

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
1-03-2011. *ls. Webster*
DATE SIGNATURE

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: 35529/2009

DATE:

In the matter between:

JOHANNES RUDOLPH MARAIS LOUW

PLAINTIFF/RESPONDENT

V

SHEENA COOPER

DEFENDANT/EXCIPIENT

JUDGMENT

WEBSTER J

1. The plaintiff who is described in the particulars of claim as "...an adult male Attorney on the non-practising roll of Attorneys" has instituted action against the defendant for (i) payment of R667 204.00 being the amount allegedly owing to him by the defendant in respect of services rendered by him to the defendant in his capacity as a "primary advisor" in relation to the development by her of the farm Schoonspruit. The plaintiff avers that these fees amount represents the total of his normal hourly rate, alternatively a fair and reasonable fee for services rendered by him plus disbursements incurred by him in the execution of his duties; (ii) damages in the sum of R500 000 for seven (7) defamatory remarks allegedly made by the defendant of and concerning the plaintiff in an affidavit deposed to by the defendant. The sum of R500 000 is a globular amount for and in respect of all seven of the alleged defamatory remarks.

2. The defendant, having given due notice in terms of Rule 23 to the plaintiff to cure what she regards as excipiable particulars of claim and the plaintiff having failed, in her view, to cure the objectionable allegations, has set the exception down for hearing.
3. 3.1 The exception on the claim for services rendered (including disbursements allegedly paid by the plaintiff) is that the plaintiff not being a legal practitioner in possession of a Fidelity Fund Certificate (being a non-practising Attorney) is not entitled to charge fees for anything done by the plaintiff for the defendant in terms of the provisions of section 41(1) and section 41(2) of the Attorneys Act 53 of 1979 and further because the drawing up or preparation of documents listed in section 83(8)(a)(i) to (v) of the Attorneys Act (as aforesaid) by any person except a practising Attorney in expectation of payment of fees constitutes as criminal offence. It has been submitted that "...a number of documents drawn by the plaintiff for the defendant fall with the categories of documents listed in section 83(8)(a) of the Attorneys Act". Further, and, tongue in cheek, the defendant contends that the particulars of claim in this regard "...are not sufficiently clear, so as to enable the defendant to ascertain, from the limited detail provided in the schedule, whether these attendances fall within the ambit of section 83(8) of the Attorneys' Act".
3.2 With regard to the second exception the defendant contends that the excerpts set out in the affidavit relied upon "...are in fact not defamatory and ... are not to be understood by readers to convey the meanings attributed to them by the plaintiff. ... or ... carry the alleged sting referred to by the Plaintiff". A further objection is that the plaintiff has failed to

set out the amount claimed in respect of each "defamatory publication" separately.

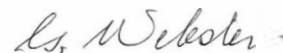
4. The plaintiff avers that (i) nothing in his account is in respect of work reserved exclusively for practising attorneys and consequently falling foul of the relevant provisions of the Attorneys' Act; and (ii) that the defamatory remarks complained of constitute one act of defamation, contained as they are, in one document and were published on one occasion.
5. The services allegedly rendered by the plaintiff to the defendant are set out in a schedule annexed to the particulars of claim. They are in very fine print, single spaced and cover approximately 13¹/₄ pages. They commence with the period "Prior to July 2004" and go up to August 2006. The time for each "attendance" is given in hours. The disbursements are itemised individually. The description of nature of the "services rendered" appear not easily capable of being construed as falling within the type of work preserved for attorneys upon merely perusing the statement of account. By way of illustration the very first attendance reads as follows: "Preliminary discussions in Johannesburg when told about development plans for farm property and client asked if I would be prepared to advise and assist; furnishing preliminary advice on possibilities; receiving basic details about the property and taking delivery of comprehensive album of photos depicting the farm and its surrounds; arranging to visit farm and discuss with Ms Cooper senior and Ms Cooper junior (Sheena Ann Cooper)."
6. Further random attendances read as follows: "August, 2004 – Preliminary work on draft documentation for instructions to attorneys, including sale agreement and statutory schedule; preliminary discussions with the Department of Agriculture in

Pretoria and obtaining forms from them for completion; detailed discussions and efforts to find the right persons with whom to deal; drafting correspondence to the Department of Agriculture and attending on replies; attending on numerous phone calls with departmental officials. Attending on regular phone calls from client and dealing with her questions." "April 19, 2005 – Attending on receipt of e-mail from Mr Anthony Stevens enclosing 12 page quotation from Eco 8 for the proposed environmental impact assessment. Perusing, considering and reply. Noting that meeting is to take place on 20 April in Nelspruit."

The closest entries relating to "legal work" as used in the profession reads as follows: "To my fees and disbursements for legal and general consultancy services rendered during the period from June to August 2006."

7. In argument before me defendant's counsel submitted that the attendance of August 2004 demonstrates clearly that the plaintiff had, i.a. drawn up the "sale agreement" which is one of the documents reserved for practising attorneys. It was submitted further that the services rendered by the plaintiff fell within the ambit of an Attorney's practice and in particular within the provisions of section 41(1) of the Attorneys' Act.
8. When the meaning of the entry relied upon by defendant's counsel was debated with him he submitted that the court would not at this stage make this finding as the entry could be capable of being construed in another way viz. that the agreement of sale had not in fact been drawn up by the plaintiff. Faced with this difficulty he submitted that the exception should not be adjudicated upon at this stage but postponed for the trial as evidence led then would put the issue in a clearer perspective to establish the defendant's contentions on the first exception.

9. It was submitted further that the finding on the first exception impacts on the claim for defamation as the "sting" lies in the allegation that the plaintiff did work preserved for practising attorneys. This further emphasized, it was submitted, the justification for oral evidence.
10. The argument on behalf of the plaintiff whilst vociferously contradicting the defendant's exceptions is essentially in accord with the shift adopted by the defendant in conceding the necessity for evidence. Plaintiff's counsel persisted in the dismissal of both exceptions.
11. With regard to the costs issue it was submitted on the defendant's behalf that costs should be reserved so as to follow the result. Plaintiff's counsel insisted on the costs order.
12. It is quite clear that the court cannot make a finding in support of the defendant's first exception. The alternative that it be reserved for trial cannot succeed. It should have been clear from the very onset that without evidence this court would find it well-nigh impossible to find in the defendant's favour on the first exception. The defendant must have been advised by those representing her that the success of exception could, in all probability, result in the end of the litigation. I see no justification in not following the practice that the costs should follow the result.
13. **Both exceptions are dismissed with costs.**



G. WEBSTER
JUDGE IN THE HIGH COURT

Date of hearing: 24 February 2011

Counsel for the Excipient: Adv MP van der Merwe

Counsel for the Respondent: Adv AJ Eyles