IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 30053/2020

1) REPORTABLE: YES
2) OF INTEREST TO OTHER JUDGES: YES
3) REVISED: NO
4) Date: 19 November 2021

In the matter between:-

JOSEPH GEOPHREY SHIVAMBU First Applicant

GRACE HLAMALANI CHAUKE-MOHLOMI Second Applicant

and

FR PANDELANI INC Respondent

Coram: Booysen: Acting Judge of the High Court of South Africa

Heard on: Monday 15 November 2021

Delivered: 19 November 2021

Summary: **Attorney –** Legal Practice Act ("LPA"), 28 of 2014 - Section 87 - Monies received in trust for fees and disbursements to be held in a trust account until services rendered and valid tax invoiced rendered before payment can be offset from the trust account.

JUDGMENT

BOOYSEN AJ

INTRODUCTION

[1] The applicants seek to compel the respondent to account for monies entrusted to the respondent's trust account and a special cost order on the scale between attorney and client.

[2] Prayer 1 of the notice of motion reads as follows:-

> "*The respondent be ordered to account to the applicants for an amount of R21 582.16 paid to them by the applicants to execute an antenuptial contract on the applicants' behalf*."

BACKGROUND

[3] The respondent filed a comprehensive answering affidavit setting out the history of its attorney-client relationship with the second applicant, which commenced during/or about September 2014.

[4] In June 2015, the second applicant instructed the respondent to execute and register an antenuptial contract. Accordingly, the respondent prepared and furnished the second applicant with a draft of the antenuptial agreement.

[5] The applicants did not attend to the notary public for the signature before they were married on 27 June 2015, which marriage was registered with the Department of Home Affairs on 30 June 2015.

[6] On 30 June 2015, the respondent, in writing, advised the second applicant that the respondent's office could register the applicants' antenuptial contract with the office of the Registrar of Deeds within 3 (three) months from 30 June 2015.

[7] According to the Respondent, the applicants did not cooperate and failed to present themselves to finalise the matter, despite numerous requests.

[8] On 25 October 2016, the second applicant telephonically enquired if she could still register the antenuptial contract. The respondent advised her that she could proceed with a universal partnership agreement or apply to the High Court for an order to change the applicants' matrimonial property system.

[9] Due to the second applicant being dilatory in paying previous accounts, the respondent insisted that she place him in funds and settle the outstanding charges for legal services rendered from 25 June 2015 to 30 June 2015.

[10] On 25 October 2016, the respondent furnished the second applicant with a statement of account for R21 582.16. The account is headed "*Statement of Account*" and contains 5 (five) small disbursements for a telephone call, instructions to Baloyi Conveyancers, drawing a cheque and attending to pay Baloyi Conveyancers. The largest is the disbursement of R19 700.00, payable to Baloyi Conveyancers.

[11] The applicants then paid R21 582.16 in 2 (two) instalments, R11 582.16 on 21 November 2016 and the balance of R10 000.00 on 26 April 2017.

[12] On 29 April 2017, the second applicant enquired from the respondent to uplift the court order. At that time, the respondent had already commenced drafting papers for an application envisaged in the Matrimonial Property Act 88 of 1984. The relationship practically ended, as it was the last interaction.

[13] In writing on 11 February 2020, the applicants' attorney terminated the respondent's mandate and urgently requested copies of the respondent's file contents, including its statement of account, if any, for the work done to date. Attached was a termination of the mandate, duly signed by the applicants.

[14] After further correspondence, the applicants' attorneys, in writing on 5 March 2020, advised the respondent that (a) they noted that the antenuptial contract, which the respondent drafted and caused the applicants to sign before their marriage in 2015, was not registered in the Deeds Office system, (b) that the applicants have "*concluded that you have failed to execute mandate they given to you*", (c) demanded from the respondent a

refund of R21 582.16, paid to execute and register the antenuptial contract and (d) failing payment the applicants would take the necessary action against the respondent, which "*include but not limited to reporting your conduct to the Legal Practice Council, issuing of summons to recover the above amount of R21 582.16 and costs they will incur in approaching the High Court for change of their matrimonial property regime from in community of property to out of community of property*."

