REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

(GAUTENG DIVISION, PRETORIA)

Case No: 44154/2021

Reportable: No
Of interest to other Judges: No
Revised: No
Date:

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SIGNATURE

In the matter between:

ALAN H MARGOLIS First Plaintiff

SAMANTHA MARGOLIS Second Plaintiff

and

OFFICE INSTALLATIONS SA (PTY) LTD First Defendant

HERNANI FERNANDO VIERA DE OLIVIERA FERRERIRA Second Defendant

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JUDGEMENT

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1 The plaintiffs claim monies from the defendants. The claim arises from the plaintiffs having represented the defendants in high court proceedings under case number 28465/2012. The defendants, in those proceedings, sued Martin Jan Scheffer ("Scheffer") and Edward Charles Gobey ("Gobey") for breach of a settlement agreement between Gobey, Scheffer and the second defendant ("Mr Fereirra").

2 The plaintiffs' claim is premised on an oral agreement between the plaintiffs and the defendants. The plaintiffs plead that the parties agreed that the plaintiffs would represent the defendants in the 2012 litigation, with the defendants paying disbursements incurred by the plaintiffs. A further term of the agreement was that the plaintiffs would mark a fee only on the conclusion of the 2012 litigation. The defendants admit the oral agreement.

3 There are three categories of disbursements to the dispute: costs incurred by correspondent attorneys engaged by the plaintiffs; payment by the plaintiffs for transcribing a record, and fees paid to advocates.

4 The defendants paid R311,000.00 for disbursements. They dispute the balance of the claim. They contend that the amounts are not justified. The plaintiffs initially claimed payment in the amount of R520 468.77. They abandoned an amount of R30,000.00, as the defendants may have paid this amount.

5 The plaintiffs are partners and practice as a firm of attorneys based in Waverley, Johannesburg. They had a long relationship with the defendants. The plaintiffs acted for Mr Fereirra as his attorneys in several matters leading to the 2012 litigation.

6 The plaintiffs engaged Jacobson & Levy Inc. as their correspondent attorneys in Pretoria in the 2012 litigation. They also engaged Mr Segal as counsel. The 2012 trial was delayed. The dispute was determined in June 2020, when the court found primarily in favour of the defendants.

7 The matter was initially allocated for trial on 4 November 2013. Mr Fereirra and his wife consulted with the plaintiffs and counsel leading to the scheduled trial date. Mrs Fereirra identified additional amounts that had to be claimed. The plaintiffs agreed that the amounts be included in the claim. This resulted in the defendants making two notices of intention to amend. The trial was postponed, with the defendants tendering costs. The trial, according to second plaintiff (Ms Margolis"), would otherwise have proceeded but for the late amendments.

8 The matter was then set down for trial in March 2015. Scheffer and Gobey were out of town on the scheduled trial date. They tendered costs and

sought a postponement. Ms Margolis and Mrs Fereirra disagreed in their respective evidence on whether the defendants agreed to the postponement.

9 Ms Margolis gave evidence that the defendants agreed to the postponement. This was denied by Mrs Fereirra. She said the plaintiffs agreed to a postponement against her instruction and that both she and Mr Ferreira wanted the trial to proceed and for defendants to seek default judgement. Ms Margolis gave evidence that the matter was defended and that the defendants would never have obtained default judgement. The trial was postponed. Scheffer and Gobey tendered costs in the amount of R35,000.00.

10 The matter was then allocated for trial on 21 November 2016. Scheffer and Gobey filed a notice on 8 November 2016 that they intended to call an expert. They then filed their Rule 39 (b) notice on 9 November 2016. Ms Margolis gave evidence that there had been no prior mention of either party calling an expert witness.

11 Ms Margolis gave evidence that the plaintiffs discussed the need to engage an expert with the Ferreira. The defendants agreed to engage an expert. Gobey had since died. Ms Margolis gave evidence that it was also agreed that his estate be substituted before the trial could proceed. The matter was removed from the roll because of the late filing of a notice to call an expert.

12 Mrs Ferreira, on the other hand, contended that the plaintiffs did not consult her or her husband before the plaintiffs agreed to the postponement. The plaintiffs, according to her, suggested the postponement to attorneys for Schaefer and Gobey.

