THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO. 215/00

In the matter between

SHAPIRO & DE MEYER INCORPORATED **Appellant**

-and-

RUDOLPH SCHELLAUF **Respondent**

Coram: Vivier, Marais, Streicher, Mpati, JJA and Froneman AJA.

Heard: 20 November 2001.

Delivered: 27 November 2001

JUDGMENT

FRONEMAN AJA

[1] The history of this matter is an unhappy one. Many reckless allegations of incompetence and dishonesty on the part of various attorneys, advocates

and judges have been made by one of the parties in the course of these and related proceedings. They are, however, irrelevant to the only material issue on appeal, namely to what extent the respondent (an erstwhile client) is liable to reimburse the appellant (a firm of attorneys) for fees paid to counsel by the appellant for the preparation of heads of argument in another appeal on behalf of the respondent.

[2] The appellant succeeded in obtaining judgment for the full amount it claimed from the respondent in the Pretoria magistrates' court. On appeal to the Transvaal Provincial Division of the High Court (before Claassen and Smith AJJ) the respondent succeeded in having that amount reduced. Both parties were granted leave to appeal to this court, but the respondent failed to prosecute his appeal and consequently the only appeal properly before this court is that of the appellant.

[3] The sorry tale started when a farm venture arising from the purchase of a farm by the respondent and some acquaintances of his went awry. The dispute landed up in court, but was eventually settled. The respondent brought an unsuccessful application to set aside the settlement agreement. Leave to appeal was refused by the court hearing the application, but granted to the respondent by this court to the Full Bench. Counsel who was originally involved in the matter was not available to do the appeal and efforts were made to obtain the services of another. Senior counsel from Pretoria was then briefed to prepare heads of argument and to argue the appeal. He asked for a consultation with client because he considered two of the four points to be raised on appeal to be without merit. The respondent, his wife and Mr. Shapiro, an attorney of the appellant firm, attended the consultation where counsel informed them of his views. Afterwards the

respondent and his wife expressed their unhappiness at this turn of events to Shapiro. Some two weeks later the appellant's mandate to act for the respondent was terminated. By that time counsel had drafted the heads of argument. Appellant paid counsel's account and sought to recover the balance still owing to the appellant by the respondent, from him. The respondent refused to pay, which led to the present round of litigation.

[4] Much colourful detail has been left out of this brief account of the background to the matter. What matters for the purposes of this appeal, however, is what transpired at the consultation with counsel and thereafter, from the time that respondent, his wife and Shapiro left the consultation until the appellant's mandate to act on behalf of respondent was terminated.

[5] In my view it is important to emphasize this relatively narrow ambit of the issue on appeal. After the appellant's mandate was terminated a bill of costs was duly drawn up by the appellant and presented for taxation. Respondent had the opportunity to contest the reasonableness of the fees on taxation and, if not satisfied with the outcome, to apply for a review of the taxation. The taxation was not taken on review. When the matter came to trial in the magistrates' court the only issues on the pleadings were (1) whether counsel had in fact spent the number of hours reflected on his statement of account in reading the record and (2) whether the respondent had terminated or suspended the appellant's mandate to require the senior counsel concerned to prepare the heads of argument, prior to counsel having worked on the heads of argument. The first issue was a non-starter: the taxation process had effectively disposed of that question. Nevertheless, it was a point persisted in even on appeal, on the premise that correspondence

between Shapiro and counsel showed that counsel only received the appeal record after the date his account records that he read the record. There is no merit in the point. The letter from Shapiro refers to the petition (more accurately the application) for leave to appeal, not the actual record of the appeal. Another red herring was respondent's assertion in evidence at the trial that counsel was only briefed for advice and not on appeal. The magistrate rightly rejected this evidence and there are no grounds on record to justify interference on appeal with that finding. What remains is the second issue, the determination of which depends on what effect the consultation and the events following upon it had on the earlier mandate given to the appellant to brief counsel for the appeal and for counsel to prepare heads of argument.

[6] Shapiro testified that at the consultation on 12 March 1996 counsel was given the go-ahead to prepare for the appeal on the basis of the two points he considered arguable. After the consultation the respondent and his wife went to a coffee shop where they expressed reservations about counsel's advice to Shapiro. Shapiro indicated that if they were unhappy they should let him know whether they still wanted the other two points to be argued and whether another advocate should be instructed or not. On 12 March the respondent sent a fax to Shapiro in which he stated that it was not possible for them to make such a quick decision and in which he requested clarification on a number of matters. On 14 March he sent another fax complaining that Shapiro had not replied to his queries. This letter again set out a litany of complaints that respondent had about the litigation process. On 18 March Shapiro replied, explaining in some detail what options were available to the respondent, and suggested that if respondent was dissatisfied

with the advice given by counsel then respondent should instruct appellant to brief another counsel (respondent avers that he only received this letter on 30 March). On 24 March, the respondent terminated appellant's mandate to act for him in the appeal. By then counsel had already spent considerable time in preparing the heads of argument and sent an account to the appellant for payment of his fees in connection with the preparation of the heads of argument. Appellant paid him and, as noted earlier, the only real issue in the appeal to this court is whether in doing so it acted within its mandate from the respondent.

[7] In the court below Claassen AJ held that in circumstances outlined above there was a duty on Shapiro to convey the respondent's misgivings to counsel and that "the original mandate to continue with the appeal was withdrawn or at least temporarily halted and Mr. Shapiro was not entitled to

accept that he had a mandate to continue without [respondent's] express authority". In my view this conclusion is not supported by the evidence on record, nor by legal principle.

[8] The respondent had, in October 1995, given the appellant a written power of attorney to do whatever was necessary to proceed with the appeal. In none of the two faxes sent to Shapiro after the consultation did the respondent expressly inform Shapiro that the mandate was withdrawn or suspended. In my view their contents also do not justify any such implication. Although the respondent and his wife are lay people they were, by that stage, well aware that they could end an attorney's mandate if they wished to do so (they had done it previously). As a matter of practical reality legal practitioners can hardly be expected to stop work whenever their

clients express some doubt about a specific aspect, but fail to instruct them to do anything about it.

[9] The relationship between attorney and client is a contractual one, said to be based on *mandatum*, with some features particular to this kind of agency (*Goodricke & Son v Auto Protection Insurance Co Ltd* (in liquidation) 1968(1) SA 717 (A) at 722 H). There is no general principle of the law of contract that allows a party to a contract to suspend or terminate the contractual relationship merely by expressing some doubt or dissatisfaction with aspects of that relationship. Nor is there any feature of the attorney and client kind of mandate that justifies such a particular rule. It is true that an attorney must act according to the instructions of the client and report to the client when it is reasonable and necessary (*Goodriche & Son v Auto Protection Insurance Co Ltd* (in liquidation) 1967(2) SA 501 (W) at 504E-

F), but "[t]his duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do" (Van Zyl, *Judicial Practice of South Africa,* 4th ed, at 33). Although this was stated in the context of explaining that an attorney may only carry out legal and proper instructions of his client, it underscores the point that clients engage attorneys not only to do their bidding, but to benefit from their professional expertise. I am appreciative of the fact that there is a crisis in access to legal services in this country and that established traditions and rules must be subjected to scrutiny in the public interest (compare *De Freitas v Society of Advocates of Natal* 2001(3) SA 750 (SCA), para. [5], at 762B), but sensitivity to the needs of a client does not translate into a legal duty to stop or suspend professional work as soon as a client expresses some reservation about a particular course of conduct. Circumstances may call for an explanation of the proposed conduct and necessitate the client being

informed of other options in case of continued dissatisfaction. That is exactly what the attorney did here.

[10] At the start of this judgment I alluded to the unhappy history of this matter. The respondent and his wife are clearly aggrieved by what they perceive as the unjust treatment they received at the hands of our legal system. That there are imperfections in the administration of justice and that individuals on occasion suffer as a result of it is an unfortunate fact of life. One can never be complacent about such a reality, but that does not justify unbridled attacks on the integrity of all those involved in the legal system. Shortly before the hearing of this appeal the respondent's wife indicated that she wished to bring an application to be joined as a party to the proceedings. At the hearing neither she nor the respondent had legal representation. She was allowed to argue the joinder application in person and in the course of

that to deal with the merits of the appeal. The respondent himself did not wish to present his own case but nothing prevented him from doing so. The application is formally defective. There is no notice of motion or supporting affidavit. It is also defective in other respects. The application was a ploy to enable the respondent's wife to appear and argue the appeal on the respondent's behalf. This she is not entitled to do (compare *Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC* 1992(2) SA 50 (W); *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956(1) SA 364 (A) at 365C). The application should thus be dismissed, but something more needs to be said about the respondent and his wife's conduct in the matter. In this court

the latter was, allowed to have her full say. In the course of doing so she again recklessly cast allegations of impropriety and dishonesty upon a number of people. This has been a consistent pattern throughout. I think it is

necessary to express displeasure at the abuse of these proceedings for those purposes.

[11] In the result the following order is made:

1. The application for joinder of Mrs.Schellauf as a party to the appeal is dismissed.

2. The appeal is allowed with costs.

3. The order in the court below is set aside and replaced to read:

"The appeal is dismissed with costs."

J.C.FRONEMAN
ACTING JUDGE OF APPEAL

VIVIER JA	**)**	
MARAIS JA	**)**	**CONCUR**
STREICHER JA	**)**	
MPATI JA	**)**	