

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

REPORTABLE

Case No.: 1215/2009
Date heard: 28 November 2011
Date delivered: 21 June 2012

In the matter between:

CAMBRIDGE CLAASSEN

Plaintiff

and

VANESSA ELAINE MITCHLEY

Defendant

J U D G M E N T

DAMBUZA J:

- 1] The plaintiff issued summons seeking an order that the defendant render to him a statement of account, supported by vouchers and substantiating documents reflecting all expenses incurred or monies expended by the defendant on behalf of the plaintiff, relating to the plaintiff's immovable properties situated at High Grove and Robinvale, Port Elizabeth. The action is defended. The defendant pleads that she has always accounted to the plaintiff by delivering to him all source documents in respect of transactions undertaken by her as the plaintiff's agent. She pleads that because all source documents and/or invoices relating to the expenses paid by her on behalf of the plaintiff are in the plaintiff's possession, she is unable to account to the plaintiff.

- 2] The background to the dispute is that from 1998 a friendship developed between the parties. In 2003 the plaintiff relocated to Australia where he had secured employment as a mining engineer. Whilst in Australia, and particularly during the period starting from 2003 to 2005 the plaintiff asked the defendant to look for suitable immovable property in Port Elizabeth for him to investment in. This led to the purchase, by the plaintiff, of two townhouses in Port Elizabeth; one property is referred to as the High Grove property and the other as the Robinvale property. These properties were bought by the plaintiff “off the plan” in February 2005 and February 2006 respectively. The defendant facilitated the transfer thereof from the property developer to the plaintiff. She was also involved in aspects of construction thereof, such as choosing fittings and finishes. Thereafter she supervised maintenance of the properties whilst they were rented out to tenants.
- 3] To enable the defendant to properly manage the properties the plaintiff gave the defendant authority to withdraw moneys from a bank account which he still maintained in South Africa. It is these funds that are the subject of these proceedings. According to the plaintiff, he also used this bank account for payment of some of his monthly commitments, such as insurance policies.
- 4] The defendant’s authority to access funds from the plaintiff’s bank account was given in a power of attorney in favour of the defendant executed during 2005. On 31 May 2006 the plaintiff signed a general power of attorney in favour of the defendant. This was intended to extend the defendant’s authority to properly manage the plaintiff’s affairs, particularly, his investments.
- 5] According to the plaintiff he started experiencing difficulties regarding the defendant’s handling of his affairs as far back as 2005 when the defendant failed to account for moneys she had used from the bank

account. When the plaintiff telephoned her to make inquiries, the defendant would be too busy to talk and would undertake to phone the plaintiff at a later stage. That would not happen. Despite these difficulties the plaintiff still needed the defendant's services as an agent, so he testified. This is because at times he would be unable to travel to South Africa when he was required to do so. For example, at some stage it became necessary for him to come to South Africa to sign certain documents in respect of the High Grove property. Because he could not do so on time, he was notified that certain suspensive conditions in the Deed of Sale relating to that property were to be invoked and that would render the contract of sale *null and void*. It is for such reasons that the general power of attorney was executed in favour of the defendant despite the problems that already existed. According to the plaintiff he revoked the Power of Attorney on 7 December 2007, following dissatisfaction with the defendant's failure to account for the moneys used from his account. The summons was issued on 6 May 2009. In the plea the defendant denies receiving notification of cancellation of the Power of Attorney.

- 6] On 1 March 2011 an order was granted by this court, by agreement between the parties. The following is recorded therein:
- a the defendant conceded that she has a fiduciary duty to account to the plaintiff in respect of monies received by her from the plaintiff during the period starting from November 2004 to May 2007;
 - b the defendant insisted that she had accounted to the plaintiff by providing him with all relevant documentation in her possession and until such documentation is returned to her she cannot properly debate the account;
 - c the plaintiff insisted that he never received any documentation from the defendant relevant to his claim; alternatively, that even if such documents were handed to him, the mere handing over thereof to him did not constitute an accounting and debatement of the monies involved;
 - d the parties agreed that by 30 June 2011 the defendant would

provide the plaintiff with an account of all monies reflected in annexure POC2 to the particulars of claim; such account would reflect payments received by the defendant from the plaintiff and details of how the money received was expended;

e the expenditure would be accompanied by vouchers or explanation as to the reason why there were no vouchers and there would be an explanation of the purpose of the expenditure;

f four weeks after 30 June 2011 the plaintiff would furnish the defendant with a schedule setting out items in the defendant's account with which he (the plaintiff) did not agree; and

g the parties would then formulate a list of disputed items by way of a Rule 37 Minute and then arrange for debatement of the account.