13 It was not put to Ms Margolis that the defendants were unaware as to why the trial was postponed. It was also not put to her that the plaintiffs decided, unilaterally, to have the trial postponed. The complaint by Mrs Fereirra was mentioned for the first time when she gave evidence.

14 The matter was then allocated for trial on 26 October 2017. The trial was estimated to last some five days. The matter did not proceed. The parties again disagreed as to why the matter did not proceed.

15 Ms Margolis said the matter was crowded out because there were not enough judges and matters lasting more than two days were not heard. Mrs Fereira said the plaintiffs were responsible for the matter not proceeding because the plaintiffs "booked" the court for one day, knowing that the matter would last at least five days.

16 There is no reason not to accept Ms Margolis' evidence that the matter was crowded out. This is more so in the light of her other evidence that it was in the interest of the plaintiffs for the matter to be heard because the plaintiffs were to be paid their fee only at the conclusion of the trial. The plaintiffs had been responsible for disbursements associated with the dispute for years. It made no sense for the plaintiffs to engineer a postponement when that would be against their own interest. Mrs Fereirra had no appreciation

of the court process. This is shown by her evidence that the plaintiffs had "booked" the court for a day.

17 The Fereirra told the plaintiffs, following the postponement on 26 October 2017, that they wanted a new advocate. Mr Kaplan was then briefed, replacing Mr Segal. The plaintiffs advised Mr and Mrs Fereirra that Mr Kaplan charged at higher rate than Mr Segal.

18 The plaintiffs sent the defendants a breakdown of disbursements on 11 November 2019. The defendants had not asked for the breakdown. The breakdown included fees for counsel. The disbursements amounted to R462 000.00. The plaintiffs credited the defendants with the amount of R311,000.00 for disbursements; being Mr Ferreira's half share of a property he co-owned with the first plaintiff.

19 Ms Margolis gave evidence that the plaintiffs sent the defendants copies of invoices for counsel's fees as and when the plaintiffs received the invoices. She referenced several e-mails in which she and her father sent Mrs Fereirra and her husband copies of invoices from counsel. She denied that the defendants were only ever sent two invoices.

20 Mrs Fereirra gave evidence that the defendants only received two invoices pertaining to counsel's fees. She continued that she and Mr Fereirra first became aware of other invoices for counsel's fees when the plaintiffs instituted summary judgment proceedings against the defendants. Ms Ferreria also mentioned that she was unaware that the correspondent

attorneys had engaged counsel. She contended that those advocates were engaged without her and Mr Ferreira's prior approval.

21 The matter was then allocated for trial commencing on 29 July 2019. This followed the plaintiffs having requested a special allocation from the Deputy Judge President. Mrs Fereirra was pleased with how Mr Kaplan conducted the trial, as shown in text messages exchanged between her and Ms Margolis.

22 Ms Margolis sent Mrs Fereirra and her husband a written report on 25 June 2020 regarding the status of the litigation. She mentioned that the plaintiffs were awaiting judgement and that the defendants had not paid disbursements.

23 Judgement in the 2012 litigation was subsequently delivered. The plaintiffs sent Mrs Fereirra and her husband a copy of the judgement on 30 June 2020.

24 The court dismissed claim 1 by the defendants. The parties agreed that the court erred in the quantum awarded to the defendants. There was a shortfall of R810 144.76 in the total amount that ought to have been awarded to the defendants. The parties disagreed on what was to be done with the judgement.

25 Ms Margolis gave evidence that Mr and Mrs Ferreira felt strongly that the court should have allowed claim 1, which was a substantial amount. The Ferreira agreed that the judgement should be fixed. The plaintiffs discussed the issue, including seeking rectification whilst abandoning claim

1 or making a cross-appeal should Scheffer and Gobey appeal. The plaintiffs advised the Ferreira that a cross-appeal would be the best course to adopt. Mr and Mrs Ferreira agreed to the making of the cross-appeal.

