT

JUDGMENT

SERITI, J

1. The plaintiff is the appointed liquidator of Bondpack CC which was finally wound up by an order of the Witwatersrand Local Division of the High Court of South Africa on 27 January 2004.
2. In the particulars of claim the plaintiff alleges that at all material times, particularly during the period June 2000 to November 2001 the defendant acted as a financial advisor and investment broker to Bondpack CC.
3. It is further alleged that during the period mentioned above Bondpack CC, represented by its sole member, Derek Bondi advanced

to the defendant several amounts of money amounting to twenty one million four hundred and sixty two thousand rands (R21 462 000.00).

4. It was an express, alternatively implied, alternatively a tacit term of each such advance made by Bondpack CC that the defendant would render a detailed statement of account and account to Bondpack CC for the proceeds of the investment.
5. From 13 July up to 29 November 2001, the defendant repaid to Bondpack CC various amounts totalling an amount of six million five hundred and sixteen thousand rands (R6 516 000.00).
6. In the prayer, plaintiffs prays for an order in the following terms:
 - (a) that the defendant render a detailed statement of account of the investments made by him on behalf of Bondpack CC during the period mentioned in paragraph 2 above.
 - (b) debatement of the said account.
 - (c) payment to the plaintiff of whatever amount appears to be due to Bondpack CC upon the debatement of the said account.

7. The defendant who is a financial accountant by profession, in his plea stated that he no longer have, in his possession documentation relating to the allegations against him.

He further pleaded that the alleged amount was not advanced to him in his personal capacity, but that same was advanced to an entity known as Innovative Reinforcements Business Trust.

8. The matter was set down for hearing on 20 September 2006. On the said date HARTZENBERG J made the following order by consent of the parties:

“1. That the defendant render a detailed statement of account supported by vouchers of all sums received by him in any capacity from Bondpack CC and/or Derek Bondi and of the placing of such funds by him and of such funds as were repaid during the period June 2000 to November 2001.

2. That the account is to be delivered by no later than 15 November 2006 and the supporting vouchers by no later than 7 February 2007.

3. That the remainder of the matter is postponed *sine die* and the defendant shall co-operate with the plaintiff to obtain a date for further proceedings of this matter.”
9. On 15 November 2006 the defendant delivered a statement of account.
10. On 9 September 2007 the plaintiff served a request for further particulars for purposes of trial.

The defendant failed to comply with the said request and on 30 November 2007 the plaintiff delivered an application to compel the defendant to serve and file the requested further particulars for purposes of trial.

On 19 December 2007 the plaintiff obtained an order ordering the defendant to supply the requested further particulars within ten days.

11. On 23 January 2008 the plaintiff delivered an application to strike out the defendant’s defence as the defendant failed to comply with the court order. The said application was set down for hearing on 25 February 2008, and few days before the date of hearing the defendant delivered his response to the request for further particulars

for purposes of trial.

12. When the matter came before me on 17 March 2008 the issue that had to be dealt with was the debatement of the account, and an order , if necessary for the payment to the plaintiff of whatever amount found to be due to Bondpack CC.

13. On the first day of the trial I was requested to stand the matter down to 14:00 for the parties to negotiate. At 14:00 I was requested to make the following order by consent:

13.1 The trial will proceed at 10:00 on 19 March 2008 and the procedure will be that the plaintiff will only give an opening address where after the defendant will give evidence under oath;

13.2 The defendant will not attempt to amend his plea;

13.3 The defendant will no apply for a postponement.

14. The trial commenced with the plaintiff's opening address and submissions on duty to begin. The opening address of the plaintiff was contained in substantial written heads and in short raised the following

issues:

14.1 That the first statement of account delivered does nothing else but acknowledge that the amounts as set out in the plaintiff's particulars of claim was in fact disbursed by Bondpack CC.

14.2 This account has no supporting vouchers as required and the purported attached vouchers are either irrelevant, or not vouchers in terms of accounting principles.

