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

CASE NO: 3364/2016
DATE HEARD: 2/12/2016
DATE DELIVERED: 8\12\16
NOT REPORTABLE

In the matter between:

JOHANNES MATHYS ERASMUS **APPLICANT**

and

MARK WILLIAMS **RESPONDENT**

JUDGMENT

PLASKET J

[1] This is an application for leave to appeal against an order I issued directing the respondent, Mr Mark Williams, to make an interim payment of R250 000.00 to the applicant, Mr Johannes Erasmus, pending the taxation of his bills of costs, plus additional relief, including an attorney and client costs order.

[2] At the heart of the matter is a contingency fee agreement entered into by the parties when Mr Erasmus had instructed Mr Williams to recover damages from the Road Accident Fund (RAF) after he had been injured in a road accident.

[3] The principal arguments advanced by Mr Williams were that he was entitled to charge 25 percent of the award to his client in terms of the contingency fee

agreement and that the application was premature because Mr Erasmus was required to attempt to resolve his fees dispute by referring the matter to the Cape Law Society. These points are raised as grounds of appeal in paragraphs 1 to 4 of the first application for leave to appeal. I shall return to them presently.

[4] Ground 5 of the first application for leave to appeal is that I 'erred in making adverse findings in respect of or alternatively in relation to Prayer 2 and 3 of the Notice of Motion, while there was clearly no opposition in respect of such prayers (in paragraph [16] of the judgment)'.

[5] Two problems arise. First, it is factually incorrect that I made adverse findings in respect of paragraphs 2 and 3 of the Notice of Motion. All I said was:

'I note that, in his answering papers, the respondent has no objection to paragraphs 2 and 3 of the Notice of Motion.'

I then proceeded to deal with the fact that Mr Williams opposed the order seeking costs on an attorney and client scale. It was in relation to this issue, not paragraphs 2 and 3 of the notice of motion that I was critical of the conduct of Mr Williams. He does not seek leave to appeal against the costs order.

[6] The second problem is more fundamental. An appeal lies against 'a wrong order and not at incorrect reasoning'.[1] The same holds true of grounds 6 and 7 of the first application for leave to appeal. They are not grounds of appeal at all. They are the type of 'inappropriate and groundless submission' that 'serves no purpose other than to impugn the integrity of the court' that attracted the ire of Goosen J in *S v McLaggan*.[2]

[7] Mr Sandi, who appeared for Mr Williams, handed up another application for leave to appeal, ostensibly to replace the first application. I shall refer to it as the second application for leave to appeal. It is, in some respects, at odds with the first application.

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[1] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 85.
[2] *S v McLaggan* 2013 (1) SACR 267 (ECG) para 10.

[8] The second application for leave to appeal also contains matter that is not appealable. For instance, ground 5 is to the effect that I 'should have found that the Respondent's interpretation of Section 2(2) of the Contingency Fees Act (No. 66 of 1997) was possibly caused by lack of clarity and ambiguity of the section, not necessarily because the Respondent was dishonest or sought to plunder the Applicant's money'. This has no place in an application for leave to appeal. The same applies to ground 6 which states:

'This is a very important matter to members of the legal fraternity and the public in general whose members depend on attorneys to access the courts for the resolution of legal disputes.'

I have no idea why these paragraphs are part of the application for leave to appeal. They have no bearing on the order I made.

[9] Ground 3 of the second application for leave to appeal reads:

'The learned Judge erred in failing to find that it could not have been easy for the Respondent to simply produce and make the Applicant's litigation file available within seven (7) days. He had said the file was with his costs consultants who were busy calculating the costs, usually a very cumbersome exercise.'

I have no idea why this forms part of the application for leave to appeal. The issue was never raised when the main application was argued. It relates to paragraph 3 of the notice of motion and paragraph (c) of the order. Mr Williams consented to this order.

[10] Grounds 1 and 2 of the first application for leave to appeal and ground 7 of the second application relate to the interpretation of s 2 of the Contingency Fees Act 66 of 1997. That section 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.'

[11] Mr Williams contended that he was entitled to take 25 percent of Mr Erasmus' award as his fee. As it happens, said Mr Williams, he had given a discount and had only taken 18 percent of the award. I held, in paragraph 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.'

[12] Mr Williams stated in paragraph 1 of the first application for leave to appeal that I erred in my interpretation of s 2 'in that his interpretation was limited', and I also erred in 'finding that the Respondent's understanding of s 2 ….was erroneous'.

[13] I am not told in what respect my interpretation was 'limited' and how I erred. As it happens, my interpretation of s 2 is consistent with the Supreme Court of Appeal's interpretation of that section. In *Price Waterhouse Coopers Inc. & others v National Potato Co-operative Ltd*[3] Southwood AJA held:

'Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total

[3] *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 41.

amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)).'

[14] The section's meaning and effect was explained by Morrison AJ in *Thulo v Road Accident Fund*[4] in very clear terms. He stated:

'[51] The true function of a proviso is to qualify the principal matter to which it stands as a proviso — as to which see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 79F – J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double — 100% more than — the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.

