



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/ NO

Case number: **223/2020**

In the matter between:

MACHTILT SUSANNA FERREIRA

PLAINTIFF

and

FREDERICK JACOBUS SENEKAL

1st DEFENDANT

MATSEPES INC

2nd DEFENDANT

FJ SENEKAL INC

3rd DEFENDANT

CORAM:

NAIDOO, J

HEARD ON:

3 & 4 May 2022, 23 AUGUST 2022, 1 August 2023, 7 November 2023

DELIVERED ON:

8 DECEMBER 2023

JUDGMENT

[1] The plaintiff issued summons against the three defendants, namely the first defendant, Frederick Jacobus Senekal (Mr Senekal), the second defendant, Matsepes Inc (Matsepes or the 2003 company), the third defendant, FJ Senekal Inc for payment of monies owed to her, which she alleges was paid to the first and second defendants for professional services rendered to her. She alleges that the first defendant made certain fraudulent misrepresentations to her which resulted in her paying the money to him and the second defendant. I also mention that the plaintiff's claim arose when the Attorney's Act 53 of 1979 (the Act) and the Rules and Regulations relevant thereto, were applicable. The relief claimed in the summons reads, *inter alia*, as follows:

- "1. Payment of the amount of R412 042.74;
2. Payment of interest on the amount of R412 042.74 at the rate of 9.5% per annum *a tempora morae*;
3. Costs of suit."

Adv FG Janse van Rensburg represented the plaintiff, Adv MC Louw represented the first and third defendants and Adv W Groenewald represented the second defendant (the 2003company) in this court.

[2] The third defendant filed a Claim in Reconvention against the claim of the plaintiff enunciated above, in the amount of Ninety Three Thousand Three Hundred and Sixty Nine Rand and Seventeen Cents (R93 369.17). The basis of the Claim in Reconvention is that, when Mr Senekal commenced practising for his own account under the name of the third defendant, the second defendant (the 2003 company), and the third defendant, represented by Mr Senekal, entered into an agreement that in all litigation matters, where clients

requested Mr Senekal to take over their files on behalf of the third respondent, the latter will be entitled to recover all outstanding fees and be liable for all disbursements in connection with such files. The third defendant alleges that this agreement with the 2003 company was concluded on 1 February 2018, and that the third defendant took over the file of the plaintiff relating to the application under High Court case number 1582/2017 at the latter's specific instance and request. The amount claimed in reconvention is allegedly in respect of work done and professional services rendered by Mr Senekal and senior counsel in the aforementioned application, which the plaintiff specifically mandated Mr Senekal and senior counsel to do. I will return to this aspect and the plea of the defendants later, to the extent necessary

- [3] The plaintiff applied for an amendment to the summons, mid-way through the trial. A written judgment was prepared in that application which set out the background to this matter. For convenience, I repeat here the relevant paragraphs of that judgment relating to the background. During 2016, the plaintiff instructed Mr Senekal to represent her in motion proceedings in this Division, and Mr Senekal accepted the mandate, and subsequently launched an application on her behalf, in this court. The plaintiff alleges that Mr Senekal, in representing her, as a director of the second defendant, fraudulently represented to her that he was an admitted attorney, who was in possession of a valid Fidelity Fund Certificate (FFC) and had complied with all legal requirements to represent her, as set out in the Attorney's Act 53 of 1979, which was applicable at the time. It is not

in dispute that over a period of time, he issued several invoices for disbursements and professional services rendered, which the plaintiff paid in the total amount of R412 042.74. Such payments were made into the Trust Account of the second defendant.

