REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: A2022-021757

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

....
SIGNATURE **DATE**

In the matter between :

SIMON DELANEY Appellant

and

HI-TECH TRAINING ACADEMY (PTY) LTD First Respondent

HI-TECH TECHNICAL SERVICES CC Second Respondent

MICK SHAUN MARTIN Third Respondent

JUDGMENT

ORDER

(1) The appeal is upheld with costs.

(2) The order of the magistrate is substituted with the following order:

"1. The defendants are directed, jointly and severally, to pay to the plaintiff the sum of R42,000, together with interest thereon at the rate of 10.25% per annum from the date of summons to the date of final payment.

2. The defendants are directed, jointly and severally, to pay the party and party costs of the plaintiff, including the wasted costs of the postponements on 17 November 2021 and 10 December 2021."

DODSON AJ [MOORCROFT AJ CONCURRING]:

Introduction

[1] This is an appeal from the Roodepoort Magistrate's Court. It arises from a claim by the appellant, an attorney, for fees in the amount of R42,000 for professional services rendered to the respondents. The professional services consisted of the drafting of three contracts, namely a sale of shares agreement, a lease agreement and a consultancy agreement. The claim was opposed by the respondents. The magistrate dismissed the claim in its entirety.

[2] The magistrate dismissed the claim on the grounds, that (a) the attorney was bound by law to have in place a written agreement in respect of the fees to be charged, yet none had been concluded; and (b) the appellant had failed to

prove that he had a mandate from the respondents to draft the agreements. Insofar as costs are concerned, the magistrate ordered that each party was to bear their own costs, save in respect of two postponements at the instance of the respondents. In respect of these the respondents were required to bear the costs on the party and party scale.

The pleadings

[3] The appellant pleaded that the professional services were rendered pursuant to a partly oral and partly written agreement. Attached to his declaration were certain annexures. The first was a covering email dated 21 January 2019 saying–

> "Please find attached documents as per our telecom today. The proposal of 04/12/2018 was the original offer sent from the prospective buyers. Our contract should be suitable to both parties and payment terms [have] been relaxed to try to ensure they can comply."

[4] The first attachment to the email was a separate letter from the third respondent to the appellant in which he asked "as per our last telecom, can you prepare the contract as [discussed] with a draft as soon as possible based on information of parties and terms and conditions as below". The letter then itemises what the respondents wished to include in the sale of shares agreement. The letter goes on to provide that –

> "**A separate rental agreement** is to be concluded between the parties, which shall remain in force until the final payment for the purchase for Hi-Tech Training Academy (meaning after the last R500,000 instalment of the R3,000,000 purchase price). Thereafter both parties can extend the agreement on terms suitable to both parties." (emphasis in the original document)

[5] The second attachment was the unsatisfactory draft sale agreement of 4 December 2018 provided by the prospective purchaser.

[6] In a special plea the respondents asserted that the fee invoices had not been taxed to ensure their fairness and reasonableness. In the plea over, the respondents asserted that whilst the plaintiff had indeed been mandated to prepare a first draft of the sale of shares agreement, there were no further instructions given by the respondents. It was also asserted that the services had not been rendered with professional competence and further that the fee agreed for drafting the sale of shares agreement was a total amount of R2,000, not an amount of R2,000 per hour as pleaded by the appellant.

[7] Consequent on the special plea of non-taxation, the appellant referred the disputed invoices to the Fee Dispute Resolution Committee of the Legal Practice Council ("LPC fees committee"). The LPC fees committee dealt separately with the preparation of the sale of shares agreement on the one hand, and the preparation of the lease and consultancy agreements on the other. The third respondent, acting on his own behalf and on behalf of the first and second respondents, appeared, represented by counsel, at the first hearing of the LPC fees committee. The committee found that –

[7.1] the agreed hourly "tariff" was R2,000 per hour which had been verbally agreed;

[7.2] the rate of R2,000 per hour was fair and reasonable considering the complexity of the instructions, their urgency, importance and significance to the respondents, the years of experience of the appellant and the financial implications of the matter;

[7.3] the submission on behalf of the respondents that the appellant's failure to provide the respondents with an estimation of the fees, as required by section 35(7) of the Legal Practice Act No. 28 of 2014, did not avail the respondents because the section had not yet come into force;

[7.4] the number of hours charged for were "perhaps excessive" and were accordingly taxed down to 15 hours at R2,000 per hour giving a total permitted fee of R30,000 excluding VAT.

