

SOUTH AFRICA / JUDGMENT

Cloete v McIntyre & Van der Post (A229/2019) [2020] ZAFSHC 118 (12 June 2020) [2020] ZAFSHC 118

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane, Naidoo

CASE / FILE NUMBER

A229/2019

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No: A229/2019

In

the matter between:-

NICOLAAS

PETRUS

CLOETE APPELLANT

and

McINTYRE

& VAN DER

POST RESPONDENT

CORAM:

NAIDOO,J et MOLITSOANE,J

HEARD:

8 May 2020

JUDGMENT

BY: MOLITSOANE, J

DELIVERED: 12 JUNE 2020

[1] The Respondent, a firm of attorneys sued the Appellant, its own client for professional services rendered. The action was instituted

in the Magistrate Court: Bloemfontein. The trial court found in favour of the Respondent and ordered the Appellant to pay the Respondent the capital claimed and costs relating to the Rule 43(6) application on attorney and client scale. Aggrieved by the order, the Appellant brought this matter before us on appeal.

[2] The relevant part of the Respondent's cause of action is set out as follows in the particulars of claim:

"Plaintiff's claim against the Defendant is for the amount of R14, 716.06 for professional services rendered by the Plaintiff to the Defendant on the Defendant's special instance and request, in terms of a written agreement signed on 31 January 2012, a copy whereof is attached hereto marked annexure 'B', which amount is currently due and owing, a copy whereof is attached hereto marked annexure 'C1' and 'C2', which amount the Defendant fails and/or neglects to pay, despite demand thereto."

[3] The Appellant pleaded as follows to the particulars of claim:

"2.1 Defendant deny (sic) owing the amount of R14 716.06 as Defendant specifically disputed the relevant accounts and requested the Plaintiff in writing

on the 15th September 2014 to proceed to have the necessary accounts taxed, which was not done.

2.2 The written agreement attached as Annexure 'B' was signed by Defendant in relation to work that was already finalised and paid for in 2012 and was the terms not agreed to when defendant approached the Plaintiff in 2014, as it was agreed that Plaintiff would only charge fees on party and party scale.

2.3

2.4 Defendant furthermore dispute liability towards the Plaintiff as the Plaintiff has failed to comply with Defendant's specific mandate given to Plaintiff, being to prepare a Rule 43(6) application. As is evident from Annexures 'C1' and 'C2' the Plaintiff failed to comply with Defendant's mandate to proceed with a Rule 43(6) as these instructions were never complied with.

2.5 Defendant pleaded that on the giving of instructions to the Plaintiff, Defendant have made a payment of R3 500 to the Plaintiff which is not being taken into account or reflecting on any of the statements attached to as Annexure 'C1' or 'C2'"

[4] The facts of this matter are briefly as follows:

During 2012 the Appellant approached Mr Glenn Bradshaw (hereinafter conveniently referred to as the Respondent), an attorney and director in the Plaintiff's firm. The purpose of the visit was in relation to a lease agreement wherein the Appellant was a lessee and his father-in-law, the lessor. When the instruction was given in that matter the Appellant was made to sign a document styled 'Client Information & Mandate' in which he accepted liability for payment of the Respondent's fees and disbursements reasonably incurred, on the attorney and client scale. The mandate was executed and the Respondent paid for the services rendered albeit at a very late stage.

[5] In 2014 the Appellant again approached the Respondent for further assistance concerning his wife. The parties are at odds as to the mandate given to the Respondent on this second visit. It appears that when the Appellant approached the Respondent on this second visit, he was already seized with a divorce action. It further appears that he initially conducted his defence but after he was served with a Notice of Bar, Messrs Lovius Block came on record for him. Lovius Block withdrew as his attorneys of record and it is at that stage that the Respondent came on record for him. He made a payment of R3 500.00.

[6] It is the Respondent's case that since the Appellant was already their client in the matter of 2012 above, a new file was not opened but they continued to assist him in the second mandate using the old file. The Appellant contends that he only instructed the Respondent to lodge an application in terms of Rule 43(6) as he was concerned with the visitation rights in respect of his children. He denies contrary to the assertion by the Respondent that his instructions were for the finalisation of the action of divorce. The Appellant further contends that he agreed with the Respondent that the latter would levy his fees on the party and party scale when he charged him. The Appellant denies any indebtedness to the Respondent and asserts that the work done by the Respondent was far less than the fee of R3 500.00 he paid and he was thus entitled to a refund.

