

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A3101/2022

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

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In the matter between:

GRAHAM PHILIP BENNETTO

Appellant

and

DREYER & NIEUWOUDT

Respondent

JUDGMENT

STRYDOM, J (Adams J concurring):

Introduction

- [1] This is a Full Bench appeal against the decision of the Regional Magistrate, Randburg, dated 4 July 2022 in an action brought by the firm of attorneys, Dreyer & Nieuwoudt (respondent) against its former client Mr Bennetto (appellant). The Learned Magistrate granted judgment in favour of the respondent together with costs on an attorney and client scale.
- [2] Various ancillary issues were raised pertaining to a special plea, condonation, rule 31 applications and a rule 60A application. By agreement between the parties, the court on appeal was informed that the court need not make any findings on these issues but deal with the appeal itself.

Grounds of appeal

- [3] In the appellant's notice of appeal dated 14 March 2023, the following grounds were relied upon:
- 3.1 The respondent did not properly account to him, as provided in the Mandate and Fee Agreement ("the Mandate Agreement") as required in terms of the law.
 - 3.2 The magistrate erred in finding that the appellant was an unreliable witness.
 - 3.3 The respondent's alleged failure to account properly to the appellant was in contravention of s 48(1) read with s 48(2)(c), s 41(1)(a), s 50(2)(b)(i) and (ii), and s 51(1)(a) of the Consumer Protection Act 68 of 2008 ("the CPA") and that the Mandate Agreement was misleading.
 - 3.4 The Appellant had proven his defence of estoppel.
 - 3.5 The Appellant's special plea to stay the action should have been upheld. (This ground of appeal was not persisted with).

- 3.6 The costs on an attorney and client scale should not have been awarded to the respondent.

The Mandate Agreement

[4] The Appellant provided the respondent with a mandate to render professional legal services to him in connection with the action instituted against him by Hyprop Investment Ltd in the Gauteng Division of the High Court under Case No. 400044/2015.

[5] It should be noted that it is not disputed that the parties entered into this agreement which was signed by the parties. It is further not disputed that the professional services were rendered to the appellant. What is in dispute is whether the respondent properly accounted to the appellant in a manner which it was required to be done in terms of the Mandate Agreement. For this reason, the court will have to refer to the terms of the Mandate Agreement and then consider whether the respondent complied with these terms.

[6] The following was confirmed in the Mandate Agreement:

“1.1 The attorneys are entitled to charge fees on the attorney and own client scale for services rendered in terms hereof and that I undertake to pay the attorneys fees as set out in this agreement;

1.2 The fees on an attorney and own client scale will be calculated on the basis that the attorneys will render me an account based on the High Court tariff plus 50% thereof;”

[7] It was further confirmed that:

“2.1 Disbursement will reasonably have to be incurred, and I accept responsibility to pay such disbursement to the attorneys on demand;

2.2 I shall personally be responsible to pay in full all disbursements incurred by the attorneys in respect of the fees of service providers such as advocates, experts, arbitrators and assessors who the attorney will be entitled to appoint in their sole discretion when they deem it necessary, as principal vis-à-vis such service providers;

- 2.3 Disbursements in respect of travel costs by motor vehicle will be recovered at the appropriate AA tariff applicable from time to time;
- 2.4 The costs of making photocopies will be recovered at the rate provided for in the High Court tariff, plus 50%;
- 2.5 All other disbursements shall be recovered on the basis of the actual amount thereof;
- 2.6 If requested to do so the attorneys will provide me with a copy of the High Court tariff referred to."

[8] In paragraph 3 of the Mandate Agreement the appellant acknowledged that the attorney's fees for services rendered and disbursements incurred shall be as provided for in paragraphs 1 and 2 above and the appellant was made aware that he was entitled to engage the service of another attorney who may levy fees on a lower scale or tariff but that he elected not to do so.