14.3 On 7 February 2007 the defendant delivered a 95 page vouched account, but consisting of multiple copies of the same documents. Once again this alleged vouched account has the following defects:

14.3.1 The documents are no vouchers and in no way support the statement of account;

14.3.2 In fact they are inconsistent with other documents delivered by the defendant;

14.3.3 Accordingly the alleged vouched accounts do not comply with the court order.

14.4 The plaintiff's contention is that the defendant has no defence; no explanation or account has ever been given as to the fate of the R21 462 000.00 received from Bondpack CC. The defendant has a strategy of withholding relevant documents and attempts to confuse the issue by the production of piles of irrelevant documentation. This is further borne out by the further particulars that were delivered, after being compelled to do so, before trial.

14.5 There was a section 152 enquiry held and due to the same pattern followed by the defendant by either, not producing relevant documents or delivering wads of irrelevant documentation, this action was brought.

14.6 The plaintiff proceeded with an application for the committal of the defendant for contempt of court of the order granted by HARTZENBERG J.

On 5 September 2007 following discussion between counsel and the judge the application was settled on the basis that a trial date would be expedited.

14.7 A request for further particulars for purposes of trial was delivered and only after an application to strike out the defendant's defence was set down for 25 February 2008 did the defendant deliver the further particulars. The further particulars once against set out no defence nor do they account or vouch. In main the following can be said:

14.7.1 the amount of annexures mentioned in the particulars do not correspond to the amount mentioned.

14.7.2 "those annexures that were supplied were jumbled in an illogical order as if they were either deliberately supplied in such order or dropped and reassembled by someone unfamiliar with the matter."

14.7.3 the same documentation is multiplied and attached as constituting different vouchers.

14.7.4 there are no vouchers to support any assertions.

The defendant accordingly has the *onus* to account and debate and bears the duty to begin.

15. Immediately after the plaintiff's opening address the defendant, despite the order by consent, requested that his plea be amended. There was, however, no formal application for an amendment before me and after argument I refused such request. I informed the defendant that application had to be made formally and in accordance with the Rules of Court, and if and when, such application is made, it will be considered. I also reminded the defendant about the order I made on the first day of trial.
16. The defendant then chose to testify under oath and proceeded with his evidence in chief.
17. On the next court day, prior to proceeding with his evidence in chief, the defendant brought an application for the amendment of his plea and the filing of a special plea.
 - 17.1 In his affidavit he alleged that on the first day of trial the matter stood down until 14:00 for settlement purposes and he was shocked that his settlement proposals were not accepted. He agreed to the proposal that he will not apply for amendment of his pleadings because he thought it would expedite the matter. After listening to the opening address of the plaintiff he realised he would be prejudiced if he did not apply for amendment and

introduces his special plea.

- 17.2 The plaintiff opposed this application. The plaintiff reiterated that agreement had been reached which was made an order of court in terms of which, *inter alia* the defendant would not apply for amendment. The plaintiff's counsel further pointed out that the defendant's attorney in a letter dated as early as 22 January 2008, addressed to the plaintiff's attorney, indicated that the defendant's plea needs to be amended and that it would be impractical to hold a pre-trial before such amendment and therefore they will not be attending the scheduled pre-trial. No such amendment came to light. No explanation why it was not done earlier is set out in the affidavit supporting the application. There is also no explanation as to why the amendment is necessary. On the reading of the proposed amendment it is clear that many admissions in the plea are to be withdrawn and no explanations are furnished for this drastic step.

The plaintiff will suffer obvious prejudice as he will have to face a whole new case. As far as the special plea is concerned it is one of mis-joinder and no explanation is given for the degree of lateness or the reason for this amendment.

