DELETE WHICHEVER IS NOT APPLICABLE

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES/NO~~

(3) REVISED ✓

28 JULY 2011

DATE SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEAL CASE NO: 5060/2010
SGHC CASE NO: 22210/2008

In the matter between:

BRIAN KAHN INCORPORATED Appellant
(Applicant in the court *a quo*)

and

MELLENEY VENESSA SAMSUDIN Respondent
(Respondent in the court *a quo*)

JUDGMENT

VAN EEDEN AJ:

1. In the court *a quo*, presided over by our brother Moshidi J, the appellant applied for judgment of some R260 000.00, together with interest, the claim being based on professional services allegedly rendered by the appellant, a firm of attorneys, to the respondent, its erstwhile client. The appellant claimed that there was *"no dispute of any nature whatsoever in regard to the*

respondent's indebtedness to the applicant".[1] It further alleged that the respondent's mandate to it had been reduced to writing, and in support of that contention it attached two documents to its founding affidavit, collectively termed *"the engagement letter"*. The respondent, nevertheless, disputed both the amount of her alleged indebtedness and the conclusion of the so-called engagement letter. That dispute notwithstanding, these clauses of the engagement letter remain relevant to this appeal:

> *"15.1 In accordance with the modern trend throughout the western world to avoid, wherever possible, litigious or hostile environments, this firm commits itself to the process of alternate dispute resolution ("ADR") in dealing with you. It is therefore a term of this firm's accepting your mandate (and by extension, our attorney/client relationship with you) that should there be any dispute of any nature whatsoever between this firm and you, whether in relation to the quantum of our charges or otherwise, such dispute is to be resolved by way of:-*
>
> *15.1.1 mediation (see 15.2.1); and*
>
> *15.1.2 if mediation is unsuccessful, arbitration (see 15.2.2).*
>
> *15.5 The aforesaid dispute resolution mechanism (i.e. mediation and arbitration) replaces the taxation or where applicable assessment of charges by the Law Society. In other words, should you at any time*

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[1] Page 6 para 4.

require this firm to justify or determine quantum (in respect of any charges – fees, disbursements or interest) there shall be deemed to be a dispute in regard to the quantum of our charges and mediation and arbitration will take place as the only processes involved in quantifying the charges."

2. In opposing the relief sought, the respondent prayed that the application be dismissed, alternatively that the application be stayed pending the submission to and taxation of the appellant's bills of costs.[2] The respondent's approach to the mediation and arbitration clause was expressed in these terms:

> *"23.2 In the premises, even if the above Honourable court were to find that I am bound to Applicant in terms of Annexures "NG1" and "NG2"[3] to the founding affidavit (which is denied), it is a term of those documents that:*
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> *23.2.1 accounts are payable upon "presentation" and inasmuch as there was no presentation of the aforesaid accounts to me, the amount claimed is not payable;*
>
> *23.2.2 any dispute in regard to Applicant's fees has to be resolved by mediation, and if mediation is unsuccessful, then arbitration (clause 5 of Annexure "NG2"). There*

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2 Page 384 para 3.
3 These documents constitute the so-called engagement letter.

has been no mediation or arbitration and Applicant was not entitled to institute these proceedings." [4]

3. When the matter was called in the court *a quo*, the appellant was represented by Mr Subel SC and Mr Strathern. Mr Kaplan represented the respondent. He informed the court that he wanted to raise a point *in limine*. He handed in heads of argument dated 25 March 2010, which was the date upon which the application was heard in the court *a quo*. It appears that he had only advised Mr Subel of this point the previous day. From the heads of argument it appears that the so-called point *in limine* essentially entailed the contention that since the appellant failed to allege that the amount claimed had either been agreed upon or had been taxed, the appellant could not recover the amount claimed. Mr Kaplan stated that although the conclusion of the engagement letter was in dispute, the court could approach the matter as though the engagement letter was binding *"for purposes of this argument"*.[5] Mr Kaplan referred the court to paragraph 15.5 of the engagement letter, already quoted hereabove, which stipulates that a dispute of fees would be submitted to mediation and arbitration to the exclusion of taxation or assessment of charges by the Law Society. He then contended that since the appellant had chosen to launch the motion proceedings in issue, it was precluded from relying on Clause 15.5, i.e. the matter could no longer be referred to mediation and arbitration, and that the appellant was consequently obliged to tax a bill of costs. Mr Kaplan concluded that since it was common cause that

