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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16755/2018

DATE: 2018-07-04

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE: 19 July 2019

SIGNATURE:

In the matter of

STEVE MERCHAK ATTORNEYS

PLAINTIFF

and

G G

DEFENDANT

JUDGMENT

VICTOR J:

The issue for determination is whether summary judgment should be ordered for payment of the applicant's fees or whether partial summary judgment can be ordered in respect of certain of the justiciable issues

appropriate for the grant of summary judgment proceedings. Those limited issues would include payment by the plaintiff to third parties such as counsel and the like.

The plaintiff is an attorney who rendered professional services at the behest of the defendant in respect of her divorce.

On 9 January 2014, and at Sandton the parties entered into a partly oral mandate agreement and partly written. The material and express terms were that the defendant engaged the professional services of the plaintiff to institute divorce proceedings and to attend to all legal process ancillary to her divorce action.

The plaintiff's standard terms and conditions applied to the legal services. The plaintiff would be responsible for supervising the services. The rates would vary according to the type of legal service rendered. The rates would be reviewed regularly and could change during the course of the matter. The plaintiff would charge the defendant for services provided by himself, his clerks, professional assistants or other personnel. She would be responsible for payment of all those disbursements such as – including searches in respect of title deeds, company searches and for the payment of counsel's fees.

It would appear that the defendant at some stage became disgruntled with the services that she was receiving. She advised the plaintiff that she wanted a divorce settlement in the sum of R10 million and when it appeared to her that her action was being delayed at the instance of the plaintiff, she then entered into a settlement agreement directly with her husband where she only received an amount of

approximately R3 million. She was dissatisfied with the settlement. The settlement agreement between the defendant and her husband is also referred to in the particulars of claim.

Be that as it may the plaintiff accepted her repudiation of the agreement and then sued for his fees.

The sum in respect of which the plaintiff sues for his fees and disbursements is R1 254 144.05, together with interest and costs of suit.

I had to consider a condonation application for the late filing of the opposing affidavit. Initially the defendant indicated when the matter was called, that they would bring a condonation application and thereafter that changed on behalf of the defendant and she rejected the notion that there should be condonation.

Be that as it may the condonation application loomed large in particular in relation to the rules of court and the disjuncture between the rules of court and the practice manual, and in particular in relation to the counting of the dies, as to whether they would be court days or not.

I have considered the law carefully and I am of the view that condonation should be granted to the defendant for the late filing of the opposing affidavit. In *South African Breweries Ltd V Rygerpark Props (Pty) Ltd And Others* 1992 (3) SA 829 (W) it is clear that the court has a wide discretion to grant condonation for the late filing of an opposing affidavit. I come to the conclusion that the defendant is entitled to condonation save of course that the costs must be born by the defendant in respect of the condonation, and those costs must include the costs of 29 May 2018.

I have already referred to the equivocation on the part of the defendant as to whether the condonation was going to be brought or not, and in the end the matter had to be postponed so that an affidavit in respect of condonation was to be filed.

The plaintiff then sought to answer to those allegations and what happened then is that the plaintiff filed a prolix affidavit setting out matters in the guise of dealing with condonation but in fact amplifying the merits of her defence. In effect having a second bite at the cherry so to speak.

I have had regard to that affidavit and the new matter in that affidavit I disregarded.

As to the defendant's defence, in the affidavit resisting summary judgment she confirmed that the agreement was partly oral and partly a written mandate agreement in terms of which legal services were to be rendered [mechanical problem]. It is clear to me that the plaintiff was cautious before launching the rule 43 application, as well as the summons. He considered the defendant's legal position and the merits of her claim very carefully. Quite clearly there were counsel involved and other costs in relation to not only the issue of the summons but also in relation to the rule 43 application.

She, as I have indicated, became unhappy. She believed she had been overcharged in many instances, and it was submitted by counsel that summary judgment in these circumstances should not be granted.

On behalf of the plaintiff a concession was grudgingly made, that if the court was not to grant the summary judgment in the full amount of R1 254 144.05 then the court should at least grant the order for the experts, and that amount is R469 760.20.

On behalf of the plaintiff it was argued that the lack of *bona fides* on the part of the defendant is clear. In this regard she did not attend the taxation of his bill of costs, she also did not refer the matter to the Law Society for a review of the costs, so the plaintiff, in the result, obtained a taxed bill of costs and it is on this basis that he sues for summary judgment.

The defendant claims that her first defence is that the plaintiff was negligent in that he took six months to institute the divorce proceedings. The second defence is that he should be disallowed his fees as a result of his negligent failure to perform his mandate and in this regard curiously she failed to deal with those invoices that were taxed and which she wished to attack. She simply says that the charge of R1 254 144.05 was absurd in the circumstances because he had done precisely nothing.

Well the documentation found of record gainsay that allegation. She concedes that there were consultations and that her erstwhile advocate Amandalee de Wet was involved in those consultations but she says by way of example that the plaintiff charged for 3.25 hours and not 2.5 hours, and submits that there is an hour difference in those – in that time and therefore the court should not grant summary judgment.

It is clear to me that there are disputes about the plaintiff's computation of the rendering of the amount for such services and there is also a further deduction which is of concern, namely the amount for legal costs that she received, when she was awarded costs at the Rule 43 stage.

I find that the affidavit of the defendant is very bald, however, I am mindful that there are disputes in relation to the plaintiff's fees. However, in that very bald affidavit resisting summary judgment she does not attack the fees that the plaintiff had to pay to the various service providers. Counsel on behalf of the plaintiff advised that that amount was the sum of R469 760.20 and having made that submission the defendant did not ask for time to stand down to deal with that figure of R469 760.20.

In my view the defendant has failed to place before court a *bona fide* defence in respect of those payments and I accordingly grant summary judgment as set out in the notice of motion for that amount.

The order that I make is:

1. The defendant's application for condonation is granted.
2. The defendant is to pay the costs including the wasted costs of 29 May 2018, taxable and payable immediately.
3. The defendant is to make payment to the plaintiff in the sum of R469 760.20, together with interest thereupon from 1 September 2017 to date of payment at the prescribed rate.
4. I grant leave to defend the remainder of the plaintiff's claim

5. The defendant is to file her plea within 20 days from date of this order
6. The defendant is ordered to make payment of the summary judgment application in respect of this partial order that I granted, and such costs are taxable and payable immediately.

**JUDGE M VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**