26 Mrs Fereirra, unlike Ms Margolis, said Mr Fereirra, on receipt of the judgement, telephoned the first plaintiff and instructed him only to have the judgement rectified in relation to the incorrect amount. She continued that she and Mr Ferreira only became aware much later that the plaintiffs had sought a cross-appeal and did not have the judgement rectified. She further contended that the plaintiffs were not authorised to seek a cross appeal but did so because they were determined to go to the Supreme Court of Appeal in Bloemfontein at the expense of the defendants.

27 Gobey and Schaefer sought leave to appeal. The plaintiffs filed a cross-appeal. Leave to appeal and the cross-appeal were granted. The parties disagreed on the costs of transcribing the record. This cost forms part of items that make-up the disbursements claimed by the plaintiffs.

28 Mrs Fereirra said the defendants never authorised the plaintiffs to obtain the record or to pay for the transcript. That is because she and Mr Fereirra never authorised the cross-appeal, as the plaintiffs were instructed only to correct the judgement in relation to the quantum. Mrs Fereirra also said the attorneys for Schaefer and Gobey had, in any event, paid for the transcripts and that she had proof of the payment.

29 Ms Margolis wrote to Schaefer and Gobey's attorneys regarding their obtaining the record for the appeal. There was no positive response. The

plaintiffs, counsel and Mr and Mrs Fereirra discussed the fact that the attorneys for Scheffer and Gobey were not obtaining the record. It was then agreed that the defendants would obtain the record. That was because the defendants would otherwise forfeit the cross-appeal. Mr Ferreira agreed that the plaintiff pay a deposit to obtain the transcript. The plaintiffs then paid the 50% deposit to obtain the record.

30 Ms Ferreira's evidence that her husband instructed the first plaintiff only to rectify the judgement in relation to the quantum and that there was no authorisation for a cross-appeal is hearsay. The court pointed out, when Mrs Fereirra was to commence her evidence and on the court observing that Mr Fereirra was sat in court, to counsel for the defendants that the defendants were running the risk of hearsay. Counsel for the defendants informed the court that he was aware of the risk. Ms Ferreira then continued her evidence in the presence of her husband.

31 I am not persuaded that the plaintiffs decided unilaterally to cross-appeal, or that they did so because they wanted a ticket to the Supreme Court in Bloemfontein at the expense of the defendants. All indications are that the plaintiffs were solicitous in looking after the interests of the defendants. It again would make no sense for the plaintiffs to prolong the dispute between the defendants and Schaefer and Gobey. Litigation in the Supreme Court of Appeal meant a delay in the plaintiffs being able to charge their fee, whilst remaining liable for additional disbursements, including counsel's fees in the appeal.

32 It bears pointing out that the plaintiffs sent Mr and Mrs Fereirra the application for leave to appeal on 22 July 2020. The cross-appeal was served on 8 September 2020. The defendants did not demur, at the time, that the plaintiffs acted contrary to their instruction to only correct the quantum in the judgement. Mrs Fereira did not, in her text message to Mr Kaplan on 1 September 2021, raise a concern that the plaintiffs embarked on a cross-appeal contrary to their instruction.

33 The plaintiffs wrote to attorneys for Scheffer and Gobey on 20 July 2021, pointing out that those attorneys had not paid for the transcription; that their leave to appeal had lapsed and that the defendants would proceed with their cross-appeal on their own.

34 Mr Fereirra wrote to the plaintiffs on 4 August 2021, advising the plaintiffs that the defendants were terminating their mandate. That was because the defendants had no money to continue with legal representation. Ms Margolis replied on 5 August 2021. She expressed surprise that their mandate was terminated without any discussion. She further pointed out that the termination was after "…some two weeks ago, after having been advised that your opponents had failed to procure the court record, to outlay the deposit required by the transcribers…." She also detailed the disbursement that was due to the plaintiffs; together with fees which the the plaintiffs were prepared to accept.

35 Mr and Mrs Fereirra requested a meeting with the plaintiffs. The meeting occurred on 10 August 2021. The meeting was cordial. Ms Margolis

mentioned in the meeting that the plaintiffs' disbursements had not been paid. Mr and Mrs Fereirra advised that they did not have money.

36 The parties exchanged correspondence after the 10 August 2021 meeting. The plaintiffs wrote to Mr and Mrs Fereirra on 18 August 2021. The plaintiffs confirmed that their mandate had been terminated; that the disbursements were due, together with fees as mentioned in the plaintiffs' letter of 5 August 2021. The defendants were advised to pay with immediate effect.

