REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

29/11/12

CASE NO: 10069/2010

(1) REPORTABLE: YES / NO

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

(3) REVISED. 29/11/12

In the matter between:

FORENSIC RESTITUTION (PTY) LTD **PLAINTIFF**

(Registration Number: 2002/025528/07)

and

KWINANA AND ASSOCIATES (GAUTENG) INC **DEFENDANT**

(Registration Number: 2004/003961/21)

J U D G M E N T

KUBUSHI, J

[1] This is a claim by the plaintiff against the defendant for payment of an amount of R1 628 285.37 being for professional services rendered by the plaintiff on behalf of the defendant to the office of the Compensation Commissioner (the Commissioner) relating to the forensic investigations commissioned in that office.

[2] The plaintiff issued certain invoices to the defendant for work already performed. The defendant paid some of the invoices but is refusing to pay the remaining ones. As a result of a dispute that arose between the plaintiff and one of its employees who was involved in this project, the defendant paid part of certain of the amounts claimed by the plaintiff into its attorneys trust account.

[3] At the commencement of the hearing I was informed by the parties' counsel that the plaintiff had initially instituted action against the defendant by way of motion proceedings on the same cause of action for the same amount as claimed in this action. And that on the 3 September 2010, Ranchod J, handed down judgment in that matter. In that judgment, the court concluded that the applicant (the plaintiff in this matter) succeeded to

establish that the respondent (the defendant in this matter) was the party it contracted with.

[4] The court found, that the plaintiff has substantially succeeded in so far as the claims relating to the amounts that the defendant had paid into its attorneys' trust account. It ordered the defendant to pay the said amounts together with interest thereon to the plaintiff. However, the claim in respect of the difference between the amounts the plaintiff invoiced to the defendant and the amounts the court ordered the defendant to pay to the plaintiff remained in issue. And the court referred it to trial for determination.

[5] Finally the court issued the following order:

(i) it granted judgment in favour of the plaintiff against the defendant, in respect of the claims wherein the defendant had paid part of the invoiced amounts to its attorneys, for an aggregate amount R819 218.25 together with interest thereon at the rate of 15.5% to be calculated from different dates stipulated in the order until date of final payment;

(ii) it referred the balance of the plaintiff's claim against the defendant to trial with specific direction that the plaintiff file its declaration within 30 days from the date of the order, the Rules of Court to apply thereafter to the exchange of further pleadings and processes in respect of the matter; and

(iii) It ordered the defendant to pay the costs of the application.

[6] The parties informed me further that pursuant to that judgment, on 27 September 2010, the defendant applied and was granted leave on 28 November 2010, to appeal the judgment of 3 September 2010. The defendant filed its notice of appeal on the 21 December 2010. On 17 March 2011, the parties, in disregard to Ranchod J's judgment, agreed between themselves, that the appeal proceedings be discontinued and the whole matter, including the claims decided by Ranchod J, be referred to the trial court for determination. It is on this basis that the matter is before me on the same issues – cause of action and amount claimed.

[7] My view is that this was an improper procedure to follow. A judgment of a court cannot be set aside by agreement between the

parties. It can only be set aside by a court of competent jurisdiction on appeal or review. See **EX PARTE NAUDE** 1964 (1) SA 763 (D & CLD) at 764F.

[8] The general rule is that an order of a court of law stands until set aside by a court of competent jurisdiction and until that is done a court order must be obeyed even if it is erroneous. It is an important principle of our law that once judgment has been delivered it is regarded as final and cannot again be enquired into. It becomes *res judicata* and creates rights between the litigants. After pronouncing an accurately drawn up judgment a court becomes *functus officio* as well. Its jurisdiction in the case is fully and finally exercised and its authority over the subject-matter ceases. It can as a result, not alter, supplement, amend or correct that judgment. See **MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM v KRUISENGA** 2008 (6) SA 264 at paras [25] – [28] and **CLIPSAL AUSTRALIA PTY LTD v GAP DISTRIBUTORS (PTY) LTD** 2009 (3) SA 305 at 312G – H.

[9] The following facts are common cause in this instance, namely, that the parties cited in the application proceedings are substantially the same parties as cited in the matter that is before me; that the issues raised by the applicant and the defence raised by the defendant in its opposing affidavit in that application proceedings are substantially the same issues raised in the declaration by the plaintiff and the defence raised in the defendant's plea that are before me in this matter; and that Ranchod J deliberated on those issues and granted judgment in respect thereof.

[10] The judgment of the court of 3 September 2010, is, in my view, clear, unambiguous and final and I am, therefore, not competent to make an order that can nullify the effect thereof. The judgment can only be set aside or altered by a court of competent jurisdiction on appeal or review and must as such stand.

[11] The claims that were referred to trial are, as already stated, in respect of the amount that is the difference between the amounts the plaintiff invoiced to the defendant and the amounts the court

ordered the defendant to pay to the plaintiff. And it relates to the following invoices: 1276, 1277, 1282 and 1287. The dispute herein is in regard to the rates to be charged and discounts to be applied. The main issue is whether a discount of 25% is applicable or not. There are also two invoices: 1314 and 1315 which according to the plaintiff have not been paid at all. These six invoices are in respect of the claims that I must deal with in this matter.

