28/9/2010
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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 17303

In the matter between:

DEREK ADLAM	1st Plaintiff
DEON DE BEER	2nd Plaintiff

And

BLACKE SWART & ASSOCIATE	Defendant

JUDGMENT

LEDWABA, J

[1] The plaintiffs issued summons against the defendant seeking an order directing the defendant to render an account to the plaintiff, debatement of such account and an order that the

defendant pay the balance to the plaintiff if any, after the debatement. The defendant is defending the action.

[2] Both plaintiffs testified and called Mr. Morgan James Evans (Mr. Evans) as their witness before closing their case. Defendant's application for absolution from instance after the plaintiffs closed their case was dismissed. Mr Blackie Swart, Mrs Swart and Mr. Allan Wallace testified on behalf of the defendant before defendant's case was closed.

[3] The plaintiffs are chemists. In the year 2000 were criminally charged, together with 2 other accused for wrongfully and unlawfully dealing with prescription medicine.

[4] Defendant is an incorporated firm of attorneys which was known as Blakie Swart and Evans Inc when the first plaintiff consulted with it in 2000 regarding the aforesaid criminal matter.

[5] The accounts that the plaintiffs wanted the defendant to render and in respect of which a debatement was to be held are, according to the plaintiffs, concerning:

(i) two cheques paid to the defendant by the first plaintiff amounting to R21 000

(ii) A Toyota Land Cruizer vehicle (the Land Cruizer) valued at about R330 000, and

(iii) A Formula 323 water boat (the boat) 260 000

[6] I will first summarise the evidence of the witnesses which I regard relevant for the understanding of the conclusion to be reached when I adjudicate on the relief sought by the plaintiffs.

[7] The first plaintiff (Mr. Adlam) testified that his mother and himself had previously instructed Mr Blackie Swart (Mr. Swart), an attorney at the defendant's firm of attorneys in respect of their private matters before. On 10 April 2000 he went to defendant's firm of attorneys and consulted with Mr Swart to instruct him to represent them in their criminal case and to further make representation to the Office of the Director of Public Prosecutions because the officer to whom representations were to be made was Mr. Swart's friend and could probably decide in their favour.

[8] He further said he signed a fee agreement which Mr Swart presented to him, see Bundle A page 9-12. Despite the fee agreement only mentioning him only as a person liable for the fees, he specifically said he instructed Mr Swart to act for Mr. De Beer and himself.

[9] He said Mr Swart asked him how much money they could raise for the case. His response was that R500 000 could be raised. Mr Swart said the R500 000 would be enough as fees for criminal case and it should be paid at his offices. Mr Swart wanted a deposit of R50 000 but he only paid him with

two cheques in the amounts of R16 500 and R4 500 respectively. He further said Mr. Swart told him that he would debit his fees after rendering professional services. He said he later discussed the R500 000 fee with Mr. de Beer and both agreed to pay the said fee.

[10] As far as the fee agreement is concerned, it should be noted that in the last page of the fee agreement (page 12) there is a hand written note which reads as follows
"Fooie ooreengekon kan onmidel gedebiteer en as fooie beskou word en dan so gebank word"

[11] Mr. Adlam said he paid a further R100 000 cash as fees to Mr. Swart on 12 or 13 April 2000 which had been stored at Mr de Beer's fathers house at Centurion. He said the R100 000 consisted of five R100 packets, the value of each packet was R20 000. He further said he put the money on Mr Swart's desk who quickly counted the packs, not the contents, and placed them below his desk and did not issue a receipt nor did he ask for same.

[12] Regarding payment of the balance of the fee they agreed upon he told Mr. Swart that Mr. de Beer and himself were in the process of selling the Land Cruizer and the boat for R260 000 and R330 000, respectively and the balance would be paid thereafter. Mr Swart told him that he will also look for people interested in buying the said items.

[13] He further said the same night after the R100 000 was paid, at about 22h00 Mr Swart phoned and told him that there was a person interested in buying both items and he should arrange for the items to be delivered to him, Mr. Swart.

[14] After a few days he arranged with Mr. Swart that he should collect the Land Cruizer at Centurion from Mr de Beer. It is common cause that Mr Swart did collect the Land Cruizer from Mr De Beer at Centurion.

[15] He further said Mr Swart was involved in an accident in February 2001 and sustained a back injury and could represent them at court. He phoned Mr. Swart several times requesting a refund and he collected the copies of charge sheet from Mr. Swart's offices in June 2001.