18. After considering the pleadings, the proceedings the previous day and the submissions by plaintiff's counsel, I refused the applications for amendment with costs as no reason were given for the degree of lateness or the necessity for the amendments. The prejudice that was likely to be suffered by the plaintiff can not be cured by a cost order.
19. The defendant testified and after his testimony he was cross-examined by the plaintiff's counsel. The dates allocated to this matter expired prior to the finalisation of cross-examination .

After certain arrangements were made, the matter was postponed to 16 April 2008. In fact, as more than one day was required, it was arranged that the matter will proceed on 16, 17 and 18 April 2008.

20. On 16 April 2008, my registrar brought to my attention an affidavit by the defendant. A medical certificate was attached to the said affidavit. There was also a filing-sheet. The said documents were, according to my registrar, delivered to her office at about 9:30 on that day.
21. In the said affidavit, *inter alia*, the following is stated:

“2. Gedurende die maand van April het ek olik geraak en mediese advies ingewin. Ek heg hiermee 'n afskrif van

dokterssertifikaat ter bevestiging van my mediese posisie en nie in staat is om verhoor met uitgestelde datums 16, 17 en 18 April verder by te woon nie.

Dit is duidelik uit vermelde sertifikaat dat ek geopereer word as deel van die diagnose van my siekte toestand.

3. Ek versoek die Agbare dat vermelde aangeleentheid uitgestel word in my absentia, aangesien ek vir myself optree en nie teenwoordig kan wees by vermelde verrigtinge nie.”

The medical certificate mentioned earlier was allegedly issued and signed by Dr Otto Beyer, a facial and oral surgeon.

The medical certificate in question reads as follows:

“This is to certify that the above patient was treated by me on 15/04/08 to 30/04/08 included is hereby recommended for the purpose of recovery.”

22. In court, the plaintiff’s counsel advised the court that they have just received the application for postponement, and they are opposing the

application.

The instructing attorney, Mr P Vos was called into the witness box to testify in support of their opposition to the application for postponement.

23. In his evidence he testified that he heard of the application for a postponement at about 09:00 on 16 April 2008. They became aware of the said application when they perused the court file in order to make certain that papers in the court file are properly paginated.
24. At about 09:30 he telephoned Dr Beyer's room in order to speak to him, but he was informed by a receptionist who identified herself as Magda Holland that Dr Beyer was in theatre. He identified himself and advised Ms Holland that he has in front of him copy of medical certificate mentioned earlier. Ms Holland immediately advised him that she had Dr Beyer's file in respect of the defendant in front of her, and that the defendant saw the doctor on 15 April 2008. The defendant was complaining about a pain in his wisdom teeth and that Dr Beyer has scheduled to operate the defendant on Friday 18 April 2008.
25. He further testified that he obtained Dr Beyer's cellular phone number from Ms Holland. He attempted to phone Dr Beyers on the said

telephone number without success.

He telephoned the defendant's office and spoke to Ms Coetzee who informed him that the defendant was at the hospital. He then informed Ms Coetzee about what he ascertained from the hospital and asked Ms Coetzee for the defendant's home and cellular telephone number. She was unable to assist her, and he was put through to a lady who identified herself as Ansie. The latter informed him that she was not allowed to give to any person the contact telephone numbers of the defendant. She took his telephone numbers and undertook to pass same to the defendant together with a message to the effect that the plaintiff is going to oppose the defendant's application for a postponement when the matter is called at 10:00 on the same day. He also informed her that the plaintiff will be prepared to grant the defendant a reasonable time to prepare for the hearing and/or for his formal application for postponement. The defendant did not contact him on the day of hearing until the court adjourned at about 11:00.

26. After the abovementioned evidence was tendered, the court dismissed, with costs, the defendant's application for a postponement. The said application was dismissed because of the following factors:

- (a) There was no substantive application for a postponement. The

purported application for a postponement was simply dropped in my registrar's office about 40-45 minutes prior to the commencement of the hearing, and it was not served on the plaintiff.