[12] The plaintiff claimed the following invoices in the Notice of Motion:

Date	Invoice number	Amount
30/09/09	1314	R 58 144.56
30/09/09	1315	R106 317.54
30/10/09	1276	R226 645.68
30/11/09	1277	R707 744.49
30/12/09	1282	R449 046.00
30/12/09	1287	R 80 387.10
		R1 628 285.37

The remaining balances after the judgment of 3 September 2010 are made up as follows:

Date	Invoice	Amount	Payments	Balance
30/09/09	1314	R 58 144.56		R 58 144.56
30/09/09	1315	R106 317.54		R106 317.54
30/10/09	1276	R226 645.68	R 16 758.00	R209 887.68
30/11/09	1277	R707 744.49	R475 593.75	R232 150.74
30/12/09	1282	R449 046.00	R246 838.50	R202 207.50
30/12/09	1287	R 80 387.10	R 80 028.00	R 359.10
		R1 628 285.37		R809 067.12

[13] At the hearing of the case the plaintiff led the evidence of a single witness, its sole director David Michael Oswald. Its evidence is that its director, Oswald, did not discuss the rates directly with the defendant but through Frik Kitching who was its employee. Kitching then discussed the rates with him. The rates agreed upon by the parties were as *per* the prevailing rates of the Auditor General less 10%. The further information he received from Frik Kitching and confirmed by a director of the defendant, Ms Kwinana was that the Commissioner has negotiated a further once off discount of 25 %. This discount came through the second payment the plaintiff received from the defendant. He confirmed that it was normal that in a sub-contracting contract that a discount is used. Frik Kitching did not inform him about further 25%

discounts for the other months as such he did not know about those discounts. And if Frik Kitching negotiated and agreed with the defendant about these further discounts of 25%, he was not authorised by the plaintiff to do so and he therefore acted to the prejudice of the plaintiff.

[14] When the invoices were submitted to the plaintiff with the incorrect calculation, a complaint was lodged with the defendant through Tendai Mapenda an employee of the defendant who has always communicated with plaintiff on this account. The invoices with the incorrect amounts (lower rates) were sent to the defendant by Frik Kitching who used the wrong rates that included the 25% discount that was never agreed upon.

[15] In its particulars of claim the plaintiff alleged that the parties were agreed as to the rate payable to it in respect of the services rendered to the defendant by its relevant employees and sub-contractors. The plaintiff rendered certain invoices to the defendant based on the rate agreed and the time sheets of the said employees and the sub-contractors. The defendant paid

some of the invoices but refuses and/or neglects to pay the remaining invoices.

[16] The defendant's plea is that it did not receive invoice number 1314 and 1315 and that the amounts in invoice 1277, 1276, 1282 and 1287 were incorrectly calculated by the plaintiff and as such do not reflect the correct amounts. It pleaded also that it was an express term of the agreement that a discount of 25% will be given to the defendant for the work done in October, November and December 2009 months.

[17] At the close of the plaintiff's case I had to determine whether the plaintiff had made out a *prima facie* case in respect of these claims.

[18] It is trite that absolution should not be granted at the end of the plaintiff's evidence except in very clear cases. A plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim – to survive absolution, because without such evidence no court could find for the plaintiff.

It must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. Questions of credibility should not normally be investigated until the court has heard all the evidence which both sides have to offer. See **GORDON LLOYD PAGE & ASSOCIATES v RIVIERA** 2001 (1) SA 88 (SCA) at paras [2]; **DE KLERK v ABSA BANK LTD** 2003 (4) SA 315 (SCA) at 323 par [10] and D T ZEFFERTT & A P PAIZES: **THE SA LAW OF EVIDENCE** 2nd ed p179.

[19] In his address, the defendant's counsel contended that the *onus* was on the plaintiff to prove that there was no 25% discounts agreement between the plaintiff and the defendant and that the plaintiff failed to discharge that *onus*. She based this contention mainly on the prevarication by the plaintiff's witness when answering questions about the discount.

[20] In this instance, my view is that the plaintiff has made out a *prima facie* case to which the defendant has to answer. As stated in **THE SA LAW OF EVIDENCE** above, contradictions are not a

basis for absolution. I therefore did not go into questions of credibility, leaving them out until all the evidence from both sides has been heard.

[21] There is evidence, in my view, in this instance, which remains unchallenged at this stage, namely, that the parties had agreed to a particular rate, that is, the Auditor General's rate less 10%; and further evidence that the discount of 25 % was never agreed upon and that if Frik Kitching had negotiated such a discount he had no authority as an employee of the plaintiff to do so. These are allegations, which, to me, deserve an answer from the defendant.

[22] I therefore as a result make the following order:

(i) The judgment of the 3 September 2010 is final and cannot be nullified.

(ii) Absolution from the instance is refused in respect of the claims referred to trial.

(iii) Costs are reserved for adjudication at the main trial.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE	: 17 AUGUST 2012
DATE OF JUDGMENT	: 29 NOVEMEBR 2012
PLAINTIFF'S REPRESENTATIVE	: MR W. VAN NIEKERK
PLAINTIFF'S ATTORNEY	: WAYNE VAN NIEKERK INC
	C/O BERNHARD VAN DER HOVEN
DEFENDANT'S REPRESENTATIVE	: MS L. MBANJWE
DEFENDANT'S ATTORNEY	: L MBANJWE INCORPORATED