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4 Page 371 para 23.2.
5 Page 724 para 5.

the appellant had refused to submit to taxation, the application fell to be dismissed with costs. Mr Subel resisted the application that the so-called point *in limine* be argued first. He contended that it was not a discrete issue, that it formed part of the substance of the application and consequently had to be argued as such.

4. It brooks of no doubt that a court is empowered, in the exercise of its discretion, to direct that a preliminary point be disposed of first in motion proceedings.[6] It will be ordered when the issue is one of substance that may dispose of the matter as a whole, or at least of a substantial portion thereof. In such circumstances it will normally be convenient to allow the parties to first complete argument on the preliminary issue and, depending on the outcome thereof, to only then proceed with the remainder of the matter. This procedure is particularly apposite when the legal issues are crisp and far removed from any conflict of fact, much like when parties first argue a legal issue, but nevertheless request a court to refer the matter to oral evidence if the appellant should lose the legal point.[7]

5. The court *a quo* did not expressly rule on the question as to whether the so-called point *in limine* had to be argued first and separately from the remainder of the application or not. In fact, it seems uncertain that it afforded counsel a proper opportunity to debate this issue. Be that as it may,

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6 Raymond v Abdulnabi & Others 1985 (3) SA 348 (W) 349E. It is very often applied when *locus standi* is in issue. De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others 2002 (6) SA 370 (W) and Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd & Another 2001 (4) SA 842 (W).

7 Fax Directories (Pty) Ltd v SA Fax Listings CC 1990 (2) SA 164 (D & CLD).

Mr Kaplan's point *in limine* did not raise a crisp or discrete legal issue. The argument entails that the engagement letter evidences a contract, and effect must consequently be given thereto unless that is prevented by some impediment. Mr Kaplan's argument did not raise a legal impediment preventing the implementation of the engagement letter that could justify a dismissal of the application. Instead, it required of the court to make further factual findings to determine, at the very least, whether the appellant had waived the right to insist on the mediation and arbitration clause. In other words, the argument advanced the proposition that the court should accept that the engagement letter was binding, but that the mediation and arbitration clause could no longer be enforced. If this limited concession did not raise an academic point that could not realistically assist in bringing the matter to finality, it came perilously close to it. It was made for the limited purpose of securing an order that the application be dismissed on the basis of the argument advanced, and if that failed, the application as a whole had to be dealt with afresh, but on the true factual position. If the court rejected the waiver argument, the limited concession did not empower the court to refer the dispute to mediation and arbitration, nor to grant the applicant the relief it sought. Courts are not called upon to adjudicate academic issues, and will generally decline to decide questions on provisional facts, for that will inevitably mean that their decisions are equally provisional.[8] In my view the approach suggested by Mr Kaplan was not one upon which the court *a quo* should have acted at all. And whilst there may be some doubt as to whether

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8 Standard General Insurance Co Ltd v Commissioner for Customs and Excise 2005 (2) SA 166 (SCA) [6] to [9].

full argument was allowed on the separation of the point *in limine*, there is no doubt that no argument was heard on the substance thereof. When granting leave to appeal, the court *a quo* accepted that counsel for the appellant did not present argument in respect of the point *in limine*.[9] I am convinced that the omission by the court *a quo* to have afforded counsel for the appellant the opportunity to address the court, happened *per incuriam* and not by design. Nevertheless, the omission deprived the court of the benefit of oral argument *"in which counsel can fully indulge their forensic ability and persuasive skill in the interest of justice and their clients"*.[10] I accordingly find it surprising that on appeal counsel did not refer to any authorities relevant to this issue. The court *a quo* made these orders which I quote *verbatim*:

