IN THE HIGH COURT OF SOUTH A FRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

REPORTABLE

CASE NO: 16 793/2013

In the matter between:

ANTHONY HYMAN HERMAN **PLAINTIFF**

And

COLLEEN WENDY OOSTHUIZEN **DEFENDANT**

JUDGMENT DELIVERED ON THURSDAY, 26 MARCH 2015

DLODLO, J

INTRODUCTION

[1] Plaintiff in this matter is an attorney. He has instituted an action claiming professional fees due and owing to him by the Defendant. The Defendant, a practicing estate agent and a businesswoman in her own right was married to one Anton Gerald Oosthuizen [who was also a businessman and an estate agent] on 12 November 2005 in Cape Town out of community of property by way of an ante-nuptial contract in terms of which the accrual regime was applicable. The Defendant employed the services of the Plaintiff who then practiced in the firm of Attorneys Abe Swersky and Associates in Cape Town, on various matters mentioned later on in this judgment. The various matters on which the Plaintiff was engaged *inter alia* related to the matrimonial breakdown and the consequences that ordinarily follow therefrom.

THE PLEADINGS

The particulars of claim categorize the various claims as follows:

(a) Under claim A the amount claimed is R403 749.23, being the amount of the Plaintiff's fees billed to the Defendant as taxed by the Taxing Master in the amount of R625 094.50 , less an admitted amount of R330 335.40 paid by the Defendant, together with interest thereon at the rate of 2% per month until 18 September 2013

(b) Under Claim B two amounts are claimed, namely:

(i) An amount of R62 207.11 being the sum of money disbursed by the Plaintiff in respect of cost, consultant's fees and charges for which Plaintiff alleges the Defendant is liable under a mandate concluded between the Defendant and the Plaintiff;

(ii) An amount of R7 625.00 being the amount of fees and disbursements due to the Plaintiff by the Defendant as assessed by the Law Society of the Cape of Good Hope under Section 69 (h) of the Attorneys Act.

[2] Importantly, according to the testimony of the Plaintiff his claim in respect of cost consultant's charges set out above falls to be reduced by the amount of R14 099.10 in that such an amount has been allowed for in the Taxing Master's allocator in respect of his attorney and client bill. Despite denials apparent on the pleadings I mention that at the trial no dispute arose as to the quantification of the Plaintiff's claim. An amount of R330 335.40 paid by the Defendant in reduction of the Plaintiff's fees is admitted. The Plaintiff's claim is further premised on a deed of cession in terms of which the Plaintiff took cession of the abovementioned claims from his erstwhile firm of Abe Swersky and Associates which was dissolved after the death of the partner, Mr Abe Swersky. The cession is not an issue for determination as it was not disputed at trial. At trial the

Defendant's defence was limited to a challenge to her liability under a written mandate or Letter of Engagement concluded between the partners of the Plaintiff's erstwhile firm, Abe Swersky and Associates and the Defendant on 31 August 2011. The Defendant contended that she is not bound by the terms and conditions of that agreement on grounds set out *infra*.

[3] In the Defendant's Plea the Defendant state that she was not afforded the opportunity nor requested to read the Letter of Engagement and the contents thereof were not explained to her but that she was merely requested to fill out a form to become a client of Abe Swersky and Associates and to sign the annexures to such form which she did. It is further pleaded that the Defendant was not in a sound mental state at the time of signature of the Letter of Engagement and that therefore she was unable to enter into a valid and legal binding agreement. Although the Defendant admits that her signature appears on the Letter of Engagement she stated that she only recalls having had to fill out a form providing her personal details in order to become a client of Abe Swersky and Associates and to sign the annexures to such form. Having recorded above the contents of the Defendant's Plea it is important to also record that at the trial the Defendant's counsel advised the Court that despite the afore-going allegations on the pleadings the Defendant's primary defence is that there was a mistake on her part when she entered into the contract.