7] Despite the agreement which was made an order of court the defendant failed to provide the account as provided in paragraph d above. The plaintiff then drew his own schedule of moneys received by the defendant from him or his bank account which, according to him, were never accounted for. The total amount is R582 825,00, made up of 50 transactions as follows:

No.	DATE	DESCRIPTION	AMOUNT
1.	19 November 2004	Cash Loan to V. Mitchley	R 3, 000.00
2.	24 November 2004	Internet bank transfer to K Arndt	R 5,000.00
3.	25 November 2004	Internet bank transfer to Arndt	R5,000.00
4.	26 November 2004	International telegraphic transfer to K Arndt (Germany bank acc.)- amount of EURO 3526.80 (AU\$6,000)	R 38,000.00
5.	29 March 2005	Internet transfer to Vee Mitchley	R 4, 500.00
6.	09 May 2005	Internet telegraphic transfer to V Mitchley	R 55,000.00
7.	09 June 2005	Internet bank transfer to V Mitchley	R 5,000.00
8.	21 June 2005	International telegraphic transfer to V Mitchley	R15,000.00
9.	22 June 2005	International telegraphic transfer to V Mitchley	R 50,000.00
10.	12 July 2005	International telegraphic transfer to V Mitchely	R 30,000.00
11.	04 August 2005	International telegraphic transfer to V Mitchley	R 50,000.00
12.	14 September 2005	Bank cheque- Linton Grange	R 50,000.00
13.	22 September 2005	Bank cheque- Linton Grange	R 10,000.00
14.	03 October 2005	Cash Loan to V Mitchley for earthworks on her property	R 10,000.00
15.	21 October 2005	Cash withdrawal- Linton Grange	R 15,000.00
16.	28 October 2005	Cash withdrawal- Linton Grange	R 15,000.00
17.	25 November 2005	Cash withdrawal- Newton Park	R20,000.00
18.	09 December 2005	Cash withdrawal - Linton Grange	R 10,000.00
19.	28 December 2005	Cash withdrawal -Linton Grange	R 10,000.00

20.	13 January 2006	Cash withdrawal-Linton Grange	R 10,000.00
23.	03 May 2006	Cash withdrawal- Linton Grange	R 5,000.00
24.	05 May 2006	Cash withdrawal- Linton Grange	R 5,000.00
25.	05 May 2006	Cash withdrawal- Linton Grange	R 5,000.00
26.	19 May 2006	Cash withdrawal- Linton Grange	R 2,000.00
27.	24 May 2006	Cash withdrawal- Linton Grange	R8,000.00
28.	07 June 2006	Cash withdrawal-Linton G.	R 4,800.00
29.	13 June 2006	Cash withdrawal -Linton Grange	R 5,450.00
30.	15 June 2006	Cash withdrawal -Linton Grange	R 5,000.00
31.	22 June 2006	Cash withdrawal- Linton Grange	R 18,540.00
32.	11 August 2006	Cash withdrawal- Linton Grange	R 2,000.00
33.	14 August 2006	Cash withdrawal Linton Grange	R 4,800.00
34.	21 August 2006	Cash withdrawal- Linton Grange	R 6,000.00
35.	19 September 2006	Cash withdrawal- Linton Grange	R 4,000.00
36.	03 October 2006	Cash withdrawal- Linton Grange	R4,200.00
37.	06 October 2006	Cash Withdrawal- Linton Grange	R 5,000.00
38.	23 October 2006	Cash withdrawal- Linton Grange	R 6,700.00
39.	10 November 2006	Cash withdrawal-Linton Grange	R 8,750.00
40.	22 November 2006	Cash withdrawal- Linton Grange	R 4,000.00
41.	20 December 2006	Cash withdrawal- Linton Grange	R 6,200.00
42.	30 January 2007	Cash withdrawal- Linton Grange	R 9,100.00
43.	16 February 2007	Cash withdrawal- Linton Grange	R7,690.00
44.	28 February 2007	Cash withdrawal-Linton Grange	R 5,000.00
45.	13 March 2007	Cash withdrawal –Linton Grange	R 14,000.00
46.	19 March 2007	Cash withdrawal –Linton Grange	R 2,495.00
47.	18 April 2007	Cash withdrawal- Linton Grange	R6,000.00
48.	20 April 2007	Cash withdrawal- Linton Grange	R10,000.00
49.	04 May 2007	Cash withdrawal- Linton Grange	R 4,800.00
50.	18 May 2007	Cash withdrawal-Linton Grange	R 2,800.00