- 4] The plaintiff asserts that she was induced by the fraudulent misrepresentation made by Mr Senekal to pay the said amount in the belief that he was entitled to charge such fees and disbursements and that such amounts were due, owing and payable to him. The plaintiff claims that she is entitled to be reimbursed in the amount of R412 042.74. together with interest thereon, as claimed in the summons.
- [5] The evidence of the plaintiff and Ms Christina Jacoba van der Merwe (formerly Marais), the former Chief Executive Officer of the then Free State Law Society, was led, at the end of which the matter was adjourned for the plaintiff to properly investigate and consider the issues raised in Ms van der Merwe's evidence, after the late introduction by the first and third defendants of a FFC, which they alleged was relevant to this matter. When the matter resumed on 23 August 2022, the applicant applied to file a supplementary affidavit to deal with new evidence in respect of the second defendant's identity, that had come to her attention after the previous adjournment and shortly before the hearing on 23 August 2022. There was no opposition to this application and it was accordingly granted as prayed. The plaintiff also filed an application to amend her Summons

and Particulars of Claim by deleting the reference to the second defendant as “Matsepes Inc” and replacing it with “Matsepes (Bloemfontein) Inc, with registration number 1998/020850/21.” The plaintiff sought costs of the application in the event that the application was opposed. This application was opposed by the second defendant, Matsepes Inc, which had also filed a Notice of Objection to the proposed amendment.

- [6] I pause to mention that during the course of the plaintiff's *viva voce* evidence in court, it emerged that the second defendant (Matsepes Inc) and Matsepes (Bloemfontein) Inc are two separate entities with different registration numbers, who practise from the same premises. The registration number of the second defendant is 2003/023083/21 (the 2003 company), while that of the Matsepes (Bloemfontein) Inc is 1998/020850/21 (the 1998 company). The plaintiff asserts that at the time that Summons was issued she was unaware of the existence of two separate entities, as Mr Senekal, when he rendered the services to her, appears to have done so as a representative of both entities. He intermittently used the letterheads of both in the course of dealing with her matter. She made all payments into the Trust Account of Matsepes (Bloemfontein) Inc.
- [7] As indicated, the amendment sought by the plaintiff was granted, the court ordering that the plaintiff's Summons and Particulars of Claim be amended by deleting the reference to the second defendant as “Matsepes Inc” everywhere it appeared and replacing it with

“Matsepes (Bloemfontein) Inc, Registration number 1998/020850/21”. Thereafter, the 1998 company Matsepes (Bloemfontein) Inc withdrew its defence and filed a Notice to Abide by the court's decision. The 1998 company, which was the entity with which the plaintiff interacted and into whose account she paid all the monies she now claims, was after the amendment to the summons, correctly reflected as the second defendant in this matter. I will henceforth refer to this entity as the second defendant. It was common cause between the parties that Mr Senekal was a director of second defendant and that it was into its Trust account that the plaintiff deposited all amounts that she was invoiced for.

- [8] When Mrs van der Merwe initially testified, she confirmed that a letter was sent, via email, by a Mr Frank Sudron, ostensibly from the Fidelity Fund to a functionary at the Free State Law Society advising that Mr Senekal was in possession of a valid FFC for the 2017, which was issued on 14 December 2016, with the expiry date being 31 December 2017. When dealing with the true identity of the second defendant (the 1998 company), Mrs Van der Merwe earlier testified that Mr Matsepe who was a director of the second defendant was not in possession of a FFC, which information was extracted from the records of the Law Society. She further testified that if a FFC was denied to one director of a company, no other director would be issued with a FFC.
- [9] While she was being cross-examined, a further FFC came to hand from the instructing attorneys of the defendants. As it was allegedly

very relevant to the issue raised earlier in the evidence that Mr Senekal and other directors did not hold a valid FFC for 2017, the court provisionally allowed the document to be introduced into evidence for the purpose of cross-examining Mrs van der Merwe thereon. The plaintiff consented to the document being shown to Mrs van der Merwe for the purpose of cross-examination and reserved her right to deal with its admissibility later. It was a FFC issued to Mr Matsepe by Mrs van der Merwe for the 2017 year. She confirmed that it was her signature that appeared thereon, and explained that at that time, the Law Society was migrating to the digital system, where practitioners who had complied with the Act and qualified for receipt of the FFC could download the certificate from a digital portal.