> *"1. That the point in limine is upheld.*
>
> *2. That the Applicants is to tax his account, if he wants to.*
>
> *3. That the Applicant shall pay the costs of the application."*

6. It is a fundamental principle that every litigant should be given a fair opportunity of addressing the court. But the mere failure on the part of a court to hear argument is not necessarily an irregularity or fatal to the proceedings. It was, for instance, not regarded as a fatal irregularity when the circumstances were such that there was a duty to speak on the part of the litigant, or on his or her representative. Thus in **Willemse v Cape Town**

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9 Page 741 line 24.

10 Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd 1973 (1) SA 627 (AD) 628G.

Stevedoring[11] the court held that notwithstanding *"a certain celerity with regard to the proceedings"*, it was satisfied from the information supplied in counsel's affidavit that it would have been possible to call back the Magistrate who had failed to hear the appellant's counsel on the applicability of certain legislation relevant to the case. Although the application for review was consequently dismissed, Juta JP emphasised that every party is entitled to put his case before the court which is hearing it, and stated that such entitlement included the right to argue on the facts. Similarly, in **R v Cooper** [12] the Chief Justice writing for a unanimous and distinguished bench[13], found that there was no irregularity in the proceedings when a trial judge inadvertently omitted to ask the appellant whether he wanted to address the jury under circumstances where the appellant was quite aware of his rights, but made no attempt to exercise them. The Chief Justice added that even if there had been an irregularity, the appellant could not take advantage thereof. In **Serfontein v Bosch**[14] De Villiers JP found himself in full agreement with authorities quoted *"to the effect that it is not necessarily a gross irregularity if the court merely omits to hear argument (exemptly gratia, per incuriam), for in such circumstances the attorney or advocate should draw the court's attention to the omission immediately"*. And in **S v Bressler** it was held that if no prejudice is established, the irregularity will also not be regarded as fatal, and in such an

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11 Willemse v Cape Town Stevedoring Company & Another 1916 TPD 507.
12 Rex v Cooper 1926 AD 54.
13 Innes CJ, Solomon, De Villiers, Kotzé and Wessels JJA.
14 Serfontein v Bosch 1930 OPD 75 78.

instance a higher court will not interfere.[15] In these matters the irregularity has no consequence on appeal or review.

7. In other instances, however, the failure to hear a party, whether intentional or per *incuriam*, may be fatal to the proceedings. In **Serfontein v Bosch**[16] the Magistrate dismissed an application for a postponement and without hearing the defendant's attorney in argument on the merits, granted judgment for the plaintiff. In doing so, the Magistrate did not commit a mere oversight, but intentionally refused to hear the defendant's attorney. The intentional refusal to hear argument constituted a gross irregularity, which resulted in the proceedings after the closing of the plaintiff's case to be set aside. The matter was remitted back to the Magistrate's court for continuation of the trial. Similarly, in **District Commandant v Murray**[17] the Appellate Division upheld a decision of the Cape Provincial Division setting aside criminal proceedings where an accused was not given the opportunity of giving evidence in his own defence, and of calling such other witnesses as he may desire. In **Shenker's** case[18] an accused was sentenced where his counsel was afforded no opportunity to address the court in mitigation. It was held that the proceedings were irregular and prejudicial to the appellant and sentence was accordingly set aside.

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15 S v Bressler 1967 (2) SA 451 (A) 458B-C.
16 Serfontein v Bosch 1930 OPD 75 78.
17 District Commandant, South African Police & Another v Murray 1924 AD 13.
18 Shenker v Additional Magistrate, Wynberg 1965 (3) SA 121 (CPD).