[9] Important for a decision in this matter is clause 4 of the Mandate Agreement which reads as follows:

"I understand that:

- 4.1 The attorneys are entitled to render me interim accounts in respect of fees and disbursements and that, at the conclusion of the matter they will render me a final account;
- 4.2 All disbursements reflected in the account will, insofar as possible, be accompanied by supporting documentation, and that in respect of fees, the attorney will set out a short cryptic description of the work done by them together with the time spent in execution thereof;
- 4.3 Should I require the attorneys to furnish me with a detailed specified account in respect of services rendered by them, and in the event of the total of such detailed specified account being higher than the total of the account as set out in paragraph 4.2 above, I accept responsibility to:
 - 4.3.1 pay such higher amount, and,
 - 4.3.2 pay the costs incurred in the preparation and drafting of such specified detailed account, which may include the cost of a cost consultant;

4.4 If I do not object in writing to the account, or request a specified detailed account, within 30 (thirty) days of receipt of the account from the attorneys, I will be deemed to have waived any right which I may have in respect thereof and that I will also then be deemed to have accepted the attorneys' account as fair and reasonable."

[10] In clause 6 of the Mandate Agreement, the appellant reserved himself the right to withdraw from this undertaking and to terminate the mandate given in terms hereof by giving the respondent written notice of such withdrawal and termination within seven days from the date of signature thereof.

[11] At the heart of the dispute between the parties lies the interpretation of clause 4 as quoted above.

[12] On behalf of the appellant, it was argued that the interim accounts in respect of disbursements referred to in clause 4.1 had to be accompanied by supporting documentation and that in respect of fees the respondent had to set out in the interim account a short cryptic description of work done by the respondent together with the time spent in execution thereof. The Appellant further argued that he never asked the respondent to furnish him with a detailed specific account as contemplated in clause 4.3.

[13] On behalf of the respondent, it was argued that the Mandate Agreement as far as the interim accounts are concerned, was not obligated to set out in these accounts a short cryptic description of the work done together with the time spent in execution thereof. It was submitted that this detailed information would only be contained in a final account referred to in clause 4.1. It was further argued that the appellant in fact asked for a detailed specific account and that such account was drafted which constituted a final account.

[14] Further aspects that remained contentious between the parties was if the account stipulated that all fees charged by the respondent had to be on a time-spent basis. In this regard, the appellant averred that clause 4.2 is clear that fees could only be charged on a time spent basis while it was argued on behalf of the respondent that the overriding clause pertaining to the fees of the respondent is clause 1.2 which stipulated that the fees will be charged on an

attorney and own client scale and will be calculated on the basis that the respondent will render accounts to the appellant based on the High Court tariff plus 50% thereof. Concerning what this entails, evidence was led that not all fees will be charged on a time spent basis but on the basis of what is provided for in the High Court tariff.

[15] The court has been referred to various authorities pertaining to how the interpretation of a written agreement be approached. For purposes of this judgment, the court will accept that a written agreement between parties must be read as a whole to determine the true intention of the parties thereto and if unambiguous, no extrinsic facts or evidence are permissible to contradict, amend or qualify the terms thereof.

[16] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ it was found as follows:

“Whatever the nature of the document, consideration must be given to the language used in the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[17] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*² it was found as follows:

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in light of all relevant and admissible context, including the circumstances in which the document came into being.”

¹ 2012 (4) SA 593 (SCA) at 604.

² 2014 (2) SA 494 (SCA) at para 12.

- [18] In short, the approach of the court would be that the words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material.³
- [19] The words used in the Mandate Agreement is unambiguous and clear but must still be considered in their context.
- [20] Clause 2.1 provides that the attorney's fees will be calculated on the basis that the attorney will render the appellant an account based on the High Court tariff plus 50% thereof. The reference to *an account* would mean one account. The overriding principle for charging fees would be the High Court tariff. The High Court tariff was tendered to appellant in terms of clause 2.6. Clause 3.1 also made it clear that the High Court tariff would prevail.
- [21] Clause 2.1 makes it clear that disbursements became payable on demand and clause 2.5 provides that disbursements shall be recovered on the basis of the actual amount thereof.
- [22] Clause 4.1 provides the respondent with an *entitlement* to render *interim accounts* in respect of fees and disbursements, and at the conclusion of the matter respondent had to render a *final account*. From this it can be gathered that more than one *interim account* could be rendered for disbursements and fees but more importantly, before a decision in this matter, the fees would only be charged on an interim and not on a final basis.
- [23] Clause 4.2 then refers to "*the account*" in which all disbursements reflected must, as far as possible, be accompanied by supporting documentation and in respect of fees the respondent had to set out a short cryptic description of the work done together with the time spent in execution thereof. The question for interpretation, within the context of the entire Mandate Agreement is whether the reference to "*the account*" is a reference to *interim account* or the *final account*.
- [24] In my view, the reference is to the *final account*. If it was a reference to the *interim accounts*_it would have referred to "*the accounts*" in the plural.