- [10] She further explained that, due to the systems of the Law Society and that of the Fidelity Fund being different, there were problems with the system, and manual corrections had often to be made, after contacting the Fidelity Fund and advising them accordingly. If the practitioner met the requirements, the system would automatically place her signature on the certificate, without input from her. When asked if the certificate was validly issued, she explained that it could have been done in error, or it may thereafter have been withdrawn because a qualified audit was submitted. Without looking at the Law Society's system and/or files, she would be speculating, as she was unable to say whether the certificates were validly issued or whether they had been withdrawn. I pause to mention that it is common cause between the parties that the second defendant's financial year-end is 30 September each year, that the audited financial audit statement

for 2016 was submitted to the Law Society on 2 June 2017 and that the audited statement for 2016 was a qualified statement.

[11] At the end of Mrs van der Merwe's evidence, the plaintiff applied for leave to allow Mrs van der Merwe to inspect the records of the Law Society in order to ascertain the true position in respect of the FFC's issued to Mr Senekal and the directors of the second defendant. The plaintiff also reserved her right to recall Mrs van de Merwe. At the next hearing of the matter, and as I indicated earlier, the plaintiff applied to file the supplementary affidavit in respect of the true identity of the 1998 company and the 2003 company, which was granted, and she also applied for the amendment of the summons and Particulars of Claim, which was granted in the terms I have indicated earlier in this judgment.

[12] Mrs van der Merwe was subsequently recalled to testify in respect of the further investigations that she conducted, at the plaintiff's request, in respect of the FFC's that were introduced during her previous testimony, and the 2016 audited statement of the second defendant. She traversed in detail the relevant content of the audited statement and indicated that it was a qualified audit, which was not acceptable to the Law Society, and the firm would be given an opportunity to explain the qualification and rectify the audit report in order to comply with the Rules. In respect of the FFC's that were issued to the directors of the second defendant, Mrs van der Merwe explained that where the financial year end of a firm is different to that of the Law Society, which is the end of February, then the practitioners are

allowed a six-month grace period from the end of their financial year to file their audited financial statements.

[13] In the case of the second defendant in this matter, whose financial year-end was 30 September 2016, they would have had until 31 March 2017 to file their audited statements. However, practitioners required a FFC to practice from 1 January each year. They would apply for the FFC in December of the previous year and it would be issued by the Law Society, in good faith and in the hope that an unqualified audit would be submitted. Mrs van der Merwe indicated that the FFC would be issued out of leniency on the part of the Law Society to enable the practitioner to practice from 1 January. This is what occurred in the current matter, where the FFC's for Mr Senekal and the other directors of the second defendant were issued on the 14 December 2016, to enable them to resume practice on 1 January 2017.

[14] They filed their audited statements on 2 June 2017 (instead of 31 March 2017), and it was a qualified audit. Mrs van der Merwe testified that when a qualified audit is filed, the electronic system flags the firm or practitioner and the FFC that was issued immediately becomes invalid and is withdrawn. The FFC becomes invalid, *ab initio*, that is, from the date it was issued. The practitioner is requested to immediately return the FFC, but her experience was that they rarely did so. In this case a copy of the FFC was in the Law Society's file, so she assumed that it was either returned by Mr Senekal or the Law

Society had made a copy for its records. However, in terms of the Law Society's Rules and practice, the FFC would have become invalid from the date of issue, being 14 December 2016. The second respondent did rectify the qualification in respect of its audited statement and upon filing same with the Law Society, was issued with a fresh FFC's on 22 June 2017, for the remainder of that year. The only reason a fresh FFC was issued for each director was that the previous one (issued in December 2016) was withdrawn.