[7] The grounds of appeal on which the judgment is assailed may be summarised as follows:

1. The Court a quo erred in ordering the Appellant to pay the Respondent's costs on the attorney and client scale when no such relief was sought;
2. The Court a quo erred in finding in favour of the Respondent, where Respondent failed to render services in line with the mandate of the Appellant.

[8] On 9 May 2014 the Respondent forwarded a statement of account in the amount of R16 482.00 to the Appellant for services rendered. The Appellant disputed his indebtedness to the Respondent and further called for the taxation of the bill. At that stage the Respondent did not tax the bill. The Respondent proceeded to institute a claim for payment of the amount of R14 716.06 against the Appellant. Before the hearing the Respondent sought to tax his bill of costs but same was opposed by the Appellant. The Taxing Master refused to tax the bill as there was a dispute regarding the mandate of the Respondent as well as the scale to be

applied for the taxation. The matter was then set down for trial. During the trial the Respondent acknowledged that an amount of R3 500.00 had been paid by the Appellant and that same should have been deducted from the account rendered. That part of the claim that was acknowledged was abandoned. The court however made no formal ruling in respect of the abandoning of the claim but I am satisfied that it was common cause that the amount of R3500.00 had been paid. The end result is that the Plaintiff only pursued payment of R13 177.06. At the end of the defendant's case the court a quo, granted an order in the following terms:

- a) The Plaintiff's claim against the defendant (Appellant) on the merits succeeds with costs.
- b) Defendant is ordered to pay the plaintiff the applicable tariffs in 2013 relating to Rule 43(6) application on attorney and client scale.

The order as crafted is not clear. It is not clear if judgment was granted on the amount of R14 716.06 as claimed in the summons or on the balance of R16 482.12 less the deposit of R3 500.00 as conceded and abandoned by the Respondent. The order of the court a quo is further contradictory as I will illustrate later.

[9] It is not in dispute that the Appellant approached the Respondent after a divorce action had been instituted against him for

assistance. What is in dispute is the nature of the mandate of the Respondent. The Appellant wants this court to believe that he had instructed the Respondent to launch an application in terms of Rule 43(6) in order to deal with the visitation rights of his children. This submission is not supported by the evidence. An application in terms of Rule 43(6) is interlocutory in nature. It is usually dealt with as part of an instruction for the main action of divorce. While it is dealt with separately from the main action it is intertwined with the main action of divorce. It is inconceivable that two firms of attorneys would come on record for the Appellant for the main action of divorce and ancillary interim relief in terms of Rule 43(6) pendent lite. This militates against the contention by the Appellant that he had instructed him to launch a Rule 43(6) application only. The

Respondent does not practice as an Advocate who may be instructed on an ad hoc basis in an action or application. He places himself on record for the duration of the action or until his mandate is terminated or he withdraws as an attorney of record of a party.

[10] It is apparent from the record that the Appellant was kept informed about the progress in his matter by way of letters as well as consultations by the Respondent. It might be so that when he first approached the Respondent for assistance after the institution of divorce his main concern was visitation rights. I have no reason to reject the evidence of the Respondent that after consultation he advised the Appellant that pursuing a Rule 46(3) application was not a viable option. The Respondent opined that pursuing a speedy finalisation of the divorce would have been the better option at that stage. An order in terms of Rule 43 is not a final order as contended by the Appellant. It may be varied or confirmed by the final order of

divorce hence it is understandable if a party considers it prudent to pursue finalisation of divorce rather than proceeding with a Rule 43 application as the same results may be obtained which may be final in nature. Much was said about the fact that such application was granted after the Appellant instructed a new firm of attorneys. That might be so but the fact remains that it was months after the initial consultation with the Respondent and it is possible that circumstances might have changed during the period. No submissions were made with regard to the circumstances of the parties at the time the application was granted.