[52] As this principle of interpretation is not always applied there is a danger of a misinterpretation of this section by legal practitioners. Incorrectly interpreted it can be used to argue that the client has to pay (i) double the normal fee or (ii) 25% of the total amount awarded in a claim sounding in money, whichever is the higher. That is completely wrong. The practitioner's fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgment, or (ii) double the normal fee of that practitioner, whichever is the lower. If double the normal fee results in the client having to pay a fee higher than 25% of that which was awarded to the client in a money judgment (costs aside) the legislature has put a ceiling on such fee and said, in effect, 25% of the money amount awarded is the maximum fee that can be raised. Where, however, double the normal fee does not exceed 25% of the money amount awarded then double the normal fee is the maximum fee that can be raised.'

This statement of the law was approved by Mojapelo DJP in *Mofokeng & others v Road Accident Fund*.[5]

[15] Ground 7 of the second application for leave to appeal is to the effect that 'another court may view the matter differently and give a different interpretation of Section 2(2) of the Act'. In this respect Mr Sandi's argument was that the section is ambiguous because many attorneys that he had spoken to interpret the section the same way that Mr Williams does – that they are entitled to take 25 percent of any award of damages made to their clients. The fact that many attorneys interpret the

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[4] *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) paras 51-52.

[5] *Mofokeng & others v Road Accident Fund* GSJ 22 August 2012 (case nos. 22649/12; 19509/11; 24932/10; 20268/11) unreported, para 48.

Act contrary to the authoritative interpretation given to the section by the Supreme Court of Appeal and ignore the clear meaning of the section is cause for grave concern but has no bearing on this application for leave to appeal. It certainly is no basis to suggest the section is ambiguous.

[16] On the basis of the cases that I have cited and, being bound by the *Price Waterhouse Coopers Inc*. case, I conclude that there are no reasonable prospects of success on appeal in respect of the meaning of s 2 of the Act.

[17] Grounds 3 and 4 of the first application for leave to appeal and grounds 1, 2 and 4 of the second concern whether Mr Erasmus was obliged, before seeking judicial redress, to refer his complaint to the law society having jurisdiction for it to review the fee charged by Mr Williams, or whether I should have referred the matter to the law society. The two applications for leave to appeal are, however, contradictory.

[18] Mr Williams states in paragraphs 3 and 4 of the first application that I erred in finding that s 5 of the Act and clause 10 of the contingency fee agreement (which is worded similarly to s 5 of the Act) 'did not create obligations to exhaust internal remedies'.

[19] Once again, I am not told how I erred. Section 5 provides that an aggrieved client 'may' refer his or her complaint to the applicable law society. On this basis I concluded that this 'internal remedy' was discretionary and 'allows the applicant the option of referring a complaint about fees to the law society of which the respondent is a member'.

[20] Apart from the permissive, as opposed to mandatory, language of the section, I am strengthened in the correctness of my interpretation by the judgment of Bozalek J, in *Darries v Fielies*.[6] He did not consider it a bar to him setting aside a contingency fee agreement in circumstances in which the applicant had launched his application

[6] *Darries v Fielies* WCC 9 June 2014 (case no. 14788/13) unreported.

after referring a complaint to the law society and before the law society had dealt with the matter.

[21] Grounds 1, 2 and 4 of the second application take a different approach. It is stated in ground 1 that I erred in 'failing to direct that it was desirable and in fact more convenient for the matter to be referred to the Cape Law Society. . .''; in ground 2 that I erred in 'failing to find that Clause 10 of the Contingency Fees Agreement ("JM2") entitled the Applicant to first approach the Law Society. . .'; and in ground 4 that I erred 'in failing to find that the Applicant's complaint first be investigated by the Cape Law Society . . . and that the said Society within sixty days thereafter submits a report to this Court on the outcome of its findings on the matter'.

[22] Mr Sandi conceded that s 5 of the Act and clause 10 of the contingency fee agreement could not preclude Mr Ersamus from approaching the court for relief. Once that concession is made – and in my view, it was correctly made – that is the end of the issue. Mr Sandi was unable to explain how I may have erred in respect of clauses 1, 2 and 4 of the second application when none of these grounds were raised before me. Indeed, the case for Mr Williams was that s 5 and clause 10 were absolute bars to the proceedings brought by Mr Erasmus. Mr Sandi was also unable to explain where I, having been seized of the matter, could have got the jurisdiction to direct Mr Erasmus to the law society – and to order it to investigate and report back – because I may have thought that it was more convenient for him to resolve his dispute that way. There is simply no merit in these grounds.

[23] There are no reasonable prospects of a court of appeal reaching a different conclusion on this issue.

[24] In the result, the application for leave to appeal is dismissed with costs.

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C PLASKET

JUDGE OF THE HICH COURT

APPEARANCES

For Applicant: Mr N Sandi instructed by Mqeke Attorneys

For Respondent: Mr S Cole instructed by Wheeldon, Rushmere & Cole