[15] The respondent denies that the amount of R21 582.16, or any portion thereof, constitutes trust funds.

[16] The respondent did not register an antenuptial contract with the office of the Registrar of Deeds.

[17] The respondent's answer is simply that as of 29 April 2017, the second applicant owed far more than R21 582.16. A conservative estimate of fees due, owing, and payable was R38 000.00 before the High Court appearances.

[18] According to the respondent's version, the account statement was a fee estimation for the deposit required to execute its mandate.

ISSUE TO BE DETERMINED

[19] The crisp issue is if the respondent is obligated to account or simply retain the deposit for the services rendered.

ACCOUNT

[20] The person seeking an order for an account must establish a fiduciary relationship between that person and the other party, an agreement, which obligated accounting or a statutory provision created such an obligation. See **Absa Bank Bpk v Janse Van Rensburg** 2002 (3) SA 701 (SCA)

LEGAL PRACTICE ACT ("LPA"), 28 OF 2014

[21] Section 84 of the Legal Practice Act ("LPA"), 28 of 2014 subsection (1) obligates every attorney who practises for his own account, alone or in a partnership or as a director of a juristic entity, to have a Fidelity Fund certificate.

[22] Section 84 Subsection (2) prohibits any legal practitioner or person employed or supervised by that legal practitioner to receive or hold funds or property belonging to anyone unless the legal practitioner concerned has a Fidelity Fund certificate.

[23] Section 84 (3) applies the requirement for a Fidelity Fund certificate to a deposit taken on account of fees or disbursements for rendering legal services.

[24] Section 86 - Trust accounts - subsection (1) obligated every legal practitioner referred to in section 84 (1) to operate a trust account. In other words, every attorney practising for his own account, alone, in a partnership or as a

practice director, must use a trust account.

[25] Section 87 subsection (1) requires legal practitioners with trust accounts to keep proper accounting records in respect of: -

> "(*1) A trust account practice must keep proper accounting records containing particulars and information in respect of- (a) money received and paid on its own account;*
>
> *(b) any money received, held or paid on account of any person;*
>
> *(c) money invested in a trust account or other interest-bearing account referred to in section 86; and*
>
> *(d) any interest on money so invested which is paid over or credited to it."*

[26] Section 88 - Trust money and trust property of trust account practice - stipulates that trust monies does not form part of the assets of the trust account practice and reads:-

> *"88* ***Trust money and trust property of trust account practice***
>
> *(1) (a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice-*
>
> *(i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34 (2) (b); and*
>
> *(ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.*

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.

(2) Trust property which is registered in the name of a trust account practice, or jointly in the name of an attorney or trust account practice and any other person in a capacity as administrator, trustee, curator or agent, does not form part of the assets of that attorney or trust account practice or other person.

ATTORNEYS' TRUST ACCOUNT

[27] Section 33 (1) of Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, repealed by the LPA, imposed two duties on practising attorneys. Firstly, to keep a separate trust account and deposit all money received on account of any person and secondly to keep proper books of account containing particulars and information as to money received, held, or paid on account of any person. In addition, section 33 (2) required the attorney to keep all trust money until payment to the persons entitled to it so that there are always sufficient funds in that account to cover all trust obligations. See **Incorporated Law Society, Transvaal v G** 1953 (4) SA 150 (T) and **Rheeder v Ingelyfde Wetsgenootskap Van Die Oranje-Vrystaat** 1972 (3) SA 502 (A)

[28] Every attorney must realise that trust account obligations are a fundamental duty, a breach of which may easily lead to removal from the roll. See

Incorporated Law Society, Transvaal v K and Others 1959 (2) SA 386 (T)

[29] An agreed sum paid to an attorney to cover fees and disbursements is trust funds, as some part of that amount is held as the client's agent, i.e., received by the attorney on account of his client. See **Incorporated Law Society, Natal v Cornish** 1961 (1) SA 24 (N).