[15] The plaintiff closed her case after Mrs van der Merwe testified on the second occasion. The first and third defendants thereafter closed their respective cases, without leading any evidence. The issues that are common cause between the parties, and which are most pertinent to the matters to be adjudicated, are that:

- 15.1 the plaintiff instructed Mr Senekal during 2016 to represent her in a High Court application;
- 15.2 Mr Senekal was at the time a director in the 1998 company and the 2003 company; He held a valid FFC for 2016
- 15.3 he rendered invoices to the plaintiff on letterheads of the 1998 company as well as the 2003 company, which each bore different banking details;
- 15.4 the plaintiff paid all invoices that were rendered to her from time to time, in the amount of Four Hundred and Twelve Thousand Forty Two Rand and Seventy Four Cents (R412 042,74);
- 15.5 All payments made by the plaintiff were deposited into the account of the 1998 company;

- 15.6 Mr Senekal was, on 14 December 2016, issued with a Fidelity Fund certificate for the year 2017;
- 15.7 the second defendant (the 1998 company) submitted a qualified audit in respect of its 2016 financial statements on 2 June 2017;
- 15.8 the FFC issued on 14 December 2016 was withdrawn and deemed to be invalid;
- 15.9 the audit qualification was rectified and a new FFC was issued to Mr Senekal on 22 June 2017;

[16] The primary defence raised by Mr Senekal in his plea is that he was in possession of a valid FFC for the year ending 31 December 2017. Although the plaintiff initially raised the issue that he could not have been in possession of the FFC as he did not produce a copy thereof, it appears that Mrs van der Merwe's evidence that the certificate was issued electronically and could be downloaded by the practitioner, watered down the plaintiff's challenge that Mr Senekal was never in possession of the FFC. Furthermore, her evidence was that a copy thereof was found in the file of the Law Society. The real, and seemingly the only, dispute between the parties is whether the qualified audit invalidated the FFC from the date of submission of the qualified audit statement (2 June 2017) or from the date of issue thereof (14 December 2016). The plaintiff asserts that it was from the latter date, whereas the first defendant alleges that it could only be from the former date.

[17] The provisions of the Attorneys Act which the plaintiff relies on as relevant to this matter are sections 41(1) and (2), and 42 (4), read with section 83(10).

In terms of section 41(1) and (2):

- (1) A practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.
- (2) Any practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting.

Section 42(4) provides that:

Any document purporting to be a fidelity fund certificate which has been issued contrary to the provisions of this Act shall be null and void and shall on demand be returned to the society concerned.

Section 83(10) stipulates that:

Any person who directly or indirectly purports to act as a practitioner or to practice on his or her own account or in partnership without being in possession of a fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

[18] In support of his defence that he was in possession of a valid FFC, the first defendant highlighted the provisions of section 42 (1), (2) and (3), which set out the requirements to be complied with to enable the secretary of the Law Society to issue a FFC:

- (1) A practitioner practising on his or her own account or in partnership, and any practitioner intending so to practise, shall apply in the prescribed form to the secretary of the society concerned for a fidelity fund certificate.
- (2) Any application referred to in subsection (1) shall be accompanied by the contribution (if any) payable in terms of section 43.
- (3) (a) Upon receipt of the application referred to in subsection (1), the secretary of the society concerned shall, if he or she is satisfied that the applicant has discharged all his or her liabilities to the society in respect of his or her contribution and that he or she has complied with any other lawful requirement of the society, forthwith issue to the applicant a fidelity fund certificate in the prescribed form.
- (b) A fidelity fund certificate shall be valid until 31 December of the year in respect of which it was issued

[19] The first defendant, in essence, contends that he did in fact apply for the FFC, paid the necessary contributions and satisfied the other legal requirements of the Society. It is for this reason that the FFC was issued to him. The evidence of Mrs van der Merwe in this regard is that the first defendant must have complied with all other requirements of sections 42 and 43 of the Attorneys Act, save the filing of an audited financial statement, in order for her to have issued the FFC on 14 December 2016. The Practice Rules of the Law Society authorised her to issue the FFC in that situation to enable the practitioner to practice, pending the filing of the audited statement. When a qualified audit is filed, the Law Society is entitled to invalidate and withdraw the FFC, until the qualification of the audited statement is rectified. A fresh certificate would then be issued for that year.