[4] Nevertheless and in evidence before Court, the Defendant did not limit her defence to one of mistake. On the contrary no defence in mistake was made out in evidence. I hasten to add that at the hearing the Defendant persisted in the allegations that at the time she concluded the mandate that she was in a mental state which did not allow her to comprehend and

conclude a contract of this nature. In other words, she did not have the necessary contractual capacity. I shall consider the Defendant's defence later on in this judgment. At pre-trial level the parties reached an agreement that in the nature of this case it is the Defendant who bears the onus. Therefore it was only logical that she presented her version first before this Court. I summarize and simultaneously comment on her evidence as presented in Court. I shall thereafter give a summary of the Plaintiff's evidence.

DEFENDANT'S EVIDENCE

[5] She testified that she approached the Plaintiff to act as her attorney and represent her in proceedings instituted to gain interim custody of her child. She approached the Plaintiff on the day after she suffered what she described to be a traumatic incident in the course of a dispute with her husband where she was left standing at the side of the road while her husband drove off with her child. According to her she was obliged to approach the Plaintiff and his firm urgently as the proceedings instituted by her husband was set down for urgent hearing the following day.

[6] The Defendant testified that when she attended at the Plaintiff's offices in order to meet with the Plaintiff, she was provided by a staff member with certain documents to complete and sign and these documents included the Plaintiff's mandate in the form of the letter of engagement together with the schedule of fees attached thereto. Despite the allegation in the Plea that the Defendant was not afforded the opportunity to read the document, she conceded that this allegation is false and that she had in fact been afforded an opportunity to read the document. The Defendant was somewhat equivocal as to whether she had been advised or requested to read the document. She, however, did not deny that she had the

opportunity to raise queries in respect of the document had she felt the need to do so.

[7] Her evidence was that at the time she concluded the mandate she was, by virtue of the recent events, so traumatized that she was not capable of comprehending the document or giving consideration to its import and that she thus signed the document without reading it. She persisted in claiming that she was not of sound mind when she concluded this contract. She, however, conceded that approximately 18 months prior she had signed a mandate in similar terms which provided for the charging and payment of fees on the same basis as now claimed by the Plaintiff, namely in accordance with the non-litigious rate of the Law Society of the Cape of Good Hope.

[8] When faced with this difficulty, the Defendant sought to suggest that she had at that time also been so traumatized that she was unable to comprehend the nature of the document. I hasten to mention that her evidence in this regard was rather extremely poor and seemed only to detract from her credibility. I say so in that it is clear that she had previously concluded a similar contract with the same Plaintiff and thus could not seriously allege that she was not acquainted with and/or familiar with the terms of the Plaintiff's mandate. She was no stranger at all to this kind of mandate or letter of engagement.

[9] The Defendant admitted that after concluding the agreement incorporating the Letter of Engagement, the mandate between the Plaintiff and the Defendant as attorney and client was implemented and the Plaintiff and his partners continued to act as her attorneys in respect of a number of different legal proceedings including –

(a) The application for interim custody of the children; (b) An anti-dissipation interdict; (c) Divorce proceedings; (d) Family violence interdict proceedings; (e) Proceedings in respect of a criminal charge laid against her. The Defendant conceded that she did not at any time during the performance of this mandate challenge the validity of the contract between the parties or even complained about the basis on which the fees were being charged. Rather she admitted that she attended to making payment upon receipt of accounts from the Plaintiff and his firm. She testified that the mandate between her and the Plaintiff's firm was terminated in or about July 2012 when she was unable to fund the litigation any further. According to the Defendant she was thereafter assisted by her pastor and that she settled the divorce with her husband.

[10] Her evidence is further that upon receipt of the Plaintiff's final account, she did not attend to payment thereof. She required the bill to be taxed. Indeed taxation was conducted by the Taxing Master over a four day period and it was concluded on 18 September 2013. **Bundle A39** shows that the bill was taxed in the total amount of R625 094.50. Clearly the Defendant's request for taxation rather than challenge to her liability demonstrates that her dispute was as to the quantum of fees charged and not her liability for fees. This tallies with the concession made by the Plaintiff that she did not thereafter, whether verbally or in correspondence, challenge the validity of the mandate or her liability for fees thereunder, but that on the contrary she sought to negotiate a discount on the fees and to make offers of payment by way of instalments.

[11] The correspondence the Defendant addressed by e-mail to the Plaintiff at the time also indicates some agreement in terms whereof she undertook to

make payment of the Plaintiff's fees out of funds to be received by her from her husband under her divorce settlement. It is, however, important to mention that the Defendant in her evidence sought to deny this agreement. But it is of course, plain from the correspondence exchanged between her and the Plaintiff that such agreement indeed existed and that she did not at the time dispute it. That it is so is apparent in **Bundle A46**, **47** and **51**. It is plain that when the negotiations between the parties were not successful and the Plaintiff issued summons, the Defendant then raised the defence that she had concluded the mandate agreement while of unsound mind (as set out in her Affidavit filed in opposition to the application for summary judgment and to which she testified at this trial).

[12] I do not differ from the contention put forth by Mr Bremridge that clearly the true nature of the Defendant's complaint or the basis upon which she seeks to escape liability is that *ex post facto* and after the termination of the mandate, she discovered the existence of the litigious tariff and was or must have been advised to the effect that in the absence of an agreement, this tariff would have applied between the parties. In other words, she realized in retrospect that she could perhaps have negotiated for a better deal had she been of a mind to do so. I ask myself a rhetorical question how on earth could this amount to a mistake? Another issue of importance is that despite the indication to the Court by the Defendant's counsel that her defence is founded in mistake, her evidence is not consistent with the defence of mistake. Her evidence remains that she was of unsound mind when she concluded the contract and she did not consider or comprehend its contents or import. I shall deal further with the mistake put forth as the defence *infra*.

[13] Her evidence as I have mentioned *supra* is completely inconsistent with the defence of mistake which is not premised on a failure to comprehend the contract but an error as to its import or terms. Her evidence must necessarily be contrasted with what I prefer to describe as the uncontroverted evidence of Renaë Stone who testified for the Plaintiff.

THE PLAINTIFF'S EVIDENCE

[14] In short Ms Stone testified that she was previously employed by the firm Abe Swersky and Associates as a bookkeeper. She did from time to time attend to having mandates and letters of engagement concluded and did so in relation to that in question herein. According to Ms Stone there was a procedure implemented as to how this should be done which she would have implemented in the case of the mandate in issue herein.

[15] According to Ms Stone the Defendant was presented on 31 August 2011 with: (a) a client information sheet which she was requested to complete giving her personal and contract details; (b) a Letter of Engagement setting out the terms and conditions upon which Abe Swersky & Associates would accept a mandate to act on her behalf to which was attached as an annexure (Annexure "A") a schedule of the fees in accordance with which the Defendant would be debited for professional services to be rendered on her behalf. Ms Stone testified that the Defendant was advised by her to read the Letter of Engagement and that her particular attention was drawn to the annexure of fees to be debited annexed thereto. Ms Stone emphasized that the Defendant was advised by her that if she had any queries relating to the Letter of Engagement and annexures thereto she could take such queries up with the Plaintiff.

[16] It was Ms Stone's evidence that the Defendant completed and signed the client information sheet and the Letter of Engagement without raising any concern and that she (Ms Stone) thereafter witnessed and initialed the document. She stated in her evidence that she could not recall witnessing a document in circumstances where the client was crying or in a traumatized state at the time of signature of the Letter of Engagement remarking that if that had been the case she would have recalled it. According to Ms Stone the Defendant frequently came into the office and most times she was very friendly and "chatty" with all staff members with whom she came into contact. Ms Stone did not experience the Defendant as being afraid of or intimidated by the Plaintiff.

[17] The Plaintiff's testimony was that save in deserving cases (where a special arrangement is reached) he offers his services exclusively on the basis of the tariff as set out in the Schedule to the Letter of Engagement which is in accordance with the non-litigious tariff of the Law Society of the Cape of Good Hope from time to time. According to the Plaintiff clients are not presented with any choice or election between that tariff and any other tariff.

[18] In the Plaintiff's evidence clients must either accept that tariff or negotiate and agree on another fee arrangement with the firm, which engagement would also, by its very existence, have the effect that the litigious tariff would be irrelevant. The Plaintiff testified that the firm had a procedure which it followed in having mandates signed and this accorded with that testified to by Ms Stone. The Plaintiff also mentioned in his testimony that the Defendant had signed a similar mandate previously and that any suggestion that at that time she was unable to comprehend the document was without merit. He added that he has on

occasion had clients who raised queries or sought to negotiate another arrangement. He emphasized that there is no question of himself having failed to draw the Defendant's attention to any choice or election or to any other fee tariff which she could choose or insist on to form the basis of the mandate.

[19] According to the Plaintiff the Defendant was perfectly lucid at the time of her giving him instructions on the day she signed the Letter of Engagement. He added that throughout the period of his mandate (some 11 months) his debits were never queried, questioned or challenged by the Defendant. He told the Court that the accounts he rendered from inception and from time to time were paid by the Defendant without demur. In his evidence the Defendant had every opportunity throughout the period of the mandate to query or challenge his several debits and accounts but she did not do so. He thus had no reason to suspect that there was any mistake or dispute with regard to the terms of mandate. The Plaintiff told the Court that he had advised the Defendant in detail of the likely costs of pursuing the litigation to trial and the figures and the rough estimates which he had given the Defendant which she obviously accepted was uncontroverted and unchallenged.

[20] The Plaintiff had encouraged the Defendant and had even taken active steps to settle the matter by drafting several consent papers incorporating settlement proposals which were then discussed and negotiated but that the Defendant had refused to do so. This piece of evidence was uncontroverted. He testified that the Law Society had rejected the Defendant's complaint as being unfounded. According to the Plaintiff he alone (except in the case of the criminal proceedings) had dealt exclusively and diligently with the Defendant's matters. He told the Court

that the Defendant made various attempts to negotiate a reduction of his fees and to pay in instalments. Importantly, the Plaintiff testified that the Defendant agreed with him to pay his fees from the funds to be received from her husband in terms of Clause 5.1 of their consent paper but that the Defendant reneged on such agreement.

[21] The Plaintiff testified that it was only after the Defendant's various offers to pay were declined that she put up the version that when she signed the Letter of Engagement she was of unsound mind and did not know what she was signing. He testified that throughout the subsistence of the mandate each account sent to the Defendant was paid by her without demur and that at no time during the subsistence of the mandate did she query any fees debited to her. In passing I must mention even at this stage that the evidence by the Plaintiff supported the allegations made in the particulars of Claim.

EVALUATION AND APPLICATION OF RELEVANT LEGAL PRINCIPLES TO THE FACTUAL MATRIX

[22] Mr Van der Linde prefixed his submissions by stating that the general rule with regard to the signing of documents in our law is that the *maxim caveat subscriptor* applies. He pointed out that this principle requires that in the normal course when a person signs a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document. According to Mr Van der Linde in the interests of fairness and justice I should relax the application of the *maxim* and that I should do this through the application of the doctrine of *quasi*-mutual assent. I have been referred to ***Brink v Humphries & Jewel*** 2005 (2) SA 419 (SCA) at 424G-425D as well as to ***Sonap v Pappadogianis***

1992 (3) SA 234 (A) at 239I-240B. In the latter case Harms AJA (as he then was) postulated the test as follows:

"Did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?"

And the three-fold inquiry suggested is as follows:

"Firstly, was there a misrepresentation as to the one party's intention; Secondly, who made that representation; and thirdly was the other party misled thereby? The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?"

The above cases are completely distinguishable from the instant case. The Defendant did not plead mistake in the instant matter. In ***National & Overseas Distributors Corporation (Pty) Ltd v Potato Board*** 1958 (2) SA 473 (A) at 479 the then Appellate Division held, *inter alia*:

"At least the mistake (error) would have to be reasonable (Justus) and it would have to be pleaded."

[23] As I mentioned earlier on in this judgment while the Defendant's counsel advised the Court that the Defendant's defence was one of mistake and the issue of mistake was dealt with in cross-examination, there is no clarification on the pleadings or elsewhere of what the mistake was. In other words no clarification is apparent on the pleadings as to the respects in which it is alleged there was no consensus between the parties.

[24] It must be mentioned that what compounds the situation is that the Defendant did not testify at all that there was any mistake or lack of consensus. On the contrary, she testified that she did not consider the content or import of the contract and was of unsound mind at the time. In the absence of a proper allegation on the pleadings informing the Court of

what the nature of the mistake is alleged to be, the court is rendered unable to determine this defence to the Plaintiff's claim. See in this regard ***National & Overseas Distributors Corporation (Pty) Ltd v Potato Board*** *supra.* However, in the interests of justice I shall proceed to consider the defence of mistake *infra*.

[25] One may as well prefix this discussion by quoting from **Christie**, **The Law of Contract in South Africa**, 6th edition page 328 where the learned author gives the following guiding observation of the law of contract:

"When a layman says he made a mistake in entering into a particular contract the lawyer's comment, after listening to the story, will often be that this is the sort of mistake for which the law can provide no remedy. Paraphrasing the layman's description of his action as mistaken, the lawyer will say that it was ill-advised or due to an error of judgment. If the law were to give relief from what, in retrospect, are seen as errors of judgment the whole concept of a contract as binding and enforceable agreement would be destroyed."

I fully agree with the above observation. The question is was there a mistake? In answering this question I ordinarily must employ the set of questions usually employed in considering a mistake. These were clearly set out by Davis AJ (as he then was) in ***Prins v Absa Bank Ltd*** 1998 (3) SA 904 (C) as follows:

"(a) *Is there consensus?*

(b) If not, is there dissensus caused by a mistake?

(c) Is the other party aware of the resiler's mistake?

(d) Who induced the mistake and was it done by commission or omission which was either fraudulent, negligent or even innocent?"

[26] The Defendant in the instant matter needed to show firstly that at the time that she concluded the contract she acted under some misapprehension or misunderstanding as to the terms, import or effect of the contract. A legally recognizable mistake in the law of contract was explained as follows in ***Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd*** 2007 (4) SA 577 (C) at 587:

"A party to a contract who has concluded same whilst labouring under a bona fide and reasonable mistake as to its contents will not be bound by the provisions thereof. In particular, where the contracting party has been led to believe by the other party that the contract contains certain provisions, which in fact it does not, the party relying upon the misrepresentations, will not be bound by the agreement."

[27] The Defendant can hardly be said to have even met the first hurdle of showing that there was dissensus between the parties let alone that it arose by virtue of mistake. See analysis of facts by Brand JA in ***Constantia Insurance Co Ltd v Compusource (Pty) Ltd*** 2005 (4) SA 345 (SCA) in order to consider whether there was any dissensus. That is not in any event, the Defendant's case either on the pleadings or in evidence before this Court.

[28] The Defendant at no time suggested that she misunderstood or misapprehended the terms or import of the contract she concluded or that her understanding thereof was any different from that of the Plaintiff. On the contrary, her evidence was that she signed the contract without giving any consideration as to what terms it may not contain and the import of the contract may be. By way of an example, she did not testify to the effect that at the time she concluded the contract she had any expectation of what its terms would be and that the actual terms are different from

that which she thought were in the contract at the time she signed it. Indeed she could not testify to the above effect because firstly she says she did not give consideration to the terms or import of the contract when concluding it; and secondly because she had signed a prior mandate to the same effect the previous year and she thus knew what or she reasonably should be taken to have known what the terms were. The first two questions posed in ***Prins v Absa Bank Ltd*** *supra* must obviously be answered in the negative.

[29] It needs to be said that the Defendant's evidence was (in the respect mentioned *infra*) inconsistent with any suggestion that at the time she concluded the contract she did so under the operation of any mistake. Her evidence was that after the termination of the mandate and after the taxation of the Plaintiff's bill by the Taxing Master, she had been advised by the Taxing master that there existed a High Court tariff which provided for the charging of fees in amounts less than that for which she had contracted with the Plaintiff and his firm (a fact of which she had not been aware at the time of concluding the mandate). The Defendant in her evidence does not suggest that at the time she concluded the mandate she thought she was concluding the mandate at one tariff whereas in fact it was at a higher tariff.

[30] Her evidence was that she had (after the fact and after the mandate had been terminated) acquired information which led her to be unhappy about the terms upon which she had contracted with the Plaintiff. Of course it is settled law that this does not constitute a legally recognizable mistake. The high watermark of the Defendant's case is that she concluded a contract in terms with which she was retrospectively or *ex post facto* unhappy. This cannot afford a litigant any relief in relation to contract. In

my view, this falls squarely within the category of a case which **Christie** (**The Law of Contract in South Africa**) *supra* describes as providing no remedy and in respect of which a lawyer may say that the contract was ill-advised but which (if relief were given) would result in a situation where *"the whole concept of contract as a binding and enforceable agreement would be destroyed"*. Indeed the Defendant's own conduct and communications evidence this to be so.

[31] It is plain that for a substantial period of time after the mandate was terminated, the Defendant admitted her liability and sought to agree to terms with the Plaintiff as to a discount on the fees and terms to pay it off. It was only when these negotiations failed that she then sought legal advice. Her intentions are evidenced by her electronic mail of 7 October 2013 where she states that if her offers as contained therein are not accepted and if she is summoned, then in that event she will seek legal advice. The legal advice she intended to seek was clearly an endeavour on her part to avoid and/or extinguish her previously admitted obligation. So much is clear if one has regard to **Bundle A46**.

[32] She indeed sought advice and one may fairly say that *ex post facto* she manufactured two defences in her clear endeavor to escape liability. One defence is that of unsound mind (this was raised first when she resisted summary judgment and subsequently in her plea). The second defence raised at trial for the first time is that of "mistake". The latter defence was never pleaded nor supported by the Defendant's evidence before Court. I hold that there was never any mistake. This Court is not going to permit the Defendant to avoid her contractual obligations on this basis.

[33] She had onus to prove dissensus in the conclusion of the contract. In my view, that should be the end of the enquiry. There is no need that further questions posed in ***Prins v Absa Bank Ltd*** *supra* be determined. It is still our law that a man, when he signs a contract is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. See ***Burger v Central South African Railways*** 1903 TS. I fully associate myself with the following sentiments appearing as a dictum in ***Absa Bank Ltd v The Master and Others NNO*** 1998 (4) SA 15 (N):

"A unilateral mistake, other than a mere error in the motive, also does not allow the party labouring under the erroneous belief to repudiate his apparent assent to a contract except in very narrow circumstances, as explained in George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 471 and National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479. The effect of these decisions is that, for a unilateral mistake to vitiate the necessary assent to a contract, the error must be a justus error. In this respect the 'courts in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?'"

[34] Of course the Defendant relying on a mistake has onus to firstly establish that any error was material in the sense that the Defendant would not, but for her mistake, have concluded the contract. But in the instant matter the Defendant gave no such evidence. I observed that despite repeated attempts by her counsel to afford her the opportunity of giving evidence to this effect, her evidence remained unclear as to how she would have reacted differently had she known that there existed something such as

the litigious tariff. She did not testify that she would have refused to contract with the Plaintiff and his firm on any basis other than in accordance with the litigious tariff. On the contrary, it would appear that she paid no heed whatsoever to the rates or tariff reflected in the mandate but that given the urgency of the circumstances and the pending application in relation to her children, she would willingly have concluded any contract in order to engage the Plaintiff and his firm to act urgently. Undoubtedly that was the import of her evidence as I listened to it attentively. I am in agreement therefore with the submission by Mr Bremridge that there is no satisfactory evidence tendered before Court to show that the Defendant would (if advised of the existence of the litigious tariff) have concluded any different contract. In the light thereof she cannot possibly succeed in overcoming the onus on her in this regard either. Another important aspect is that even if the Defendant could prove dissensus due to mistake and that such mistake was material, the point of matter how material the mistake is, the Defendant cannot escape the contract because her mistake was clearly due to her own fault.

[35] At the risk of overburdening this judgment with a repetition of aspects already dealt with, I need to emphasize that this is not a case where the Defendant either:

(i) Read the contract but did not see or understand the import of an unusual term due to it being hidden in the document or couched in difficult language or for some other reason not due to her fault; or (ii) had some reasonable expectation of the terms of a contract of such nature and was then surprised by a term she could not reasonably have expected to find therein. On the contrary, the terms as to the Plaintiff's fees and related matters are clearly set out in the document in a paragraph commencing with words indicating an agreement to the

terms set out below. The term in relation to the Plaintiff's fees is the very first such term and appears prominently on the front page of the document. She was no stranger as to how the Plaintiff charges his fees; she previously concluded a similar mandate on the same basis as to fees. Ms Stone's evidence was clear in this regard namely, that the Defendant's attention was specifically drawn to the Letter of Engagement and separately to the Schedule of fees and that she was advised to read the documents and raise any queries she may have.

[36] The Defendant's counsel to a certain extent attempted to suggest that whatever mistake is alleged arose due to some fault on the part of the Plaintiff in failing to draw the Defendant's attention to an unusual term in the contract. This argument appears to be premised on the idea that the mandate contained an unexpected or unusual term to the effect that the Defendant was deprived of some right to contract with the Plaintiff on the basis of the High Court Tariff or that she had some election to choose between the litigious tariff and the non-litigious tariff which election the Plaintiff failed to disclose to her. This stance is at odds with the facts in the instant matter. It is also at odds with the law and is misleading. There exists no unusual or unexpected term in the contract under discussion in the instant matter. The Plaintiff's evidence was very clear in this regard, namely, that he offers his services exclusively on the basis of the tariff as set out in the Schedule to the Letter of Engagement [which is in accordance with the non-litigious tariff of the Law Society of the Cape of Good Hope from time to time]. In his evidence clients are not presented with any choice or election between that tariff and any other tariff.

[37] Strangely the Defendant testified that by virtue of her own experience as an estate agent she would expect to find a term providing for rates of

remuneration in a mandate or Letter of Engagement. It was put to the Plaintiff that generally attorneys charge rates other than that stipulated by the litigious tariff. In concluding this aspect it is prudent to refer to **Christie** (**The Law of Contract in South Africa**). I fully agree with Christie that unless the mistaken party can prove that the other party knew of his or her mistake or that as a reasonable person he/she ought to have known about it or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge. In any event, a party entering into a contract from a mistaken motive when no knowledge or fault is imputable to the other party cannot escape liability even if he can prove that the mistake of motive was material in the sense that it induced him and would have induced a reasonable man to enter into the contract. I conclude this aspect of the judgment by setting out the following telling exposition by **Christie** with which I am in full agreement at pages 329 to 320:

"However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; [Wiggins v Colonial Government (1899) 16 SC 425 429; Acacia Mines Ltd v Boshoff 1957 1 SA 93 (T) 101H-102B; Lindsay v Beukes 1958 2 PH A34 (E); Diedericks v Minister of Lands 1964 1 SA 49 (N) 57D-H; Springvale Ltd v Edwards 1969 1 SA 464 (RA) 468 470H; Osman v Standard Bank National Credit Corporation Ltd 1985 2 SA 378 (C) 388F-I], in not bothering to read the contract before signing; [Ex parte Rosenstein 1952 2 SA 324 (T); Standard Credit Corporation Ltd v Naicker 1987 2 SA 49 (N)]; in carelessly misreading one of the terms; [Patel v Le Clus (Pty) Ltd 1946 TPD 30]; in not bothering to have the contract explained to him in a

language he can understand; [Mathole v Mothle 1951 a SA 256 (T)], in misinterpreting a clear and unambiguous term, [Van Pletzen v Henning 1913 AD 82 89; Irwin v Davies 1937 CPD 442-447], and in fact in circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus. It is not sufficient simply to avoid condemnation as careless or inattentive, for the mistaken party must go further and discharge the onus of proving that his mistake was, in the eyes of the law, reasonable."

[38] Due regard being had to the facts of the instant case, even if the Defendant laboured under some misapprehension (she did not – now we know) as to the terms of the mandate, she is nevertheless bound to the document and is and must be precluded from avoiding it by operation of the doctrine of quasi mutual assent. See ***George v Fairmead (Pty) Ltd*** 1958 (2) SA 465 (A). What remains to be considered is the defence actually raised in the Defendant's Plea.

THE DEFENCE OF UNSOUND MIND

[39] This defence first surfaced in an Affidavit filed in opposition to the granting of summary judgment against the Defendant. She averred in that Affidavit that at trial she would present evidence of an expert nature to support her allegations of an inability to comprehend and thus conclude the contract of mandate. I mention though that despite being confronted with evidence that her attorneys had specially sought an opportunity to deliver expert reports so that such evidence may be presented at trial, the Defendant could not explain why such evidence had not been presented.

[40] The Defendant could not refute that on the day she concluded the contract (31 August 2011) she had been able to give proper instructions to her

attorneys (in particular to the Plaintiff) and that on the following day (1 September 2011) had deposed to an Affidavit in application proceedings prepared on the basis of her instructions to the Plaintiff attorney.

[41] The Defendant conceded that she had at that time and in the course of the legal proceedings then conducted she denied that she had suffered any psychological difficulty and had (in support of her case in this regard) submitted a report from her own "clinical pastoral therapist", one Sonya Hunt, to the effect that she was at all times fully connected to reality, even when experiencing hurt and trauma. That belied Defendant's suggestion of any psychological or mental disability at the time. It is also the Plaintiff's evidence that on the morning she signed the mandate and shortly after she had done so, the Defendant had appeared coherent and completely in control of her faculties even though she was "cross". She had been able to give detailed and sensible instructions to the Plaintiff in the matter.

[42] I am of the view that the Defendant's decision not to call expert evidence in support of her allegation in the Plea that she had been of unsound mind when requested to sign the mandate is telling. This being so in the light her prior statements under oath that she would do so leaves the door wide opened for the drawing of an inference (a reasonable one I would say) that she decided against this because she knows expert evidence would not support her case in this regard. I am of the view that the inference I have referred to *supra* is not only a reasonable one but it is an inescapable one in the circumstances of this matter. Strangely in cross-examination the Defendant conceded that the allegation in paragraph 4.1 of her Plea, that she had not been afforded the opportunity to read the Plaintiff's Letter of Engagement was false. On being questioned further on this she

was unable to give a proper explanation of why such a false allegation had been made in her Plea.

[43] I must say that the Defendant was somewhat equivocal as to whether she had been requested to read the document. But the evidence of the Plaintiff's employee that attended to presenting the document to the Defendant and who had witnessed her signature and the conclusion thereof, Ms Stone, was that the Defendant's attention had been expressly drawn to both the mandate and the Schedule of fees attached thereto. This evidence survived cross-examination. Importantly, the Plaintiff confirmed the procedure for the conclusion of the mandate agreement or Letter of Engagement which had been implemented at the firm, testified to by Ms Stone. I hasten to add that the Plaintiff's evidence in this regard was never challenged in cross-examination by Mr Van der Linde. In any event, how can an estate agent and a renowned businesswoman (which is what the Defendant is) simply sign a document without reading it? I find it hard to accept. Thus the defence pleaded has not been proved at all. I do need to point out that on the whole the Defendant was an extremely poor witness. She was argumentative and evasive whilst under cross-examination. The Court had to constantly warn her to allow questions to be fully put to her before she attends to answering them. But this was to no avail.

COSTS

[44] The general principle is that a successful party is entitled to an order of costs against the unsuccessful one. There may be justifiable reasons why a successful party is deprived of its costs. None exist in the instant matter. In the circumstances I hold that the Plaintiff is entitled to an award of costs herein.

ORDER

[45] In the result I make the following order:

(a) Judgment is granted in favour of the Plaintiff and the Defendant is ordered to make the following payments to the Plaintiff:

(i) Payment of the amount of R403 749.23;

(ii) Payment of the amount of R48 108.01 (being R62 207.11 less the sum of R14 099.10);

(iii) Payment of the amount of R7 625.00;

(iv) Interest on the aforementioned amounts at the rate of 2% per month calculated as from 18 September 2013 to date of payment.

(b) It is ordered that the Defendant shall pay costs of suit on a party and party scale.

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DLODLO, J

APPEARANCES:

For Plaintiff	:	**ADV. IC BREMRIDGE**
Instructed by	:	Thomson Wilks Inc
		[Mr.A. Scribante – 021 424 4599]
For Defendant	:	**ADV. D. VAN DER LINDE**
Instructed by	:	Frost Attorneys
		[Mr N. Frost – 021 782 4928]
		C/o C & A Friedlander
		[Ref. S. Heath – 021 487 7900]