[30] **Incorporated Law Society, Transvaal v U** 1964 (2) SA 243 (T) at 247 made the position clear that all money an attorney holds and which he has not yet earned are held by him *'for or on account of any person'*. Therefore, an attorney must pay a composite amount for disbursements and part for fees into trust. The attorney may withdraw the amount for fees only once he has done the work.

[31] Legal practitioners failing to keep proper books, handling trust funds recklessly and with a cavalier approach has been found guilty of misconduct, not fit for purpose, and struck off the roll of attorneys. See **Holmes v Law Society Of The Cape Of Good Hope And Another law Society Of The Cape Of Good Hope v Holmes** 2006 (2) SA 139 (C)

[32] Before the hearing of the matter, I forwarded the Full Court, per Mr Justice van der Linde's judgment in **Praxley Corporate Solutions (Pty) Ltd v Werksmans Incorporated** (A5074/15) [2017] ZAGPJHC 21 (28 February 2017), to the parties, which dealt with the consequence of a client paying attorneys' fees freely and voluntarily and held:-

"[29] Benson Is authority for the proposition that an attorney is entitled to sue for its fees and disbursements once the mandate is either terminated or completed, without having to wait for taxation.

…

[30] This passage stresses the entitlement of a client to raise the taxation of the attorney's bill, ultimately with delaying effect only. But that Is still far cry from saying that the right to Insist on taxation may be Invoked after voluntary election to pay the account without then raising fraud, overreach or error.

[31] These authorities relied on by the appellant accordingly do not support the proposition that it advances. It seems more in accordance with principle and logic to approach the issue in this appeal in the following way.

[32] First, contractual obligations are discharged by performance in accordance with what the parties had agreed. If the obligation is to pay, then that obligation is discharged by payment. The then Appellate Division articulated this first principle as follows in Harrismith Board of Executors v Odendaal:

> '*Payment is the delivery of what is owed by a person competent to deliver to a person competent to receive. And when made it operates to discharge the obligation of the debtor (Grotius 3.39.7; Voet 46.3.1)*.'

[33] The discharge of the obligation does not exclude further, subsequent causes of action by the debtor against the creditor arising, such as where it is discovered there had been fraud, misrepresentation, or error. Each of those causes of action has its own requirements for sustainability, and may give rise to claims by the debtor against the creditor.

…

[40] This passage leads to the third proposition, which is that whereas our common law supports the proposition that a client can, before payment, Insist on taxation (with dilatory effect), it does not afford any authority for the proposition now advanced by the appellant, which is that after payment the attorney can be compelled to have its accounts taxed, merely because the client would like it, without an assertion of fraud, overreach or error, and just to see whether the client might have an enrichment action for overpayment.

[41] The extent of the common law practice has been to have permitted the intercession of the Taxing Master prior to the client being compelled to pay in the face of the latter's challenge to the quantum of the bill, but no further. And it is understandable that it should have been so. The judicial oversight over the fees and disbursements of attorneys, and the invocation of the State machinery In aid of the oversight, Is apt when an attorney is seeking a judgment from the court for the amount of fees claimed. When however the fees have already been paid without demur, and the client wishes ex post facto to investigate whether or not there should have been demur in the first place, that is a matter for the civil law of contract and the remedies that avail there.

[42] Non constat that a client who has paid its accounts is disentitled later from, prescription considerations aside, sending its paid bills to a private taxing consultant, who might or might not advise that there has been overpayment measured against the fair and reasonable yardstick, and then suing the attorney for recovery on the basis of a condictio indebiti. There may of course be obstacles to success along the way, because without a mistake or compulsion, no condictio indebiti lies in our law.

[43] But that is different from saying that the client is entitled, after payment without protest, to insist that the attorney initiates and procures a taxation of

the invoices it had submitted, and which the client had voluntarily paid, just so that the client can decide whether or not it has a cause of action In enrichment against the attorney. It follows that the appeal cannot succeed."

SUBMISSIONS

[33] Mr Ramantsi, appearing on behalf of the respondent, relied on Praxley (*supra*) and Rules 16, 18.7, 18.8 and 21 to the Legal Practice Council Notice 198 of 2019 ("Code of Conduct"), effective 29 March 2019, which deals with the Legal Practice Counsel's intervention, taxation, and assessments of attorneys' accounts.

[34] He submitted fees paid voluntary is not subject to taxation or challenge. The Code of Conduct provides sufficient means by which the applicants could obligate the respondent to account for the fees paid, weighed against the legal work done in connection with the matter in dispute, accordingly the applicants have not exhausted other available remedies before bringing an application for this interdict.

[35] Mr Malowa, appearing on behalf of the applicants, submitted that it was implicit in the attorney-client relationship and the fiduciary relationship between an attorney and client that there was an obligation on the respondent to account for the amount paid.

[36] Mr Malowa submitted that no debt is due. The applicants cannot submit any account for taxation until the respondent accounts. The complexity of the

matter warrants the involvement of the High Court, albeit a tiny *quantum*.

[37] A registered VAT vendor is obligated to render, within 21 days of the date of supply of the service, a tax invoice conforming with Section 20 of the Value Added Tax Act, Act 89 of 1991, falling to do so is an offence in terms of section 58 of the Value Added Tax Act.

[38] The second applicant's deposit was, according to the respondent, exhausted when he last spoke to the second applicant on 29 April 2017. The respondent had to, within 21 days, submit a tax invoice for the services rendered before the respondent could offset the invoiced amount against the trust monies. The respondent did not keep the funds in trust, thus contravening his obligations to retain monies not yet earned separate from his business account held in **Incorporated Law Society, Transvaal v U** (supra) at 247.

[39] On 11 February 2020, the applicant's attorney terminated the respondent's mandate and demanded repayment of the trust monies on 5 March 2020.

[40] The Legal Practice Act commenced 1 November 2018. The Code of Conduct is effective from 29 March 2019, and the applicants issued the application on 8 October 2020.

[41] The applicants could have approached the Legal Practice Counsel for assistance, but they could also approach the court for relief at the risk of an adverse cost order. However, I will excuse the attorneys for possibly not

being aware of the Code of Conduct. The respondent's counsel brought it to my attention in his supplementary heads of argument filed shortly before the hearing.

[42] The respondent rendered services up to 29 April 2017 and must issue a tax invoice before setting off his fees against the monies in his trust account and paying the balance to the second applicant.

[43] Should the applicants disagree with this invoice, they can submit it to the Legal Practice Council for scrutiny and taxation.

[44] Accordingly, I make the following order:-

(1) The Respondent, **FR PANDELANI INC,** is ordered to, within 14 days of the date of this order, render a tax invoice to the second applicant, **GRACE HLAMALANI CHAUKE-MOHLOMI,** for the services rendered as of 29 April 2017**.**

(2) The respondent must submit the tax invoice, and a copy of this judgment to the Legal Practice Council, for taxation, within 5 days of having rendered the tax invoice to the second applicant.

(3) The respondent can set off the amount taxed by the Legal Practice Council from the R21 582.16 held in trust and pay the second applicant's balance.

(4) The respondent must pay the costs of this application.

AJR Booysen

Acting Judge

19 November 2021

DATE OF HEARING: 15 November 2021
DATE OF JUDGMENT: 19 November 2021

FOR THE APPLICANTS: adv MJ Malowa
MASHAMAITE MR ATTORNEYS INC.
E-mail: mrmashamaiteattorneys@gmail.com

FOR THE RESPONDENT: adv TB Ramantsi
FR PANDELANI INCORPORATED
E-mail: frpinc@outlook.com &
tiroramantsi@yahoo.com