37 Mr and Mrs Fereirra lodged a complaint against the plaintiffs with the Legal Practice Council on 31 August 2021. Ms Margolis gave evidence that there was nothing factual in the complaint and that the Fereirra were being vindictive. Ms Margolis continued that the Ferreira had not, in the past, questioned the work done by the plaintiffs.

38 There is force to the sentiments of Ms Margolis. The complaint to the Legal Practice Council is to be seen against the prior dealings between the parties. There is no correspondence or suggestion, before 4 August 2021, of the Fereirra raising concerns regarding the service rendered by the plaintiffs. This is illustrated by Ms Ferreira's letter to the first plaintiff on 8 November 2020.

39 Mrs Fereirra mentioned in the 8 November 2020 letter that she and Mr Fereirra were in a bad financial situation; that they could not pay or contribute anything at the moment, and that they were aware that it was unfair on the plaintiffs. Mrs Fereirra requested the plaintiffs to be patient.

40 There is no document, before 4 August 2021, in which the Fereirra complained that the disbursements by the plaintiffs were unreasonable; that the plaintiffs contributed to their financial woes; that the plaintiffs incurred unauthorised expenditure to the detriment of the defendants; that the plaintiffs failed to recover monies in favour of the defendants; that the plaintiffs engaged advocates without the prior approval of the defendants; that the plaintiffs had not sent invoices by advocates; that the plaintiffs postponed proceedings without the prior approval by the defendants; that the plaintiffs unilaterally decided to cross-appeal as a ticket to the Supreme Court of Appeal in Bloemfontein, or that the plaintiffs refused to provide the defendants with a breakdown of disbursements.

41 The very serious allegations made against the plaintiffs were first mentioned after the relationship between the parties had soured. The defendants terminated the services of the plaintiffs on 4 August 2020. The plaintiffs confirmed the termination on 10 August 2021. The Fereira lodged their complaint with the Legal Practice Council on 31 August 2021.

42 Ms Margolis explained the make-up of disbursements claimed by the plaintiffs. The disbursements were made-up of charges by Jacobson & Levy Inc. This item included payments to junior counsel in interlocutory matters. The other items were payment of counsel's fees for Mr Segal and Mr Kaplan, and the cost of the transcript in proceedings following the judgement in the 2012 matter.

43 The parties agree that the plaintiffs' claim is for disbursements, which are out of expense costs incurred by the plaintiffs. There was a difference of

view on whether the plaintiffs were entitled to all disbursements contended for.

44 The defendants raised several objections to disbursements claimed by the plaintiff. The objections were that the plaintiffs engaged counsel without approval by the defendants; that the defendants did not authorise the cost of the transcripts; the defendants also queried charges by Jacobson & Levy Inc.

45 Mrs Ferreira accepted that the plaintiffs were entitled to some payment. She contended that the plaintiffs issued instructions without prior consultation with her and Mr Ferreira, that the plaintiffs were not authorised to pay for the transcripts – because attorneys for Scheffer and Gobey were to pay and had paid for the transcript; that the plaintiffs were unaware of advocates having been briefed as reflected in the ledger by Jacobson & Levy; and that she and Mr Ferreira were only aware of two invoices by their advocates before summary judgement proceedings against them by the plaintiffs.

46 Ms Margolis explained the charges for advocates mentioned in the ledger by Jacobson & Levy. The charges were incurred in interlocutory matters. She mentioned that it was cost-effective to engage junior counsel in such matters. Ms Margolis repeated that the plaintiffs sent the defendants invoices by counsel on receipt of those statements by the plaintiffs. She referenced several emails in this regard. She denied that annexures “J” and “K” to the particulars of claim were the only invoices by the advocates that were sent to the defendants.

47 Ms Margolis disputed contentions by the defendants. The disbursements were justified and necessary. They were incurred in the furtherance of the litigation in the High Court. It was necessary to engage Jacobson & Levy Inc. because the litigation was taking place in the high court in Pretoria. The transcript was necessary. Attorneys for Scheffer and Gobey were not getting the record. The plaintiffs discussed the situation with counsel and the defendants. They mentioned that the cross-appeal would collapsed if the plaintiffs did not get the record: everyone agreed to pursue the extra R1 million, and Mr Ferreira told the plaintiffs to pay for the transcript.