[16] He instructed another attorney Mr. Jan Ellis, to represent him. The trial was finalised on 20 April 2002. His co-accused and himself were convicted and fined R300 000 and an imprisonment sentence was suspended. He then instructed Mr. Jan Ellis to write to the defendant. On 22 November 2002 Mr. Ellis addressed a letter to the defendant wherein he requested the defendant to deposit an amount of R190 000 urgently into his trust account so that counsel's fees could be paid, see Bundle A page 53.

[17] In September 2000 Sarlie and Ismail Inc. attorneys acting on behalf of Messrs Adlam and De Beer wrote to defendant, see

Bundle A page 54-55. Paragraph 2,3 and 5 of their letter reads as follows:

"*We are instructed that in and during April 2000 our client Adlam paid to you on behalf of our clients' representation for an anticipated trial the sums of R20 000-00 and R100 000-oo respectively, the former being paid in the form of two cheques drawn by third parties, and the latter in cash.*

Subsequently, and in anticipation of a costly legal process our clients entrusted to you a Toyota Land Cruizer motor vehicle registration number SD 158LG, and a formula 2327.4 litre mercury cabin cruiser boat. Your instructions were to urgently raise monies by way of the disposal of such items. Our clients expressly reserved ownership in respet of the said items until full payment had been made, and a few days pursuant to being entrusted with the said items, you informed our client that the vehicle bad been sold at a price of R330 000-00, and the boat at the price of R260 000-00. Consequently, you were to retain the sum of R710 000-oo in cash in anticipation of our clients' pending trial.

Our instructions are to urgently demand payment of the sum of R710 000-00 less your fee, properly substantiated, for any legal services rendered. We also require full and precise particulars as to the parties to whom our clients' assets as aforementioned were disposed in order that our clients may exercise their rights of ownership, duly reserved as aforementioned."

[18] Mr. de Beer testified and to a great extent confirmed the evidence of Mr Adlam.

[19] Mr. M. J. Evans testified that in 2000 he was a director at Swart and Evans Inc. attorneys, the defendant. He said he once saw the plaintiffs at a function at Mr Swart's house. They had a discussion about the Land Cruizer and the boat. He had an interest in the said items.

[20] The following day he, together with his friend Carla Botha, went to Water World to view the boat. They arranged that the said boat be exchanged for another 2 boats at the showroom.

[21] He offered Mr Swart R200 000 for the boat of Mr. Adlam and De Beer which offer was accepted and he paid Mr. Swart R125 000 with a cheque that did not go through and he later paid Mr. Swart R150 000 cash.

[22] Mr Swart did give him the keys of the Land Cruizer he drove it and took it for valuation. He was not interested in it and he returned it the following day to Mr Swart.

[23] He denied hat he gave Mr Botha the keys of the Land Cruizer and that there was a deal on the Land Cruizer between Mr Swart and Mr Botha. The plaintiff closed his case.

[24] Thereafter Mr. Swart testified. Through his secretary MS. Adri Fourie, after she duly took an oath to repeat what Mr Swart said, for proper recording, since Mr. Swart could not enunciate his evidence for recording because of injury he sustained when he was involved in an accident.

[25] Mr. Swart confirmed that he knew Mr. Adlam well and that he did some legal work for him and his mother.

[26] He consulted with Mr. Adlam for the first time at his office in Roodepoort in April 2000 concerning his criminal case. Mr. Adlam signed the fee agreement. He denied that he also acted for the second plaintiff and said if he also acted for the second plaintiff he would have opened a file for him and would have made him to sign a fee agreement.

[27] He said in the first consultation with Mr. Adlam in April 2000 he estimated the total fees for his criminal case in the amount of R50 000. He confirmed that Mr. Adlam paid an amount of R21 000 with two cheques and that they agreed that the attorney who represents Mr. Adlam in Potchefsroom would arrange for the postponements request copies of a charge-sheet and he, (Mr. Swart) would attend court when the trial commences.

[28] He received copies of the charge-sheet in consisting of 1880 pages. He read the charge-sheet and his nominal fee for perusal was R20 per page. He further said he debited fee of

R21 000 immediately there after it was paid because the contents of the fee agreement catered for that.