³ See *Commissioner, South African Revenue Service v Bosh & Another* 2015 (2) SA 174 (SCA) at para 9.

Moreover, the last reference in clause 4.1 is to *final account*. Thereafter, in clause 4.2 reference is made to "*the account*". One would have expected that a final account would have contained more detail whilst the *interim accounts* would contained less details. The evidence has shown that as far as the interim fees were concerned references were made to *deposits*.

[25] The *detailed specified account* in respect of services rendered would only have been provided if a request was made by the appellant for this account.

[26] From this analysis it is shown that the Mandate Agreement referred to three types of accounts. First, *interim accounts*, second, *final account* and third, a *detailed specified account*.

[27] The evidence in this matter has shown that only 2 kinds of accounts were rendered. The *interim accounts* and a *detailed specified account*. The evidence of the appellant as to which of the *interim accounts* he has received is, as was pointed out by the Regional Magistrate in her judgment, contradictory but the accepted version was that appellant received at least some of these *interim accounts*. That is why he asked for more detail to be provided. Respondent informed the appellant that detail would be provided when a *final account* is rendered.

[28] In my view, the appellant's argument that the *interim accounts* should have provided a short cryptic description of the work done is not sustainable. This information was to be provided when a *final account* was rendered.

[29] As far as it was argued that all fees should have been charged on a time spent basis this negates the very specific terms of clause 1.2 which provides that the respondent had to render an account based on the High Court tariff. This would mean that if the High Court tariff refers to fees to be charged on the basis of time spent then it should be charged as such.

[30] The respondent rendered *interim accounts* but never a *final account*. This step was skipped. According to the respondent the reasons for that was because the respondent asked for a more detailed account. The court, *a quo*, found on the evidence with reference to correspondence that there was such a request.

The request led to the drafting of a bill of costs. There is no reason why this court should not accept the trial court's finding on this issue. In the appellant's letter dated 24 April 2018 he requested the respondent to provide him with a more detailed account. Again, this request was made on 11 May 2018. The respondent was even aware that the file was required "*in order to tax your account.*". The appellant was informed on 14 December 2018 that the "accounting aspect" was still outstanding. In my view, the respondent was entitled to have a bill of cost drafted to provide the appellant with a *detailed specified account*, but in my view nothing much turns on the skipping of the step to deliver a *final account*. The reason being that the Mandate Agreement did not require that the *interim account* contained a short cryptic description of the work done. This information should have been included in the *final account* as well as the *detailed specified account*. Consequently, the same information needed to be included in both these accounts. The only difference is that the *detailed specified account* came with an extra cost of the cost consultant.

[31] It should be noted that the true complaint of the appellant throughout this matter was that the *interim accounts* should have obtained more information how fees were charged, calculated and arrived at. The *interim accounts* were paid by the appellant as he laboured under the impression that when the mandate was fulfilled, he was in credit. This view was formed despite the specific statement that the account must still be finalised. When the appellant then 8 months later received the bill of cost in the form of a *detailed specified account* it left him dissatisfied. It is unfortunate that it took so long to provide the *detailed specified account*, but the time period does render the account not payable.