[20] Mrs van der Merwe's further evidence was that the FFC would become invalid retrospectively from the date of issue, and not from the date of filing of the qualified audit. She was unable to say where it is stipulated that the FFC becomes invalid retrospectively from the date of issue thereof, whether in the Act, the Practice Rules or the Regulations to the Act. At best, the court would have to treat that aspect as Mrs van der Merwe's opinion. I pause to note that she conceded that the purpose of issuing the FFC (in December) was to enable the practitioner to practice and to afford him cover with the Fidelity Fund, for the protection of the public and "others as well", which I take to be a possible reference to the clients of the practitioner.

[21] The plaintiff provided no further information or evidence with regard to the retrospectivity of the invalidity, which could have been of assistance to the court. It would have been useful for the plaintiff to have supported Mrs van der Merwe's testimony by leading evidence of or introducing into evidence the Practice Rule referred to by Mrs van der Merwe. As I indicated, the first defendant did not testify, and bearing in mind that the plaintiff bears the onus to prove her claim, the court is obliged to look to the evidence led by the plaintiff, together with the law as well as facts and circumstances to decide this aspect. In view of Mrs van der Merwe's concession that she would not have issued the FFC had the first respondent not complied with all the other requirements of the Law Society, section 42(3) comes into play, and it would appear that the first respondent complied with the provisions thereof. The provisions section 41(1) and (2) would therefore not find application. Mrs van der Merwe's

confirmation that the FFC for 2017 was validly issued in December 2016, similarly renders section 42(4) inapplicable to this matter, more especially in view of evidence on behalf of the plaintiff that the provisions of section 42(1), (2) and (3) had to be complied with, before the FFC could be issued.

[22] In most of the cases referred to in the plaintiff's Heads of Argument, the attorney did not apply for or have a validly issued FFC. Similarly, in the matter of *NW Civil Contractors CC v Anton Ramaano Inc and Another 2020(3) SA 241 (SCA)*, - which the plaintiff relies on, the attorney there was not in possession of a validly issued FFC. The court undertook a useful and comprehensive exposition of the interpretation, meaning and consequences that flow from a contravention of the provisions of section 41(1) and the effect of section 83(10). The court also dealt with the provisions of section 42. However, in my view, that case can be distinguished from the present matter, as the first respondent is in a different position to the plaintiff in that matter., having been validly issued with a FFC.

[23] The primary purpose of sections such as 41, 42 and 83 of the Attorneys Act was to protect the public. The intention of the legislation becomes relevant in deciding whether the invalidity of the FFC upon submission of a qualified audit, took effect on the date of such submission or retrospectively to the date of issue of the FFC. The Practice Rule referred to by Mrs van der Merwe would have enacted to give effect to the purpose of the Act, so that the practitioner was allowed to practice, before submitting an audited financial statement, if he fulfilled all other requirements of the law and of the Law Society.

In this way the public would be protected against any loss they would suffer as a result of the theft of money or property entrusted to an attorney, which is the primary purpose of the Fidelity Fund.

- [24] That being said, the interpretation contended for by the plaintiff would lead to absurd and dire consequences. If the FFC was rendered invalid with retrospective effect to the date of its issue, then members of the public would have no recourse in respect of loss or damages they may suffer in the period prior to the submission of a qualified audit. Great inconvenience, hardship and prejudice would be visited upon unsuspecting members of the public, which could never have been the intention of the legislation and/or the Practice Rules. Therefore, the provisions of a statute, contract, court order or similar document should be subject to the rules of interpretation, which are well established in our law, and which require that a business-like interpretation must be given to such provisions or documents, having regard to the context, surrounding circumstances and facts known to those involved in the production thereof.
- [25] Applying these rules of interpretation to the present matter, it would render nonsensical a finding that a certificate which was validly issued, after compliance with the legal requirements relevant thereto in terms of section 42(3) of the Attorneys Act was invalid ab initio, upon submission of a qualified audit report. The contentions of the first defendant in this regard, that the FFC would have been invalid only from the date of submission of the qualified until the date a new

FFC was issued, make more sense and give the business-like meaning to the provisions of the Attorneys Act that our rules of interpretation require. Mrs van der Merwe testified that when a qualified audit is filed, the FFC is withdrawn and flagged on the system as invalid. The practitioner is then given an opportunity to explain and rectify the qualification, which appears to have been done in this matter, as the qualification was rectified within 20 days and a new FFC was issued on 22 June 2017. I am in agreement with Mr Louw's submission that the only period during which the first respondent can be said to have practised without a Fidelity Fund is from 2 June 2016, when the qualified audit was filed and 22 June 2016, when the new FFC was issued.