[29] He vehemently denied Mr. Adlam paid him R100 000 cash for the case. The version presented by Mr. Swart regarding cash is that Mr. Adlam had made an appointment and came to his office in about May 2000. Mr. Adlam first plaintiff brought some cash and gave it to Carla Botha, the person who purchased the Land Cruizer. When he asked Mr. Adlam as to why did he give Mr Botha the money, his response was that he (Mr Swart) should not worry because the docket was going to disappear. He (Mr. Swart) told plaintiff that he was playing with fire, and he does not want to be part of the shenanigans. During cross examination, Mr. Swart further said when Adlam gave Botha money he went out.

[30] Regarding the Land Cruizer, Mr. Swart said Mr. Adlam said he was selling the vehicle and he told him that he had an interest in it because he was about to buy a car. Since he would be visiting his family in Nabomspruit he wanted to test drive the Land Cruizer. Mr. Adlam told him that the vehicle was in Bronkhorspruit and he would make arrangements for him to have the vehicle on the Friday they agreed upon.

[31] Mr. Swart said his son-in-law Mr. Allan Wallace accompanied him to Centurion to collect the Land Cruizer from Mr. De Beer at a bridge. He drove back with the Land Cruizer. After test driving it during the weekend he was not interested in buying it because it did not have a turbo-charge and further

because Mr. Adlam did not have registration papers of the vehicle since the vehicle was from Swaziland, it was so-called 'greys model'. He arranged that Mr. Adlam was to collect the vehicle on Monday afternoon.

[32] He further said Mr. Evens saw the vehicle parked at the office. When he enquired about it, he told him that the first plaintiff was selling it and he gave him the keys since he showed some interest in it. However, in the afternoon Mr. Evans returned with his friend viz, Barnard who is also known as Carla Botha who was interested in purchasing the Land Cruizer.

[33] He said Mr. Adlam gave him permission to give Botha the keys of the vehicle. He saw the vehicle again when the first plaintiff gave Botha money in the office, in about May 2000 that was the last time when he saw the Land Cruizer.

[34] Regarding the boat, Mr. Swart testified that two weeks after the Mr. Adlam and Mr. Botha were at his office Adlam phoned to say he was selling a boat. Mr. Swart told Mr. Evans about it. Messrs Evans and Mr. Botha communicated with Mr. Adlam directly about the boat and he further received information that they bought it and latter exchanged it for two boats. Mr. Swart further disputed Mr. Evans's evidence that he received R150 000 cash for the boat and further that he received a letter in page 25 of bundle A that Mr. Adlam said it was faxed to him.

[35] Mr. Swart further said after receiving a letter from Mr. Adlam's attorneys, Sarlie-Ishmael Inc., dated 12 September 2002 (page 54 of the bundle) he phoned Mr. Adlam to enquire what nonsense was in the letter. Mr. Adlam apologised and told him to ignore the letter. He further testified that summons was served on the defendant three years after the alleged incident concerning R100 000 the cash the Land Cruizer and the boat. However, he decided not to file a special plea of prescription to the plaintiff's claim. He wanted the merits of the matter can be adjudicated by the court.

[36] In evaluating the evidence and probabilities Mr. Swart stuck to his evidence even if he was cross-examined in detail about his version. He did deviate from his evidence in chief however, in my view, his digressions were not material nor did they weaken his version.

[37] On the contrary, the evidence of the plaintiffs' considered together with the evidence of Mr. Evans, in my view, reflects some improbable characteristics, which make the plaintiffs' to be unsatisfactory.

[38] The version put forward by Mr. Adlam the plaintiff is that Mr. Swart wanted a deposit of R500 000 and they paid a deposit of R121 000 and the value of the Land Cruizer and the boat being R330 000 and R260 000, respectively, would form part of the monies to be paid into the defendant's trust account to cover the fees charged by the defendant.

[39] If it is accepted that the Land Cruizer was sold for R330 000 the total amount received by the defendant would have been R451 000 made up of the R21 000 cheques and the alleged R100 000 cash.

[40] Since Mr. Evans confirmed that he held discussion with the plaintiffs he would have informed them that he gave Mr. Swart R150 000 cash for the boat. The plaintiffs on the aforesaid figures only would have been immediately entitled to a refund of about R100 000 but there is no evidence that the plaintiffs claimed the said refund then.

[41] Having regard to the contents of the letter addressed to the defendant by Sarlie-Ishmael Inc. dated 12 September 2007 and the contents of the pleadings, I fail to understand why he plaintiffs' failed to claim the vehicle from the person in whose name the Land Cruizer was registered. Furthermore, the plaintiffs' version does not tally with the contents of the pleadings and the letter from Sarlie-Ishmael Inc. dated 12 September 2007.