- [11] The evidence reveals that Respondent attended a Rule 37 meeting and the minutes were compiled and filed. He also applied for trial dates and two days were scheduled for the hearing of the trial. The Appellant was kept informed and a copy of the set down was also sent to him under cover of a letter dated 20 June 2014^[1]. This letter and the Notice of set down, however, make no mention of what was set down, i.e. whether it was a divorce or Rule 43(6)

application. In evidence the Appellant testified that he thought that the set down was for the Rule 43(6) application. That cannot be true because on 9 May 2014 the Respondent dispatched a letter to the Appellant with the heading 'EGSKEIDING' in which the latter was informed that the Respondent was awaiting trial dates. Further letters on progress under the same heading were also sent to him later, including the account dated 14 July 2014

- [12] There is no evidence that the Appellant did anything apart from the instruction to the Respondent to pursue finalisation of his divorce action. If it was his instruction that the Respondent should only pursue the Rule 43(6) application and not the main action, then in that regard one would have expected him to at least pursue a parallel action to finalise the divorce although I already indicated how impossible that route would have been. Failure to pursue a parallel action to the alleged instruction to launch a Rule 43(6) application lends credence to the assertion that the mandate to the Respondent was to proceed with an action for a divorce.
- [13] It had always been the case for the Respondent that his mandate was to assist with the main action of divorce. On the other hand, it had always been the case for the Appellant that his instruction to the Respondent was to bring a Rule 43(6) application. In its judgment the court a quo was impressed with the testimony of the witnesses from both sides. The court remarked that the Respondent made a good impression on the court as a witness while the court also said that the Appellant too made a good impression 'notwithstanding that he [was] a layman.' The court a quo failed to appreciate the issue before it regarding the mandate of the Appellant to the Respondent. The answer to that issue goes to the heart of the claim of the Respondent. It has to be borne in mind that the contention by the Appellant is that the amount of R3 500 paid as a deposit was more than sufficient to cover the Rule 46(3) and if the court was with him in that regard, it should have granted an order dismissing the claim.

- [14] The court in its judgment, apart from being impressed by witnesses from both sides also said:

“[23] It is therefore my view that indeed the work was done on behalf of the defendant albeit the mandate being somehow blurred. (My emphasis).”

If the mandate was blurred as indicated by the court a quo, then in that case the court should have granted absolution from the instance at the end of the defendant’s case. What the court, however, did is that it accepted the evidence of the Respondent that its mandate was to proceed with the main divorce action. This I infer from paragraph 1 of its order indicating that plaintiff’s claim succeeds on the merits. In this regard, the court found in favour of the Plaintiff/Respondent.

- [15] The contradiction, however, comes when the court also makes a costs order in favour of the Respondent in paragraph 2 but in the same breath granting costs, only in respect of the Rule 43(6). This implies that the court a quo accepted the version of the Appellant. As alluded to above, if it found in favour of the Appellant it should have dismissed the claim. There is no correlation between the findings the court made and the orders subsequently granted. As indicated above the mandate was to assist with the divorce and the court a quo erred in granting an order for payment of costs of the Rule 43(6) application.

- [16] The second ground of appeal relate to whether the Appellant should have been billed on party and party scale or attorney and client scale. The Respondent testified that he had previously been instructed by the Appellant in a matter involving a lease agreement.

A file was opened. This was in the year 2012. A ‘client information and mandate’ form was completed in which the Appellant accepted liability for payment of costs on attorney and client scale. When the Appellant came again with an instruction in this matter the same file was used. It is the testimony of the Respondent that the mandate with regard to payment of fees on attorney and client’s scale as contained in the initial instruction was still applicable.

- [17] The Appellant contends that he had agreed with the Respondent that the latter would levy fees on his account on party and party scale. It is his case that the Respondent even gave him the list of tariffs on party and party scale. The Respondent conceded that he gave the Appellant a list of the fee tariff as indicated but he denied that he had agreed with the Appellant to levy costs on party and party scale. The said document is attached as an annexure to the summons. A closer scrutiny of this form reveal that it was signed by the Appellant on 31 January 2012. It does not set out the mandate or instruction of the Respondent’s client. It also has two references, namely, BCC 058 and BCC 061.