48 Ms Margolis sent Mrs Fereirra an e-mail dealing with the cross-appeal on 22 July 2020, which showed that the defendants knew of the appeal. Ms Margolis said the defendants never told the plaintiffs that plaintiffs incurred disbursements unethically.

49 Ms Margolis pointed out that Mr and Mrs Fereira complemented the plaintiffs in how they carried out their work until the plaintiffs demanded payment. Ms Margolis referred to the exchange of texts between her and Mrs Fereirra, when Mrs Fereirra was complimentary on how Mr Kaplan conducted the trial. Ms Margolis also mentioned that Mr and Mrs Fereira never accused the plaintiffs of misconduct before 4 August 2021.

50 Ms Margolis illustrated their diligence in the steps taken by the plaintiffs to recover the R35,000 in relation to the 12 March 2015 order for wasted costs in favour of the defendants. Those steps included writing letters to attorneys for Scheffer and Gobey and issuing a writ that was served by the

sheriff. The writ returned non-service. Ms Margolis pointed out that the defendants can still recover the R35,000.

51 Ms Margolis agreed that charges by attorneys and advocates must reasonable. She pointed out that the defendants chose the advocate; that they used the services by the advocate and had to pay invoices by the advocate. She denied making decisions and concluding agreements with attorneys for Sheffer and Gobey without first consulting the Ferreira, pointing out that the latter were always involved.

52 The defendants did not plead a counter-claim in so far as the defendants contend that the plaintiffs contributed to the defendants' financial woes. Mrs Fereirra admitted the oral agreement as pleaded by the plaintiffs. She also admitted that disbursements are out of pocket expenses. The plaintiffs justified the items that make-up the claimed disbursements.

53 The plaintiffs' firm is based in Johannesburg. That necessitated engaging Jacobson & Levy as their correspondent attorneys. It also made sense for Jacobson & Levy to engage junior counsel for interlocutory matters as pointed out by Ms Margolis. It would have been unreasonable of Jacobson & Levy to engage counsel of greater standing for such matters. The plaintiffs paid Jacobson & Levy, as shown in the credits reflected in the ledger by Jacobson & Levy.

54 There is no question that the plaintiffs paid the fees rendered by both Mr Kaplan and Mr Segal. The defendants did not contradict evidence that those fees were paid.

55 There is equally no question that the plaintiffs paid transcribers to obtain a record for the cross-appeal. It was fanciful of Mrs Fereirra to say that the plaintiffs incurred those costs only because they wanted a ticket to the Supreme Court of Appeal. Mrs Fereirra, in her text message to Mr Kaplan on 1 September 2021, pointed out that Mr Kaplan had a separate fee for the leave to appeal. Mrs Fereirra did not, in her exchanges with Mr Kaplan, suggest that the plaintiffs were not authorised to seek an appeal. This must also be seen in the anxiety by the plaintiffs: they continued to incur costs on behalf of the defendants over several years without being paid. There is nothing to suggest that the plaintiffs were so irrational as to incur additional costs, without the prospect of immediate payment, only for a "ticket to the Supreme Court of Appeal."

56 The plaintiffs claimed R520 468.77 in their pleaded case. They are now seeking R490 468.77, having abandoned an amount of R30,000.00 on the view that the defendants may have paid that amount.

57 The plaintiffs established their claim. I make the following order:

(a) The defendants are ordered to pay the plaintiffs the amount of R490 468.77.

(b) The defendants are ordered to pay interest in the amount referred to above at a rate of 7%, from the date of demand to date of payment.

(c) The defendants are ordered to pay the costs.

Omphemetse Mooki

Judge of the High Court

Heard: 24 – 26 April 2024

Decided: 30 April 2024

For the plaintiffs: K J Braadvedt (attorney)

Instructed by: Braadvedt Attorney

For the respondent: E Mhlongo

Instructed by: A Mtothilal Attorneys Inc.