8] Ordinarily, the object of a claim for an account and debatement thereof is to enable the claimant to establish whether the other party is indebted to the claimant. A typical claim is for delivery of an account, debatement thereof and payment of the amount found to be due.¹ In this case however, the plaintiff only claims (in the summons) the rendering of the account and debatement thereof. And, as apparent from the Court Order of 1 March 2011, the defendant admits that she has a duty to account to the plaintiff in respect of the moneys received by her from the plaintiff.

9] But, whilst the plaintiff's claim, as set out in the summons, is for the rendering of an account and for debatement thereof, included in the schedule are moneys which, on the plaintiff's own case, were simply lent and advanced by the plaintiff to the defendant. There is no claim in the summons for repayment of moneys lent and advanced to the defendant.

¹ Amler's Pcedents of Pleadings ; 7th edition at 1.

10] In my view, there would, ordinarily, be no point in rendering an account and debating moneys lent and advanced by one party to the other. But in this case, as stated above, the parties have agreed and this Court granted an order that the defendant is obliged to account for the whole amount of R582 825,00. The defendant has made submissions and tendered evidence as an explanation of how she used the moneys that she admits to have received from the plaintiff.

11] My view is that the onus is on the defendant to furnish a clear explanation of how the money was used.

12] Mr Jooste who appeared on behalf of the plaintiff submitted that the defendant has failed to account in that she failed to furnish an explanation of how the money was expended. I agree. The defendant gave no evidence at the trial. Written “submissions” on the debatement of the account were filed on her behalf. The submissions are essentially the defendant’s responses to the amounts set out in the schedule at paragraph 7 above. The evidence tendered on behalf of the defendant did not, in my view, constitute a clear explanation of how she used the moneys. My reasons for this finding appear in the paragraphs that follow. But first I refer briefly to the plaintiff’s evidence.

13] The plaintiff gave evidence explaining the background relationship between himself and the defendant. His evidence in this regard was not disputed. He then gave background explanation on each of the items and amounts set out in the schedule.

14] The defendant’s friend Bridgitte van Niekerk and the defendant’s Personal Assistant, Venitta Job, testified on behalf of the defendant. Van Niekerk’s evidence was that she first met the plaintiff when he

came to South Africa on a visit in September of 2005. On that occasion the plaintiff stayed at the defendant's home. When the plaintiff was to return to Australia on that occasion, she (Van Niekerk) packed the plaintiff's suitcase for him. On that occasion she saw Venitta Job, give the plaintiff a "blue clip file" containing invoices, although Van Niekerk did not herself, see the contents of the file.

15] According to Van Niekerk although the plaintiff visited South Africa on many occasions thereafter, she only saw him on two occasions; the first occasion being September 2005 and second being when he visited in December 2005.

16] Job's evidence was that she made all the cash withdrawals from the plaintiff's bank account and she made all the payments with the moneys withdrawn. She would then keep the receipts in blue files which he handed over to the plaintiff when the latter visited South Africa. According to her, the last batch of these receipts and invoices were mailed to the plaintiff in Australia in a box in which was also packed the plaintiff's clothes. This was in June 2006, subsequent to the plaintiff's last visit to South Africa.

17] Both Van Niekerk and Job were poor witnesses. They could not provide specific details of the expenses they testified on and were decidedly vague on issues they should have relative detailed knowledge of. Van Niekerk's evidence adds minimal if any value to the defendant's case; it relates to time spent by the plaintiff at the defendant's house. It would appear, from the submissions, that the defendant suggests that the expenses incurred by her as a result of the plaintiff's stay with her should be set off against the moneys that she has to account for. But no evidence was led on the amount of expenses incurred by the defendant as a result of the plaintiff's visit for the period referred to.