- [18] The reference BCC 061 appears to have been deleted. It is unclear how both references came to be on the document or which reference came before the other or whether they were written on the same date. It is in my view difficult to accept that the scale to be accepted in the levying of fees in this matter may be based on this document as testified by the Respondent. This document was clearly completed for a different mandate two years prior

to the mandate in the case before us. The reference BCC 058, however, appears in the reference sections of the correspondence in the matter before us. While it may be accepted that the same 'file cover' may have been used, same cannot be said about the contents thereof.

[19] Notwithstanding this, the contention by the Appellant that they agreed that costs for his action would be levied on party and party scale stands to be rejected for the following reasons:

As testified to by the Respondent there is no reason why the Respondent could have agreed to differentiate between his clients by agreeing to charge the Appellant on party and party scale while his other clients were charged on attorney and client's scale. That explanation is in my view reasonable.

[20] The mere fact that the Appellant was given a list of tariffs does not in itself prove that the agreement was that he would be charged on party and party scale. The respondent's explanation was that he gave the appellant a copy of the party and party tariff so that the latter could see that the respondent's attorney and client bill was not very much more than those in the party and party scale. During cross examination of the Appellant on the statement of account, the following transpired[2]:

MR VAN VUUREN: But I just want to know is the items that is listed here do you have issues with these items?

MR NP CLOETE: Yes I have issues with those items.

MR VAN VUUREN: Tell me why?

MR NP CLOETE: Because it's not in accordance with my instructions.

MR VAN VUUREN: How so?

MR NP CLOETE: This is not relevant to the Rule 43(6) it is relevant to the main divorce action which was not my instruction.

What is pertinently clear from the above extract is that the Appellant disputed the account on the basis that his instructions were for a Rule 43(6) which were not followed and did not dispute the scale of fees. This notion (that his instructions were not followed but he did not dispute the scale of fees) is further fortified by the letter he wrote to the respondent on 12 September 2014. In the said letter, he refers to the deposit of R3 500.00 he paid and complains about his instructions not being followed. He makes no reference to the scale of fees allegedly agreed upon. The issue of fees is conveniently only raised according to him when summons was served. What triggered this sudden realisation might simply be the Client information form of 2012 attached to the summons. The Appellant was unable to explain why he did not raise the issue of the scale earlier, especially in view of the fact that he already had tariffs.

- [21] It seems the parties were of the view that upon adjudication of the issues of mandate and the scale of fees, the matter was supposed to be deferred to the taxing Master for the assessment of the account[3]. I do not agree with this view. The pleaded case and the relief sought by the Respondent was for payment of the claimed amount and costs. This is the case the trial court was called to adjudicate upon. It is clear from the record that the Appellant only concentrated in his testimony on the number of letters written to him and their tariff. It was within the rights of the Appellant to take issue with all fees and disbursements contained in the summons but this he failed to do. He only attacked the number of letters written to him but made no reference to letters to third parties. I am unable to find that the fees charged herein were unreasonable.
- [22] It is trite that costs are in the discretion of the court. The court a quo granted costs of the trial on attorney and client scale. Although the Respondent asked for costs on an attorney and client scale in his summons, there is no evidence or reasons on record that justify a punitive costs order. In this regard the court a quo erred.
- [23] In my view both parties were partially successful in these proceedings before us. The Appellant was successful in opposing a punitive costs order against him. The Respondent was successful in ensuring that the appeal is successfully opposed on the merits. I am of the considered view that it would be in the interest of justice that each party should bear his own costs in this appeal. I accordingly propose the following order:
- [24] ORDER
1. The order of the court a quo is set aside and substituted with the following:
 - a) The defendant is ordered to pay the plaintiff's claim in the amount of R13 177.06
 - b) The defendant is ordered to pay the plaintiff's costs on a party and party scale.
 2. Each party to bear his/its own costs of the appeal.

P.E. MOLITSOANE, J

I agree and it is so ordered.

S. NAIDOO, J

On behalf of the Appellant: Mr Van Vuuren

Instructed by:

McIntyre and Van der Post

BLOEMFONTEIN

On behalf of the Respondent: Mr Coetzee

Steenkamp & Jansen Inc

[1] See pages 82 and 137 of the paginated record.

[2] Page 366 lines 16 et seq

[3] See page 245 of the paginated record.

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Prepared on 11 October 2026 · Esheria