- (b) The alleged medical report that was left in my registrar's office is a copy and there is no explanation why the court could not be provided with the original thereof.
- (c) In the affidavit, the defendant without any further explanation states that he went to see the doctor as he was not feeling well. He states that he was not feeling well during the month of April without providing any dates.

As correctly submitted by the plaintiff's counsel the word "olik" as used in the defendant's affidavit does not suggest that defendant is seriously ill, but simply means "seedy", "out of sorts", "indisposed", "off colour", and "unwell".

Reasons advanced by the defendant for seeking a postponement, and the manner in which the application was brought to the attention of the court does not justify the granting of a postponement.

27. After the court dismissed the defendant's purported application for a postponement, the plaintiff's counsel, after submitting detailed heads of argument, moved for an order in terms of which the defendant is ordered to pay the plaintiff an amount of fourteen million nine hundred and forty six thousand rands (R14 946 000.00), plus interest at the rate of 15.5% per annum from 25 November 2004 to date of payment. The summons in this case were apparently issued on 25 November 2004.
28. The effect of the court order of 20 September 2006 mentioned earlier is that the only outstanding issue between the parties is the proper accounting and debatement of account involving the outstanding balance of R14 946 000.00 and the repayment by the defendant of any amount that is found to be due to the plaintiff.
29. The documents supplied to the plaintiff in purported compliance with the court order mentioned earlier, are not in a satisfactory condition. There are no vouchers, some of the documents attached to the statement of account do not support the said statement of account. Some of the documents supplied to the plaintiff are inconsistent with the alleged statement of account. In some of the documents supplied, defendant noted that vouchers will be submitted later, but no such vouchers were ever supplied to the plaintiff.

In short, the documents supplied by the defendant to the plaintiff does in no way approximate a proper statement of account and no vouchers were attached to the said alleged statement of account.

30. The defendant testified and after his evidence in chief, he was cross-examined. Prior to the finalisation of his cross-examination, the matter was postponed to 16, 17 and 18 April 2008. As mentioned earlier, the defendant failed to attend court on 16 April 2008.
31. The defendant has failed to deliver a proper statement of account. The statement of account he delivered to the plaintiff is lacking in various material respects and he also failed to deliver supporting vouchers as ordered by this court on 20 September 2006.
32. The plaintiff's counsel submitted that the defendant should be ordered to pay the plaintiff's costs on attorney and client scale, which costs should include costs consequent upon the employment of two counsel.

The history of this matter, clearly indicates that the defendant has always been using delaying tactics. He attempted, at all costs to delay the finalisation of this matter. He even attempted to withdraw on the date of the hearing certain admissions he made and also attempted to introduce a special plea. He failed to timeously respond to the request

for further particulars for purposes of trial and the plaintiff was forced to bring an application to compel him to do so. An order was granted forcing him to deliver the requested further particulars within 10 days and he again failed to deliver the said further particulars despite the court order forcing him to do so. He delivered the requested further particulars few days prior to the hearing of an application to strike out his defence.

33. My view is that the plaintiff is entitled to the attorney and client costs.

The court therefore makes the following order:

- (a) the defendant must pay the plaintiff an amount of fourteen million nine hundred and forty six thousand rands (R14 946 000.00);
- (b) the defendant must pay interest on the amount mentioned in (a) above at the rate of 15.5% per annum, calculated from 25 November 2004 to date of payment;
- (c) the defendant must pay the plaintiff's costs on attorney and client scale which costs will include the costs reserved on 20 September 2006 and will also include costs consequent

upon the employment of two counsel.

W L SERITI
JUDGE OF THE HIGH COURT

31496/2004

Heard on: 16 & 17 April 2008

For the Plaintiff: Adv J M Suttner SC & R Hutton SC
Instructed by: Deney's Reitz Inc, Pretoria

For the Defendant: D P Du Plessis Inc, who withdrew as attorneys of record shortly before the hearing.

Date of Judgment: 25/04/2008