8. Whenever the failure to hear a litigant, or his or her counsel, is fatal to the proceedings, the particular circumstances of the matter must dictate the future of the matter. If possible, the court of appeal will adopt a pragmatic approach and will dispose of the matter rather than to remit it to the court of first instance. In **Shenker's** case the accused was, after the setting aside of the sentence, sentenced afresh by the court of appeal. There are further examples. In **Bressler's** case the Appellate Division considered and confirmed the sentence imposed by the court *a quo*.[19] In **Transvaal Industrial Foods**[20] the Appellate Division acceded to the request to *"rehear"* the matter without having any regard to the findings of the court *a quo*. It followed the same approach as it would if a trial judge had *"ascended into the arena"*, namely by having no regard to the court *a quo*'s findings on issues such as credibility.[21] A similar approach was adopted in **Ntuli v Zulu**[22], where a review of the North Eastern Divorce Court came before the High Court, during which it appeared that the presiding officer had refused to hear argument. The court elected not to remit the matter back for rehearing. In **Simaan's** case[23] the court also held that all the material necessary for a decision was substantially before it, and imposed a fresh sentence.

9. When granting leave to appeal, the court *a quo* expressed frustration that appellant's counsel did not raise its failure to hear counsel there and then.[24] I

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19 S v Bressler 1967 (2) SA 451 (A) 455 B-H.
20 Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd 1973 (1) SA 627 (AD) 628G.
21 Solomon & Another, NNO v De Waal 1971 (1) SA 575 (AD) 581A.
22 Ntuli v Zulu & Others 2005 (1) SA 456 (NPD).
23 Simaan v SA Pharmacy Board 1982 (4) SA 62 (AD) 80G.
24 Page 741 [8].

am left with the impression that the court *a quo* raised this consideration to indicate that had attention been drawn to the oversight, it could or would have rectified the irregularity that had occurred *per incuriam*. On appeal Mr Cassim SC assisted by Mr Kaplan directed some criticism at their colleagues' failure in this regard. Mr Strathern, who appeared on his own, advised us from the Bar that there was indeed some discussion on re-approaching the presiding judge in order to discuss the events, and Mr Kaplan confirmed this. The parties were, however, unable to agree on how to achieve that, mainly I believe, because the respondent adopted the attitude that it would not abandon the order made. I do not think Mr Subel and Mr Strathern can be faulted for failing to direct the court's attention to its failure to hear argument from them. They must have been taken by complete surprise, not only by the celerity of the proceedings, but also by the nature of the order made. The order was not one which the respondent had moved for. No reasons for the order were seemingly given, and the absence thereof could only have added to their surprise.[25] It seems clear that there was no reasonable opportunity for counsel to debate the matter with the court *a quo*, and they cannot be said to have rested supine when the order was granted.[26] Any argument placed before a court that has already pronounced on the issue is not on the same footing as argument presented while the matter is open.[27] In my view the failure to hear counsel amounted to an irregularity fatal to the proceedings, and the appeal must thus succeed. The conundrum to be

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25 The Supreme Court of Appeal has recently again stressed the importance of giving reasons for order – see S v Maake 2011 (1) SACR 263 (SCA) [19].

26 Compare S v Bressler 1967 (2) SA 451 (A) 457G; Shenker v Additional Magistrate supra 125E.

27 District Commandant, South African Police & Another v Murray 1921 AD 13 19.

answered is whether the application should be remitted back, or whether this court should dispose of it.

10. The application raised an important issue, namely whether an attorney can contract out of having a disputed account submitted to taxation or assessment by the Law Society, as Clause 15.5 of the engagement letter purports to achieve. In concluding Clause 15.5 (assuming that the appellant proves the conclusion of the engagement letter) the parties clearly sought to oust taxation or assessment of charges by the Law Society. In support of this the appellant attached an unreported judgment of this division to its heads of argument.[28] In this matter Pienaar AJ granted an application that the respondent submits to mediation and arbitration where a similar dispute existed. The agreement between the attorney and his client expressly provided for mediation and arbitration in the event of a dispute about fees arising. The respondent argued for an implied or tacit term to the effect that the attorney's bills of cost could nevertheless be submitted for taxation upon request, and that the agreement between them did not exclude his right to demand taxation. Pienaar AJ held that no implied or tacit term could be read into a contract where there is a contradictory express term, and consequently ordered the respondent to proceed to mediation and arbitration. The court *a quo* did not purport to follow Pienaar AJ, and the latter's decision is of course not on appeal before us. The decision does, however, seem to run counter to the reasoning adopted in the reported matters dealing with a client's

