IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case number: 23534/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

D & A CALENDARS CC — First Applicant

DARRYL ALBERT BANNISTER — Second Applicant

and

BANNISTER'S PRINT (PTY) LTD — Respondent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Applicants seek to have an agreement of settlement which was made an order of court declared to have been fraudulently created and null and void ab initio and to have the court order set aside. The alleged fraud is that of an attorney ("Lieberthal" [1]) perpetrated on the applicants who were his own clients. Understandably, applicants contend that the fraud of Lieberthal "unravels all" whilst, equally understandably, respondent contends that it should not be visited with the consequences of fraud in which they played no part and where they were entitled to rely upon the authority of Lieberthal as representative of the applicants.

2. An action was instituted by respondent against first applicant in April 2011, was defended and was enrolled for hearing in February 2013. On 5th February 2013, an agreement of settlement was telefaxed through to court, apparently signed by both parties, counsel appeared and the document was made an order of court.

3. Subsequently, second applicant discovered that the document which had been emailed to him by Lieberthal[2], printed out and perused by second applicant, initialled by him on the first to fourth pages, signed by him on the last page and returned by his driver to Lieberthal [3] was not the document which was tendered by Lieberthal to counsel and then made an order of court. On obtaining a copy of the document which was made an order of court, second applicant formed the opinion that the "*second, third and fourth pages are forgeries*" in that the portions which had been deleted on those pages in the document signed by himself are not deleted and the initials on those pages are not his manuscript[4]. The upshot, says second applicant is that "*I did not sign that document. It is a forgery. ....The forgery was perpetrated by Lieberthal*".

4. Respondent has pointed out that he has no knowledge of these various allegations but states that he finds it "*inexplicable that second applicant would initial these pages other than to signify he attests to his terms*" or that "*he was acquiescing to the content of the agreement*"[5] . In short, the respondent appears to doubt applicant's version but is unable to place same squarely in dispute. Respondent's substantive response is that

[1] Although not an admitted attorney, Lieberthal had completed his articles of clerkship and was employed in a professional capacity to carry out the work of an attorney.
[2] Para 15 of the founding affidavit and annexure FA15
[3] Paras 15 to 18 of the founding affidavit and annexure FA14
[4] Para 23 of the founding affidavit.
[5] Paras 22 and 28 of the answering affidavit.

"if there was a fraud [his own attorney] was responsible. The respondent cannot bear the consequences of this[6]*."*

DISPUTE OF FACT

5. Of course, it is not competent for this court to determine any dispute of fact which may exist concerning the authenticity of any document. Neither party asked in their pleadings for this matter to be referred to evidence or to trial, although, in argument, counsel for respondent made it clear that the fraud was not common cause, that there remained certain queries as to second applicant's initialing of the document of both documents and submitted that the matter should be referred to oral evidence.

6. On the one hand, the contents of the affidavit of Lieberthal's employer, the resulting disciplinary action taken by his employer against Lieberthal and Lieberthal's own email referring to his psychiatric treatment for *"bipolar disorder"* ,tendering his apologies for *"any distress"* caused and indicating that he cannot offer any mitigation in respect of the disciplinary sanction all confirm applicant's version. On the other hand, respondent sets out a backdrop to the initial dispute averring that second applicant will do anything to delay or avoid the financial consequences of this litigation, that he doubts the (dis)connection between the contents of both the 'original' and the 'forged' document and the initials placed thereon.

7. However, there is no express dispute as to whether or not there is a forgery and whether or not Lieberthal perpetrated a fraud. The second applicant has made a number of averments which are substantiated in various respects and the respondent is unable to dispute same and merely states his ignorance of this state of affairs. This is not an issue on which the credibility of a potential witness has been challenged and where evidence is required before coming to a conclusion on an issue where the parties have opposing or disparate versions. Notwithstanding the bizarre behavior of Lieberthal, the version of second applicant is neither impossible nor contradicted in any way.

FRAUD BY THE LEGAL REPRESENTATIVE

8. Fundamental to the conclusion of any settlement agreement to finalize the litigation between respondent (as plaintiff) and applicants (as defendants) must be a meeting of minds between these parties. Central to this agreement must be concurrence as to the document which encapsulates their intentions. In the present instance, applicant is

[6] Para 28 of the answering affidavit.

basically complaining that there was no such meeting of minds because that which he signed and believed was to be handed up to be made an order of court was entirely different to that which respondent signed and which was handed up to be made an order of court. Essentially, there was no agreement between the parties which could be called a settlement or any other type of agreement.