[42] Keeping in mind the relief sought by the plaintiff and on careful and proper analysis of the evidence, I will deal with the aforesaid accounts that the plaintiffs want an account to be rendered separately.

[43] Regarding the deposits of two cheques of R21 000, it is common cause that Mr. Adlam paid to the defendant on 10 April 2000 the said monies. The monies were put in trust and debited as fees on 14 April 2000.

[44] Mr. Swart who testified on behalf of the defendant explained that he immediately debited the fee of R21 000 as it was agreed in the fee agreement.

[45] It is clear that by then, the professional services rendered were just one consultation with Mr. Adlam and some telephone calls were made. In terms of the **Attorneys Act**, the attorney should only transfer fees and render services and must account to client accordingly, see **sections 78 and 79 of the Attorneys Act 53 of 1979**.

[46] Mr. Swart further explained that the value of the professional services that he rendered by reading 1180 pages of the charge sheet, exceed an amount that was in trust and he did account to Mr. Adlam. It should be noted that in some of the correspondence from the plaintiffs' attorneys the fee of R21 000 is not an issue.

[47] The ledger book of the defendant further reflected the defendant and the fee debited.

[48] I think it will not serve any purpose to make an order in respect of the R21 000 because there is an explanation about the said amount.

[49] Regarding the alleged R100 000 cash deposit, Mr. Swart denies to have received the said cash and he gave another version which involves a money transaction between Mr. Adlam and Mr. Botha.

[50] The burden of proof is on the plaintiffs to prove on the balance of probabilities that they paid the defendant the R100 000 cash.

[51] I fail to understand as to why would Mr. Adlam risk breaching his bail conditions by going to the defendant's office only to pay the R100 000 if the money could have been deposited into the bank account of the defendant's trust account. By then, the charge sheet had not been drafted and there was no need for a consultation with Mr. Swart. Mr. Swart testified that Mr. Adlam came to his office for the second time to meet with Mr. Carla Botha regarding the disappearance of the docket. It is, in my view, possible that this could have been the reason why Mr. Adlam visited the defendant's office.

[52] If the money was legitimately paid to the defendant as fees the question is still why Mr. Adlam not insisted on a receipt so that he could even prove to Mr. de Beer and Mr. de Beer's father that he did pay the money as part of the fees. On the contrary, if the money was paid for illegitimate activity it is understandable why a receipt would not be insisted upon.

[53] Regarding the Land Cruizer, on proper analysis of the evidence of Mr. Adlam, Mr. Evans and Mr. Swart, there is no evidence or sufficient evidence to prove that the purpose of the sale of the Land Cruizer was to use the proceeds as a deposit for the alleged fee of R500 000.

[54] In my view, the sale or intended sale was just a private deal and had nothing to do with the fees to be paid to the defendant. Advocate Maritz for the plaintiffs', correctly, in my view, conceded that the relief sought in respect of this item should not succeed.

[55] Regarding the Formula 323 boat. Mr. Swart even with the boat, denied that he received same to be used as a deposit for the alleged fee of R500 000.

[56] In my view, the issue of the boat is a private deal between Mr. Adlam, Mr. Evans and Mr. Botha and Water World in Randburg.

[57] Also, on the evidence of Mr. Evans who was a director at defendant's firm of attorney even if it may be accepted that he did give Mr. Swart some money for the boat, there is no doubt that the transaction was a private deal, otherwise he could have paid the proceeds of the alleged sale at the defendant's offices or deposited it into the defendant's trust bank account.

[58] Mrs. Swart denied that Evans gave Swart R150 000 cash and her evidence was not challenged.

[59] The relief sought by the plaintiff also in respect of this item must fail.

COSTS

[60] The matter was extremely important for the reputation of Mr. Swart who had been an attorney for about twenty years.

[61] The matter had a potential that Mr. Swart could have been struck from the roll of attorneys for mismanaging and misappropriating trust money. The need of two counsel was in my view justified.

[62] **I therefore, make the following order:**

(i) Plaintiffs' claim is dismissed.

(ii) The first and second plaintiffs are jointly and severally ordered to pay the costs which costs include the employment of a senior and junior counsel and also the wasted costs of the 26 October 2009.

A. P .LEDWABA
JUDGE OF THE HIGH COURT