IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/41933

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED.

27 July 2015 .....

DATE SIGNATURE

In the matter between:

MAREE, CHRISTINEMARIE Applicant

And

RONALD BOBROFF & PARTNERS Respondent

JUDGMENT

SPILG, J:

27 July 2015

INTRODUCTION

1. During 2009 the Applicant, Ms Maree due to medical negligence as a consequence of undergoing medical treatment required her lower limb to be ampuatated.

2. On 26 August 2009 she mandated the respondent Ronald Bobroff and Partners Inc, a firm of attorneys to recover damages on her behalf.

3. It is common cause that Ms Maree signed the following documents on 26 August 2009;

   a. A special power of attorney
   b. A consent (medical)
   c. A "No Win- No Fee Mandate"

4. Although the applicant admits signing the document headed "Percentage Contingency Fee Agreement" she contends that this was only signed on 6 February 2014 when she attended the Gauteng Provincial division High Court in Pretoria, being the date when the matter was set down for hearing. The attorneys contend that the document was signed at Rosebank at 28 September 2010.

THE APPLICATION

5. The applicant seeks an order declaring that the "NO WIN- NO FEE MANDATE" entered into on 26 August 2009 and the subsequent "Contingency Fee Act Agreement" be declared invalid, void and of no force and effect. A further order sought is that the attorneys deliver a fully itemised and detailed accounting in the form of a bill of costs with supporting vouchers where necessary reflecting the reasonable fees and disbursement incurred by them in the proceedings.

6. Finally the applicant sought an order that the respondent pays into the applicant trust account the sum, of R1 334 980.41 together with interest at a rate of 9%pa from 1 August 2014 to date of payment on the difference between that amount and the fair and reasonable fees due to it on taxation.

7. Costs are sought on the attorney and own client scale, including costs of two counsel.

THE ISSUES

8. The following issues are raised;

    a. Whether the respondent overreached the applicant in respect of the fees charged;

    b. Whether the first fee agreement is a common law fee agreement and invalid and if it is whether the *pari delictum* principles[1] govern or whether the applicant would have been unjustifiably enriched and in either event the case would not be capable of determination on motion ;

    c. Whether the maximum that can be charged as a contingency fee includes or excludes VAT;

    d. Whether the second fee agreement was entered into in September 2010 or February 2014;

    e. Whether the respondents were on risk when the second fee agreement was concluded, irrespective of whether it was in 2010 or 2014;and

    f. Whether the underlying agreement is nonetheless unenforceable.

    During argument it also appeared that disbursements to the medico legal experts were being paid only at the end.

9. I am satisfied that save for the question of when the second agreement was concluded , and what arrangements were made with the medico-legal experts and counsel for the payment of their fees all the other issues are resoluble on the papers and the outcome is a matter law. Even the question of *pari delictum* and how to determine any enrichment, if the decision came to that conclusion, can be determined on the papers. This is not the type of case mentioned by *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(4) SA 1155 (T)* where motion proceedings are not permissible at all. In any event of the four main orders sought, one is a declarator, another is a mandamus and a third is effectively for interim relief.

[1] *in pari delicto potior conditio defendentis*

WHETHER THERE SHOULD BE A REFERRAL

10. During argument Adv Ancer requested that the matter be referred to oral evidence on the narrow point of determining when the second agreement was concluded.

11. Counsel for the respondent submitted that the applicant was aware of a potential dispute of fact and therefore should not have launched these proceedings by way of motion.

12. The difficulty I have is that there is documentation which indicates that the first agreement was implemented even after the second agreement was purportedly concluded per the respondent in 2010 and similarly the second agreement does not appear to have been implemented prior to the date when the applicant contends that she signed it.

13. Moreover if it was only signed in 2014 then a fraud would have been perpetrated and the applicant would have to wait a number of years before the matter would be finalised. If not, the respondent cannot be prejudiced and it is to the respondent's advantage to have its good name vindicated sooner. If the matter is referred to oral evidence the case can be finalised before the year end.

14. I also believe that a decision as to what facts to accept based on the papers alone may have gone in the applicant's favour having regard to the nature of the explanation tendered and the apparent anomalies mentioned earlier. It is however unnecessary to determine if that in fact would have been the case, as I would prefer to test these matters, particularly having regard to the serious implications of a finding against the respondent, by vive voce evidence.

15. The bill of costs prepared on behalf of the respondent indicates that significant payments were made to the medico-legal experts only after an interim award was received. This is also relevant to whether the attorneys were on risk, bearing in mind that the merits were conceded in November 2012.

16. Although there are therefore two evidential issues, I am of the view that they can be readily resolved by proper discovery and hearing oral evidence. The issues remain very narrow and require effectively two main witnesses and the documentation

regarding the receipt of the medico legals since the dates of payment already appear on the bill of costs prepared by the respondent. I am aware of the respondent's accusations against one of its erstwhile employees. Accordingly if there is any error as to the dates of payment this can be readily resolved through the books.

17. I consider that the order should follow that ordered by Coleman J in the case of Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W)

THE TRANSFER OF FUNDS

18. The applicant sought an order that the balance of the monies received from the Fund in excess of a certain amount be transferred into the trust account of the applicant's attorneys.
19. There are two reasons why this order cannot be granted at this stage. Firstly it presupposes that the respondent is not entitled to the full amount claimed by it. The second is that no case is made out that the respondent will not be able to meet an adverse order.

ORDER

20. I accordingly order that;

1. *The issues of;*

    a. *whether the fee agreement referred to in the papers as annexure CM3 was signed on 28 September 2010 or on 6 February 2014;*

    b. *when fees and disbursements were paid to counsel and the medico-legal practitioners and when they had in fact done the work, by reference;*

        i. *in the case of counsel to briefs, the VAT invoices, pleadings settled, date of appearance and consultations;*

ii. *in the case of each of the experts to the date of examination, date when the report was completed as appearing on the reports themselves and the VAT invoices,*

are referred to oral evidence.

2. *Save in the case of the Plaintiff and Ms Vanessa Valente Glencross neither party shall be entitled to call any witness unless:*

   a. *it has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called by the respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person is set out; or*

   b. *the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.*

3. *Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.*

4. *The fact that a party has served a statement in terms of para. 2 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.*

5. *Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in para. 1 hereof, which are or have at any time been in the possession or under the control of such party.*

6. *Such discovery shall be made in accordance with Uniform Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.*

7. *The costs of the application are reserved for determination after the hearing of oral evidence.*

SPILG/J

DATE OF HEARING:	4 June 2015
DATE OF JUDGMENT:	27 July 2015
LEGAL REPRESENTATIVES:	
FOR APPLICANT:	Adv Ancer SC
	Norman Berger & Partners
FOR RESPONDENT:	Adv van Schalkwyk
	Bove Attorneys