9. In this sense, the often repeated saying "fraud unravels all" is apposite because the fraud of Lieberthal precluded a meeting of minds since the parties were not in agreement as to that which they were signing. Although this quote is a transposition from other cases where it was the perpetrator of the fraud who was attempting to resile from the contract, in the present instance there was a fraud perpetrated by the third party, Lieberthal, which unravelled any intended concurrence between plaintiff and defendants/ respondent and applicants. There was never agreement between the parties which could be made an order of court.

10. To my mind, reliance upon earlier judgments which deal with the authority with which attorneys are usually clothed is misplaced in the present case.

11. Firstly, *"attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interest."*[7] Lieberthal was never clothed with such general authority and that the 'agreement' which was made an order of court purported to be signed by second applicant on behalf of himself and first applicant indicates that Lieberthal had not so concluded any agreement.

12. Secondly, the role of Lieberthal in procuring this 'agreement' seems to be limited to that of conduit between the parties. He was not purporting to act in terms of any general or specific authorisation. Respondent has set out that the process involved proposals for settlement made by respondent's attorneys, Lieberthal apparently responded[8] confirming that his clients were prepared to settle on the proposed terms and respondent's attorneys then prepared an agreement of settlement which was forwarded to Lieberthal[9]. When the matter was called on the trial roll at the High Court, the original 'agreement' had yet been produced and the matter was stood down until a copy of the 'agreement' was telefaxed through to the court which copy was then made an order of

[7] MEC v Kruizenga 2010 (4) SA 122 SCA at para [11].
[8] I have been unable to locate this letter at either FA20 or anywhere else in the papers.
[9] Para 6 of the answering affidavit.

court.[10] Again, Lieberthal does not claim to conclude any agreement as representative of applicants. Unlike the facts in other litigation to which I was referred, Lieberthal did not profess himself entitled to settle on behalf of applicants. He purported to respondent that he was passing on the respondent's document to applicant for signature and he purported to respondent that that document had been agreed to and signed by second applicant when this was not the case. He purported to second applicant that he was passing on the respondent's document to applicant for signature when this was not the case and that this was the document which he was forwarding to respondent when this was not the case.

13. Thirdly, one has to *examine " whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself*"[11]. No such conduct on the part of the applicants has been demonstrated. The document was a forgery, initials were falsely placed on certain pages and portions of the document which had been deleted when furnished to the applicants were not deleted from the document presented to respondent. None of these misrepresentations emanated from applicants.

14. Accordingly, I find that the issue of authorization does not arise in the present case. Such representations as were made by Lieberthal did not pertain to his authority but to the authenticity of the documents which he was circulating between the litigants.

COSTS

15. Applicants asked for costs from respondent only in the event of respondent opposing this application.

16. Respondent chose to oppose. It is my view that they were entitled so to do. Respondent was, in every sense, the "innocent party" in this matter and was entitled to defend the order of court which had been taken in good faith on the basis of a document which respondent had no reason to believe was the forgery of a crazed or depressed or maniacal legal representative. Since the opposition of respondent was not unreasonable, I do not intend to mulct respondent in costs at this stage.

17. Insofar as applicants are concerned, they offered respondents the incentive that minimal costs be incurred. They were entitled to bring and have been successful in this application. I do not intend to mulct applicants in costs at this stage.

---

[10] Para 7of the answering affidavit.
[11] Kruizenga supra at para [20]

18. Accordingly, I propose to make an order that the costs of this application are costs in the cause. As and when this matter is finalized – by way of trial or by way of settlement – the costs can be allocated - either where success is found or where compromise suggests.

19. I do not believe that this is an application which justified the costs of two counsel, senior and junior, or senior counsel for the applicants and accordingly such costs as are deferred are only costs in respect of one junior counsel.

20. Orders are made as follows:

    1.1 Declaring the deed of settlement, annexurs FA8.2 and FA16 to the founding affidavit to have been fraudulently created and null and void ab intio.,
    1.2 Setting asaide the court order granted on 5th February 2013 in terms whereof the deed of settlement referred to in paragraph 1.1 supra was made an order of court.
    1.3 The costs of this application shall be costs in the cause.

Dated at Johannesburg on this day the 26th of November 2013.

K.SATCHWELL.

Counsel for Applicants: Adv. G. I. Hoffman with him Adv. J.L. Kaplan

Counsel for Respondents: Adv. M.M. Segal

Attorneys for Applicants: Ian Levitt Attorneys

Attorneys for Respondents: Schoonees Belling & Georgiev Attorneys

Date of hearing: 13th November 2013

Date of Judgment: 28th November 2013