18] In respect of items 1 to 3 of the schedule (a total amount of R13, 000.00), the defendant's explanation is that these moneys were used for the plaintiff's benefit when the plaintiff visited South Africa. But the amounts in question were received by the defendant during the period between 19 November 2004 and 25 November 2004. This was prior to the visit by the plaintiff referred to, which was during September 2005. In any event, apart from the submissions made, the defendant led tendered no evidence as explanation of how these amounts were used. Job's evidence was that she knows nothing about moneys that were received prior to the purchase of the properties.

19] Item 4 (R38 000,00) is, according to the plaintiff, an amount advanced by the plaintiff to K Arndt, at the defendant's request. The defendant undertook to refund the amount to the plaintiff. In her submissions, the defendant denies requesting the plaintiff to pay the amount to Arndt as alleged. But once more, the defendant failed to tender any evidence in this regard.

20] Items 5 to 11 of the schedule (a total of R209 500,00) are amounts transferred to the defendant during the period starting from 29 March 2005 to 4 August 2005. The defendant's submission is that the funds were used on the plaintiff's properties. But in respect of all the amounts that appear on the schedule Job was not able to give details of how, exactly the money was used. Her evidence that the file she gave to the plaintiff during his visit of in September contained a 4cm pile of receipts cannot be true in view of the fact that the purchase price of the Highgrove Property and the construction of a dwelling thereon was financed by a bank loan. She also could not explain what the plaintiff was to make of a pile of cash receipts (the evidence having been that all expenses were paid in cash to avoid payment of VAT).

21] Items 12 and 14 (R70 000,00-14 September 2005 to 03 October 2005) were, according to the defendant used for the plaintiff's benefit or by the plaintiff during his visit to South Africa in September 2005. The plaintiff conceded using R10 000,00 of this amount. He also conceded that he requested the plaintiff to give R1 500 00 to his mother. Again there is no evidence of specific amount(s) used by the defendant for the benefit of the plaintiff.

22] Regarding items 15 to 18 (cash withdrawals amounting R60 000,00: 21 October 2005 to 9 December 2005) the defendant prefaces her submission by a reminder that she is not able to recall the "service providers" who were paid, and then she proceeds to state that she paid a person by the name of Anton for satellite dishes (presumably installed at the Highgrove Property). There is no indication of how much was paid to Anton. The defendant also states that she made the following payments: R28 755,00 for truck loads of levelling soil for the High Grove property. R6384 was paid to Alugutter for down pipes; R2650 was paid for a sliding gate; R1571,19 was paid for washing line poles and R1100,00 was paid for a granite effect to columns.

23] Attached to the defendant's submissions are quotes from some "service providers" vouching for the cost of the goods supplied and work done. One such quote is from Alugutter. It is recorded thereon that "in November/December 2005 we did guttering at the above address. Unfortunately after such a long period we do not have a copy of the invoice. However the total gutters =100m with 4 PVC downpipes. Our rates at the time: R50 00 P/M + VAT & R150 00 per downpipe + VAT. (Total R6384-00)".

24] A letter from Largamor Developers cc dated 27 May 2011 is also annexed to the submission. The contents thereof are a confirmation that "all dealings at 7 Robinvale were handled by Mrs Mitchely. Extra overs attached were paid to us in cash". I can only assume, as no evidence was led in this regard, that the "extra overs" relate to payments made (in

respect of further invoices attached to the Largamor invoice) to Zeelie's Wrought Iron for a sliding gate installed at High Grove at a cost of R2650 00, wash line and other items supplied by Zillie's Wrought Iron at a cost of R1571, 17, a quote from Tessa Woods relating to "apply a granite effect to four columns + vanish" for R1,100. (as set out in photographs 22 above).

25] There are four other quotes or documents of similar nature, also annexed to the defendant's submissions. But there is no explanation therefore.

26] Significantly, Job, whose evidence was that she handled all transactions on behalf of the defendant, as the latter had an extremely poor memory, did not give any evidence or explanation on any of the attached invoices or quotes. Her evidence was only limited to stating that she gave the invoices to the defendant. No attempt was made responding to irregularities on the invoices as referred to by the plaintiff. This was in stark contrast with her evidence that she literally runs the defendant's life. Job did not give any evidence on the invoices.

27] The plaintiff on the other hand, conceded that the R1100,00 (paid for the granite effect) and R5348,00 (paid in respect of Defy products) could have been spent on the properties as alleged. He also conceded R4902,00 of the R6384,00 (leaving a difference of R1482,00) allegedly spent on downpipes. (Although he had stated in his submissions in reply, that the downpipes were provided for in the schedule of finishes for the property concerned). He further admitted that the amount of R 2650,00 could have been incurred in respect of repairs done to the sliding doors after there had been a burglary to one of the properties. He disputed all other alleged expenses set out by the defendant. He pointed out that the properties had "flip up" washing lines; therefore there would have been no need for installation of more washing lines.

He also challenged the invoice relating to the washing lines as according to the dates reflected thereon (6 October 2006) construction on the Robinvale property had long been completed. In any event this payment precedes items 15 to 18.

28] Items 20 to 27 relate to cash withdrawals amounting to R35 000,00 during the period January 2006 to 24 May 2006. The defendant's submission is that this money was used towards the High Grove property and all invoices were given to the plaintiff. She does not recall what the moneys were spent on.

29] Items 28 to 50 relate to cash withdrawals amounting to R147 325,00 during the period 7 June 2006 to 4 May 2007. The defendant submits that these moneys were spent on expenses relating to both the High Grove and the Robinvale properties. In respect of the Robinvale property expenses were incurred for installation of aluminium gutters – R4073,22, extra paving R1518,75, and installation of braai – R3250. All these expenses are disputed by the plaintiff who also points out that construction had long been completed and that contrary to the explanation by the defendant that the reason she made cash withdrawals and payments in respect of the properties was avoid payment of VAT, the moneys paid, as per the invoices does include VAT. The most glaring discrepancy in the defendant's explanation relates to withdrawals which continues after the Robinvale Property was completed (June 2006).

30] In the end, the defendant, in her submissions, only attempted to account for R58 748,16 of the R582 825,00. The plaintiff conceded that the amount of R29 818,75 may have been used for his benefit. This amount therefore falls to be deducted from the total amount in respect of which the defendant has to account.

31] It was submitted on behalf of the defendant that the amount of R528 000,00 in respect of which the plaintiff seeks an account, must be divided into two groups of moneys; the loans that were, on the plaintiff's version, advanced to the defendant and the moneys withdrawn from the plaintiff's account. It was also submitted that regard being had to the moneys that the plaintiff had deposited into his bank account, estimated at about R900 000,00, and the fact that his monthly debit orders of about R25 000,00 were paid from the said amount, the moneys deposited by the plaintiff over the period in question are accounted for. But those were not the issues that were brought before me. The issue before me, as I understand it, is whether the defendant, having admitted that she is obliged for the amount received by her from the plaintiff, has furnished an account of those monies.

32] Although generally the ultimate intention of a claim for an account and debatement is to establish money that may be owing to the claimant, there is, in this case, no prayer, in the plaintiff's summons, for payment of such amount of money as may be found to be unaccounted for. A submission was made, however, at the trial, on behalf of the plaintiff that if the defendant fails to account for the moneys received then the defendant must pay the moneys. It seems to me that where, as in this case, it is found that a claimant's money is unaccounted for or the defendant has failed provide a satisfactory account, there can be no reason why an order for payment of the outstanding amount should not be granted. Failure to grant such an order would lead to the parties having to incur further legal costs in seeking an order for payment of the outstanding moneys. I do not think that could have been intended by the parties. I have discussed this issue with legal representatives of both parties and they are both agreeable that an order of payment of amounts found to be due should be granted. I also cannot find any reason why interest should not be payable on the amount found to be due where that amount is not paid within a reasonable time of this

judgment. I am of the view that 30 days would be a reasonable period to allow to the defendant to make the payment.

33] Regard being had to the defendant's failure to render an account for the moneys received by her from the plaintiff, these moneys are due to the plaintiff.

34] Consequently, an order is granted in favour of the plaintiff against the defendant for:

- 1 Payment of R553,006.25;
- 2 Interest on the said amount at the legal rate with effect from 30 days of this order
- 3 Costs of suit.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv P E Jooste

 Instructed by Wilson Mc Williams INC,

 Port Elizabeth.

For defendant: Adv N Mullins

 Instructed by Goldberg & Victor,

 Port Elizabeth.