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[28] Case No 03/15874 Brian Kahn Inc v Pereira Salvadore Pais & Others.

entitlement to insist that his or her attorney's account be taxed.[29] The reasoning in all of these matters appear to be that when an attorney's account is disputed, it has to be determined whether the work in respect of which the attorney's claim lies, was both authorised and performed. In addition, it must of course also be determined that the fee in issue is reasonable.[30] As I understand it this function is performed under the auspices of the relevant Law Society of which the attorney is a member, and I am perplexed by the notion that agreement between an attorney and his or her client can divest the Law Society of these powers. The Law Society may very well be an interested party in proceedings such as these.

11. The issues raised by this application are important not only for the parties in this matter, but also for the whole of the attorneys' profession and the public at large. Even though these are motion proceedings, where the evidence is before us on affidavit, I still believe that this is not a matter where this court should itself adjudicate the application. The cases referred to above,[31] where courts of appeal finally disposed of the matters, stand on a different footing. No important legal principle was at stake in any of the matters. There was no possibility of a further party having an interest in the result of the matter. The parties either requested the court of appeal to finally dispose of the matter, or acquiesced in that approach. In this matter both parties accepted that if the appeal should succeed, the matter would be remitted back to the

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29 E.g. Blakes Maphanga Inc v Outsurance Insurance Co Ltd 2010 (4) SA 232 (SCA) [17], Muller v The Master & Others 1992 (4) SA 277 (TPD) 283H and Benson & Another v Walters & Others 1984 (1) SA 73 (AD).

30 Compare Malcolm Lyons & Munro v Abro & Another 1991 (3) SA 464 (W) 469D-E.

31 See paragraph 9.

High Court, and consequently did not address us on the merits. It consequently appears that there is no compelling reason why this court should also act as court of first instance. It would then be more appropriate for this court to remit the matter back to the High Court, so that all may benefit from the insight of a court of first instance, and of such contribution as the Law Society might offer to both the factual and legal issues. In reaching this conclusion, I was guided by the reasoning of the Constitutional Court in **Women's Legal Centre Trust**,[32] even though that matter concerned an application for direct access to that court. It seems to me that the Constitutional Court's approach is refusing to act as a court of first instance should also find application to the circumstances of this matter.

12. The appeal was advanced on the narrow basis that a fatal irregularity had occurred in the court *a quo*. There was consequently no reason for the appellant to file an eight volume record consisting of some 750 pages, without at least indicating which portions of the record were considered relevant and which not. Large portions of the record turned out to be irrelevant, such as responses to a notice in terms of Rule 35(12) and applications for condonation for the late filing of affidavits. Mr Strathern submitted that only the costs of the record should be disallowed and that the costs of the appearance on appeal should be ordered to follow the result. In my view that approach would not sufficiently address the failure to exclude the irrelevant material from the record, or at least to identify the irrelevant

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32 Women's Legal Centre Trust v President of RSA 2009 (6) SA 94 (CC) [27] and [28].

material when the heads of argument were filed. In the circumstances I deem it appropriate to refuse to make any order in respect of costs.

13. In the result I propose the following order:

1. The appeal is upheld and the orders of the court *a quo* are set aside.

2. The application is remitted back to the High Court for hearing on the ordinary opposed roll.

H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT

C J CLAASSEN
JUDGE OF THE HIGH COURT
I AGREE

C E NICHOLLS
JUDGE OF THE HIGH COURT
I AGREE

IT IS SO ORDERED

Counsel for appellant: Adv P Strathern
Instructed by: Brian Kahn Inc

Counsel for respondent: Adv N A Cassim SC and Adv J L Kaplan
Instructed by: Rothbart Inc

Date of argument: 5 May 2011
Date of judgment: