IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no.3364/16
Date heard: 20/10/16
Date delivered: 2/11/16
Not reportable

In the matter between:

JOHANNES MATHYS ERASMUS **Applicant**

and

MARK WILLIAMS **Respondent**

JUDGMENT

PLASKET, J:

[1] Mr Johannes Erasmus, the applicant, was severely injured in a motor vehicle accident. He instructed an attorney, Mr Mark Williams, the respondent, to pursue a claim for damages against the Road Accident Fund (the RAF). The applicant and the respondent entered into a contingency fee agreement in terms of the Contingency Fees Act 66 of 1997.

[2] The claim was settled. The applicant was compensated with substantial damages. It is common cause that the respondent retained at least R672 413 in fees. He has never accounted to the applicant for his fees.

[3] The applicant applies for orders directing the respondent to pay him R250 000 as an interim payment pending the taxation of a bill of costs; directing the respondent to produce an attorney and client bill of costs; directing the respondent to make available the applicant's litigation file and to account fully to him; and directing the respondent to pay the costs of the application on an attorney and client scale.

[4] The respondent sought leave to file a supplementary answering affidavit and condonation for the late filing of heads of argument. Without conceding that a proper case had been made out for either, Mr Cole, who appeared for the applicant, did not oppose these applications. While similarly unconvinced of the merits of the applications, in order to facilitate the finalisation of the matter, and to avoid what would only amount to prejudice for the applicant, I granted leave and condonation.

[5] The respondent had also brought an application, in terms of s 27 of the Superior Courts Act 10 of 2013, for the transfer of the matter to either the Eastern Cape Local Division, Bhisho or the East London Circuit Local Division. Wisely, that application was abandoned and the costs associated with it were tendered by the respondent.

[6] It is extremely difficult to make head or tail of the respondent's version. He has filed two sets of affidavits and heads of argument that are poorly drafted, shoddily compiled and often meaningless. The supplementary answering affidavit, for instance, was described in the applicant's heads of argument – and with justification – as being a repetitive, 'stream of consciousness' that is of no assistance to the respondent. I add that it is of little assistance to me either. The heads of argument are a disgrace. Although drafted by the respondent's attorney, it alternates between referring to the respondent in the second person and the first person and has attached to it documents that, apart from the Contingency Fees Act, are annexures to the respondent's supplementary affidavit.

[7] A number of defences are raised by the respondent in the answering papers. First, the point is taken that the applicant has not exhausted an internal remedy prior to approaching this court. There is no merit in this point. The 'internal remedy' provided by s 5(1) of the Contingency Fees Act to a client with a fees-related complaint against an attorney – referral to the appropriate law society to review the fees agreement or fee – is discretionary and does not create an obligation to exhaust the internal remedy before approaching a court. The same is true of clause 10 of the contingency fee agreement between the applicant and the respondent: it allows the applicant the option of referring a complaint about fees to the law society of which the respondent is a member.

[8] Secondly, the respondent stated in his supplementary answering affidavit that 'the applicant should have brought this matter which is review of the Contingency Fee Agreement by way of review application either in terms of Rule 53'. He proceeds to explain this submission in the next paragraph:

'The application before Court has not been brought in terms of Rule 53 as a review application. Therefore the application fails to meet prerequisite of Review application – sime (sic) since the interpretation of the Contingency Fee Agreement Act is incidental to these proceedings, they necessitate an exhaustion of internal remedies. Since these proceedings will be likened to a review.'

This is simply nonsense. It is clearly devoid of merit.

[9] Thirdly, the respondent stated that the application was premature. He had been advised that 'any action, be it on **application or action procedures**, must comply **with Sect. 129 of the National Credit Act**, before, the **commencement** of **such Application or Summons**'. He had not, however, received a notice in terms of this section. Clearly, the National Credit Act 34 of 2005 has no application in this case: the applicant is not a 'credit provider', the respondent is not a 'consumer' and the debt due to the applicant does not arise from a 'credit agreement'.

[10] As I understand it, the central defence raised by the respondent is that he was entitled to retain R672 413 of a total amount of R3 509 650.25. This latter amount is made up of damages due to the applicant of R3 409 840.65 and costs paid to the respondent of R99 809.60. This latter figure in turn is made up of R19 720.83 in

disbursements, R7 675.77 paid to a costs consultant and a party and party fee of R72 413. The applicant does not accept that the figure of R672 413 is correct. He asserts that the respondent has retained R804 620.25. For present purposes, I shall treat the respondent's figure as being the correct figure. (A proper accounting in due course should establish where the truth lies.)

[11] The respondent's defence is that the Contingency Fees Act entitles him to take up to 25 percent of any amount awarded to a client and he, in fact, gave the applicant a 'discount', only taking 18 percent of the amount paid by the RAF. He relies in this regard on s 2 of the Act.

[12] Section 2 of the Act provides:

'(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(2) Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.'

[13] It is clear that the respondent's understanding of s 2 of the Act is erroneous. It is not intended to be a licence to plunder up to 25 percent of any award paid to a client who has entered a contingency fee agreement (and who is usually indigent). All that s 2 does is to allow an attorney who is party to a contingency fee agreement to recover from an award to his or her client a success fee based on the work done

at a maximum of twice his or her usual fee. That amount may not, however, exceed 25 percent of the award, no matter how much work the attorney has done. What an attorney is certainly not entitled to is 25 percent of the client's award.

[14] More importantly, however, the contingency fee agreement entered into by the applicant and the respondent makes the position clear. Clause 5 provides that the respondent's normal fee on an attorney and client basis was to be determined in terms of the High Court tariff; and that he may charge the applicant twice that. That fee, for work done by the attorney, may not exceed 25 percent of the award. That is why Mr Cole, who appeared for the applicant, said that the respondent's entitlement was his fee for the work he had done at twice his normal rate or 25 percent of the award, whichever is the lesser.

[15] The respondent submitted a party and party bill to the RAF and was paid a fee of R72 413. Even assuming that his attorney and client fee would reach as much as R100 000, which strikes me as being unlikely from what I have been able to glean from the papers as to the conduct of the applicant's case, that would mean that the respondent would be entitled to a success fee of R200 000. That is a far cry from the amount of R672 413 that he has admitted to having taken. That means that there is, even on the respondent's own version, more than enough money to which the respondent is not entitled to cover an interim payment of R250 000 to the applicant.

[16] I note that, in his answering papers, the respondent has no objection to paragraphs 2 and 3 of the notice of motion. He does not agree that he is liable to pay the applicant's costs on an attorney and client scale. I take a different view. The respondent's conduct in appropriating his client's money is deplorable. So too is his gross over-reaching. These factors, the spurious defences that he has raised and the way in which he has conducted this litigation are red flags as to his suitability to practice as an attorney. In my view, an attorney and client costs order against him is justified. I also intend to ensure that this judgment is brought to the attention of the Cape Law Society.

[17] I make the following order.

(a) The respondent is directed to pay R250 000 to the applicant as an interim payment pending the taxation of his bill of costs. He shall do so by depositing the amount into the trust account of the applicant's attorneys, Wheeldon, Rushmere and Cole, within seven days of the date of this order, the details of the trust account being:

Wheeldon, Rushmere and Cole Trust Account
ABSA Bank, Grahamstown
Account number: [4.....]
Branch code: 420517

(b) The respondent is directed to produce and make available to the applicant's attorneys a bill of costs on the High Court scale on an attorney and client basis, as promulgated from time to time by the Rules Board for Courts of Law in terms of section 6 of the Rules Board for Courts of Law Act 97 of 1985, as approved by the Minister for Justice and Constitutional Development, within seven days of the date of this order.

(c) The respondent is directed to produce and make available to the applicant's attorneys the applicant's litigation file and to account fully to the applicant within seven days of the date of this order.

(d) The respondent is directed to pay the applicant's costs, including the costs of the application for the transfer of this matter, on an attorney and client scale.

(e) The Registrar is directed to furnish the Cape Law Society with a copy of this judgment.

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C Plasket
Judge of the High Court

APPEARANCES
For the applicant: Mr Cole instructed by Wheeldon, Rushmere and Cole
For the respondent: Mr Mvuthuza instructed by Mqeke Attorneys