[8] That decision was made on 30 June 2020. In a later decision, dated 23 October 2020, the LPC fees committee dealt with the fees in respect of the lease and consultancy agreements. The respondents were alerted to the meeting of the committee but declined to attend. The fee of R12,000 charged by the appellant was upheld.

[9] Based on these findings of the committee, the appellant filed a replication in which he pleaded that –

> "14. The LPC findings regarding the issues in dispute are accordingly *res judicata.*
>
> 15. The LPC findings comprise administrative decisions which are final and binding and are subject only to review on grounds recognised by the Promotion of Administrative Justice Act, 2000.
>
> 16. This Honourable Court accordingly has no jurisdiction to set aside the findings of the LPC and to in effect grant a different ruling regarding:
>
> 16.1 The extent of the mandate given to the plaintiff by the defendants.
>
> 16.2 The professionalism of the plaintiff.
>
> 16.3 The fees due to the plaintiff for the professional services rendered."

The evidence

[10] The appellant in his evidence in chief testified that he had been in practice for 21 years, doing a mixture of commercial and public interest work, including the drafting of contracts. On 21 January 2019, the third respondent called him on behalf of the respondents and said that he would like the appellant to draft some agreements. In that telephone conversation the third respondent gave instructions on two of the three agreements, namely the sale of shares agreement, which was required urgently, and the rental agreement. In a subsequent consultation on 25 January 2019, he also received instructions to prepare the consultancy agreement. As the appellant put it, “the third [respondent] would ... shepherd in the new owners of the business through the consultancy agreement … Even though effectively the business would have been transferred, the third [respondent] would be mostly on site to help the new owners make a success of the new business”.

[11] The first draft of the sale of shares agreement was duly prepared and sent by the appellant to the third respondent on 31 January 2019 under cover of an email. On the same day, the third respondent answered acknowledging receipt and saying that he would “check and consult with the prospective purchaser and provide feedback asap". The appellant then went on to prepare the draft lease and consultancy agreements which he sent to the third respondent under cover of an email dated 1 March 2019. On the same day, the third respondent sent an email in reply saying:

> “Thanks for the email. Unfortunately the purchasers were not serious, which I suspected, so the deal just went flat. Also expected. Still seeing if I

> could get a serious partner with some cash injection, as I am financially embarrassed and business is slow due to no capital to progress.
>
> Will keep you posted."

[12] On 15 March 2019, the appellant sent his invoice for the drawing of all three agreements to the third respondent. A short while later, the third respondent replied –

> "Hi Simon
>
> Are you serious with this invoice?
>
> I think it is way too much.
>
> Kind regards"

[13] The appellant attempted several times to call the third respondent to discuss the matter with him. Eventually on 25 April 2019, the third respondent sent an email to the appellant apologising for not taking his calls and explaining that he had blocked his calls "as I am hounded by my creditors".

[14] He went on to ask that the appellant "please calculate a settlement amount that is fair and just that both of us can agree on as you see my financial position and while I am not training, I am just getting more into trouble. Also take note that I requested only the possible sale agreement and just mentioned that if the sale went ahead, then the consulting rental agreement would have been required, and I understand that you assumed the sale would go ahead, but I was hoping it would but had it at the back of my mind that it was a shot in the dark."

[15] In response to the request to settle the matter, the appellant sent a letter to the third respondent offering a 50% discount on his fees provided that they were paid within two weeks. No response was received within two weeks and on 9

May 2019, the appellant sent an email to the third respondent withdrawing the settlement offer.

[16] In cross-examination, the appellant was questioned about the quality of his work in preparing the draft sale of shares agreement. He was also cross-examined with reference to detailed typed notes pertaining to the consultation with the third respondent on 25 January 2019. These were typed notes which the appellant testified were prepared in part before the consultation and then supplemented during the course of the consultation. Significantly, the typed notes include the following:

> "What agreements are being concluded?
>
> 1) Lease Agreement: Hi-Tech Training Academy – Hi-Tech Technical Services. Are they renting both immovable property and movable property?
>
> A separate rental agreement is to be concluded between the parties, which shall remain in force until the final payment for the purchase for Hi-Tech Training Academy (meaning after the last R500,000 instalment of the R3m purchase price).
>
> *Owner of property :* Hi-Tech Technical Services
>
> Thereafter both parties can extend the agreement on terms suitable to both parties.
>
> 2) Agreement for sale of business & shares: Hi-Tech Training Academy – Izibuko.
>
> Seller : Hi-Tech Training Academy (Pty) Ltd
>
> With registration No.: 2017/041477/07
>
> Operating from registered address 1327 Spyker Crescent, Stormill, Ext 2, Gauteng, 1724
>
> Buyer : two companies (see SMS – Izibuko & Andipheli)

3) Consultancy Agreement: Hi-Tech Training Academy and Mickey Martin."

[17] In cross-examining the appellant regarding the ambit of his mandate, it was put to him, somewhat equivocally, that –

> "although there was a layout of the instruction, … the time periods for each instruction were not all given at once and … the instruction was first and foremost to draft this sale agreement."

[18] The appellant disputed this. He also disputed the assertion that a flat fee of R2,000 was to be charged for the sale agreement, contending that it would have been absurd to have expected him to charge this amount of money for a 19 page agreement.

[19] In his evidence, the third respondent insisted that the agreed fee was capped at R2,000 in total and testified to his shock when he received an invoice for R48,000. The rental and consultancy agreements were only to be drafted in the event that the sale went through.

[20] In cross-examination it was suggested to the third respondent that it did not make sense to draft the rental agreement separately when the rental agreement and the sale of shares agreement were interlinked. In response, the third respondent insisted that the conclusion of the sale agreement was to take place before any lease agreement or consultancy agreements would be prepared.

The appeal

[21] Shortly before the hearing of the appeal, the attorneys and counsel for the respondents withdrew. The third respondent therefore appeared in person and

was content to proceed on this basis, emphasising that he sought closure in respect of the matter after the lengthy period of time that had passed and the costs incurred. Fortunately, before withdrawal, heads of argument had been filed on the respondents' behalf and those have received the careful consideration of the court, along with the oral submissions made by the third respondent in person.

[22] Whilst accepting that an appellate court must exercise restraint in revisiting the factual findings of the trial court, the magistrate's decision cannot stand. Her reasons for dismissing the claim are encapsulated in the following paragraph:

> "After careful and considered deliberation of all the evidence in its entirety, the lack of a mandate and written fee-agreements between the parties, the plaintiff's claim is dismissed."

[23] Her assertion that before a fee can be charged by an attorney, there must be a written fee agreement in place, is not substantiated with reference to any statutory instrument or other law. Clearly section 35(7) of the Legal Practice Act does not provide a basis because it has not yet come into effect.[1]

[24] The respondents also relied on the rules 35.3 and 35.4 of the rules made in terms of ss 95(1), 95(3) and 109(2) of the Legal Practice Act.[2]

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[1] The opening part of s 35(7) reads:

> "When any attorney or an advocate referred to in s 34(2)(b) first receives instructions from a client for the rendering of litigious or non-litigious legal services, or as soon as practicably possible thereafter, that attorney or advocate must provide the client with a cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the legal services, including the following:
>
> (a) The likely financial implications including fees, charges, disbursements and other costs;
>
> (b) The attorney's or advocate's hourly fee rate and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate;
>
> (c) An outline of the work to be done in respect of each stage of the litigation process, where applicable;
>
> (d) ..."

[2] Published in Government Gazette No. 41781 dated 20 July 2018.

[25] Rule 35.3 provides as follows:

> "When written instructions are given by a client to an attorney, the attorney must make sure that they set out the intended scope of the engagement with sufficient clarity to enable the attorney to understand the full extent of the mandate. If the attorney is uncertain as to the scope of the mandate the attorney must seek written clarification of the intended scope of the written instruction."

[26] That does not provide a basis for the magistrate's conclusion because (a) it says nothing about fees and (b) it qualifies its application to the situation where written instructions are given by the client. Nowhere does it suggest that a written fee agreement or written instruction is a requirement imposed on an attorney before he or she may charge a fee.

[27] Rule 35.4 provides:

> "When the client instructs the attorney verbally, the attorney must as soon as practically possible confirm the instructions in writing and in particular must set out the attorney's understanding of the scope of the engagement."

[28] Again, that rule specifically envisages that it is permissible for an attorney to obtain verbal instructions. Whilst it requires the instructions to be confirmed in writing (as soon as practicably possible), it does not render such written confirmation a condition precedent to the charging of a fee. Indeed, the rule does not even deal with the charging of a fee.

[29] Unfortunately, this misconception on the part of the magistrate permeated her judgment.

[30] Insofar as the mandate is concerned, on the respondents' own pleading, there was indeed a mandate to draft the sale of shares agreement. There was

accordingly no basis for the magistrate to conclude the absence of a mandate in relation to that agreement. Indeed, as pointed out by Mr Coetzee on behalf of the appellant, on the learned magistrate's own reasoning, she ought at least to have made an award of the R2,000 which she concluded was the agreed fee for the drafting of that agreement. Instead she dismissed the claim in its entirety.

[31] Moreover, she failed to deal with –

[31.1] the express reference to "a separate rental agreement" in the letter setting out instructions provided by the third respondent to the appellant; and

[31.2] the third respondent's failure to raise any objection whatsoever, firstly when the lease and consultancy draft agreements were emailed to him on 1 March 2019 and, secondly, in his email of 15 March 2019 complaining about the invoice, where reference is made only to the amount of the invoice and not to the work covered by it. It was only some six weeks later on 25 April 2019 when the third respondent mentioned his dire financial circumstances, that he questioned the preparation of draft lease and consulting agreements.

[32] Taking these circumstances into account, including the appellant's notes of the consultation of 25 January 2019, along with the fact that his testimony withstood scrutiny under cross-examination, the magistrate ought to have found that the appellant was indeed mandated to conclude the draft lease and consultancy agreements in addition to the sale of shares agreement.

[33] Moreover, against that backdrop, and taking into account commercial reality, it could not reasonably have been expected by the third respondent that the appellant would agree to do all of the mandated work for a fixed fee of R2,000. This is the case even if the mandate had been limited to the drafting of the sale of shares agreement.

[34] In the circumstances, the magistrate ought to have found that the appellant had proven his claim in the reduced amount of R42,000, corresponding with the assessment of the Fees Dispute Resolution Committee of the LPC.

The Oudekraal point

[35] The foregoing conclusion has been arrived at without delving into the primary submission made by the appellant, namely that the magistrate was bound by the decision of the LPC fees committee to arrive at the same conclusion that it had done. The appellant argued that the effect of the magistrate's dismissal of his claim was, in effect, to review the decisions of the LPC fees committee, whereas those decisions stood until set aside in review proceedings before a High Court.[3]

[36] The respondents' answer to this contention was that the regulatory regime brought about by the Legal Practice Act, and the delegated legislation made under it, pertained to and bound only the legal practitioners falling under the aegis of the LPC, not members of the public using their services.

[37] Mr Coetzee on behalf of the appellant urged this court to decide the issue of the status and effect of the LPC fees committee's decisions, in order to provide

[3] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC); *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

clarity in the public interest. Given the basis for our finding above, it is not necessary to deal with this issue. The principle of judicial economy discourages courts from going beyond the issues necessary for the decision of a matter. Moreover, it would be undesirable to reach conclusions on the status of the LPC fees committee's decisions in the absence of submissions from the LPC and other components of the organised legal profession. That is an issue for another day.

Costs

[38] That leaves only the question of costs. Costs must follow the result and ought to have done in the proceedings before the magistrate.

[39] Finally, there is the question of costs in relation to the two postponements that took place at the instance of the respondents. Those were dealt with by the magistrate on the basis of an order that the respondents pay the appellant's wasted costs of the postponements on the party and party scale. Before us, Mr Coetzee urged that one of those ought to have been awarded on a punitive scale, raising also the possibility of a *de bonis propriis* costs order against the respondents' then attorney. However, we see no basis for interfering with the magistrate's exercise of her discretion in relation to the wasted costs of the postponements.

[40] The following order is accordingly made:

(1) The appeal is upheld with costs.

(2) The order of the magistrate is substituted with the following order:

"1. The defendants are directed, jointly and severally, to pay to the plaintiff the sum of R42,000, together with interest thereon at the rate of 10.25% per annum from the date of summons to the date of final payment.

2. The defendants are directed, jointly and severally, to pay the party and party costs of the plaintiff, including the wasted costs of the postponements on 17 November 2021 and 10 December 2021."

_____
AC DODSON AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

I concur and it is so ordered:

_____
J MOORCROFT AJ

Counsel for the Appellant : Mr DJ Coetzee
Instructed by: Delaney Attorneys

No appearance for the respondents

Date of hearing: 1 August 2023

Date of Judgment: 28 August 2023