[32] The entire dispute about the accounting was underpinned by the appellant's wrong interpretation of what information should have been inserted in an *interim account*. Further, because appellant was of the view that the *interim account* should have obtained a short cryptic description of the work done by respondent together with the time spent in execution thereof. If the appellant was dissatisfied with the terms of the Mandate Agreement or how it was implemented, he always had the option to terminate the mandate. He never

elected to do this even after the respondent informed him that at the conclusion of the matter a final account would be rendered.

[33] The appellant's attack in this matter was not aimed at the contents of the *detailed specified account*. In fact, at some stage, he queried some entries and adjustments were made. As pointed out hereinbefore his qualm was that the *interim accounts* left him under the impression that he was in credit to the extent of approximately R16 000. In my view, all of this was occasioned by the appellant's wrong interpretation of the Mandate Agreement.

[34] When the *detailed specified account* is considered, some fees were charged according to time spent. The expert witness, Mr Friedlander, testified that the bill was drafted according to the High Court tariff, plus 50% as stipulated in the Mandate Agreement. He testified that the amounts charged were fair and reasonable. His evidence was not contested, except on the aspect of the fees which allegedly should have been time based. In my view, subject to a finding on the other grounds of appeal raised by appellant, as was found by the magistrate, has proven that fees were charged according to the Mandate Agreement.

[35] The defence raised by the appellant that the respondent failed to perform his reciprocal obligations in terms of the Mandate Agreement is to be rejected on the strength of this court's finding that respondent rendered the *interim accounts* and the *detailed specified account* in line with the Mandate Agreement. There is no basis for an argument that the respondent failed to fully perform its obligations.

[36] The same apply to the estoppel defence raised by the appellant. This defence was based on the allegation that "[a]t all material times, the plaintiff held out to the defendant that he was up to date with his payments in respect of fees and that he was in fact in credit in respect of fees owing to the plaintiff,"

[37] In my view, as was found by the magistrate, the appellant failed to discharge the *onus* which was on him to prove that a representation was made which deceived the appellant. It is to be noted, that at some stage it was his version that he never received any of these *interim accounts*, but on the assumption

that he did receive some of them, as was shown in evidence, then these *interim accounts*, rendered in terms of the Mandate Agreement could never have deceived the appellant. In addition, no detriment, loss or prejudice was shown. An interim account is exactly what it is called and is not final. The view which appellant formed was based on his own misunderstanding of what the Mandate Agreement determined. It was not based on a misrepresentation made by respondent. I am in agreement with the finding of the learned magistrate that the appellant has not established the defence of estoppel on a balance of probabilities.

[38] As far as the magistrate's finding that the appellant was an unreliable witness is concerned there is no reason for this court to come to a different decision. The magistrate meticulously considered the evidence and formed her views without any misdirection. Having said this, I agree with the contention on behalf of the respondent that for purposes of interpretation of the Mandate Agreement the credibility finding is immaterial.

[39] What remains is the defences raised under the CPA. During argument before this court it was stated that this defence is not abandoned but it certainly was not strenuously argued. As found by this court, the Mandate Agreement was not misleading. The Mandate Agreement was signed by the parties after an open and transparent process. The appellant was at some stage advised by his ex-wife who is an attorney.

[40] In my view, the magistrate's evaluation of the evidence, in relation to the alleged breaches of the provisions of the CPA, is correct. These defences cannot be sustained. The respondent has shown that the *detailed specified account* was fair and reasonable, albeit, that it was delivered after a delay. The appellant should have agreed to have the draft bill taxed. This would have been done in accordance with the High Court tariff and the Mandate Agreement. Certainly, it would have curtailed proceedings and costs.

[41] The magistrate in, the exercise of her discretion, and after a full motivation, ordered cost on an attorney and client scale. It cannot be found that the

magistrate misdirected herself in the exercise of her discretion. Consequently, the cost order should stand.

[42] The following order is made:

42.1 The appeal is dismissed with costs.

R. STRYDOM, J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

L. ADAMS, J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,

For the Appellant: Adv. C. Bothma SC

Instructed by: DHD Attorneys

For the Respondent: Adv. N.M. Davis SC

Instructed by: Dreyer & Niewoudt

Date of Hearing: 17 August 2023

Date of Judgment: 24 November 2023