- [26] This would fall outside the period that the plaintiff bases her claim on. Although she pleads that her claim consists of fees and disbursements for services rendered during the period 1 January 2017 to 21 June 2017, she conceded during her testimony that some items on the invoices relevant to this matter bore no specific dates, so she was unable to say when those services were rendered. In any event, there was no evidence from her that services were rendered or invoices raised in respect of work done between 2 June 2017 and 22 June 2017. In the plaintiff's Heads of Argument and during oral address in court, Mr Janse Van Rensburg indicated that the plaintiff reconsidered the invoices and that she now claims an amount of R316 397.43, as opposed to the amount of R412 042.74 initially claimed in the summons, fortifying the point I just made about lack of evidence to sustain the claim in respect of the period 2 June 2017 to 22 June 2017.

[27] The plaintiff's claim was based on *condictio indebiti*. She alleged that the misrepresentations Mr Senekal fraudulently misrepresented to her that he was in possession of a valid Fidelity Fund Certificate and that he was entitled to charge fees and incur disbursements. As a result of the fraudulent misrepresentation, she was induced to pay the amount claimed in the summons. In view of my finding that the version contended for by the plaintiff regarding the retrospective invalidity of the FFC, is untenable, it follows that Mr Senekal was in possession of a validly issued FFC during all times material to the plaintiff's claim. Hence, her contentions based on the premise that he was not in possession of a valid FFC and not entitled to charge fees or disbursements cannot be sustained. It is not in dispute that all the work invoiced for, was done and that the amounts invoiced for were paid voluntarily in the belief that such amounts were due and payable. The contention that such amounts were not due and payable similarly, cannot be sustained. I deem it unnecessary to traverse the merits of the plaintiff's claim in any further detail, as such claim hinged on the court finding that Mr Senekal was not in possession of a valid FFC, when he performed the work on her behalf, which she paid for. She has not, in my view, made out a case for the relief she claims.

[28] I pause to reiterate that my findings in this matter are based on the evidence placed before me and, as such, are specific to this matter. A different outcome may well have resulted, had the plaintiff placed further and better evidence before me regarding the retrospectivity of the invalidation and withdrawal of the FFC.

[29] I turn now to deal with the third defendant's Claim in Reconvention.

As I alluded to earlier, the first and third defendants closed their respective cases, without leading any evidence. There is, consequently, no evidence before me in respect of the Claim in Reconvention. Mr Louw correctly conceded that the Claim in Reconvention should be dismissed with costs.

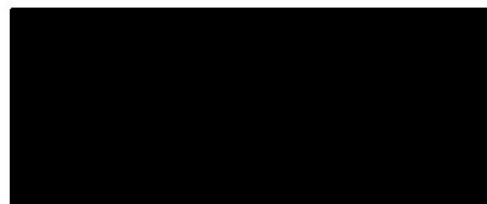
[30] With regard to the issue of costs, the defendants sought the dismissal of the plaintiff's claim with costs. It is trite that the award of costs is a matter in the discretion of the court, exercising such discretion judiciously and taking into consideration all relevant circumstances of the matter. In this matter, the plaintiff was placed under a misapprehension about the identity of the second defendant through the deliberate and intentional actions of Mr Senekal and other functionaries of the 1998 and 2003 companies. She was obliged to go through protracted litigation before she learned the true identity of the second defendant. Upon the court granting the amendment to the summons sought by the plaintiff, the second defendant withdrew its defence and indicated its intention to abide by the decision of the court. The court frowns upon such conduct and is of the view that although the first defendant is substantially successful in this matter, a costs order reflecting the court's displeasure should be made.

[31] In the circumstances, the following order is made:

31.1 The plaintiff's claim is dismissed;

31.2 Each party is directed to pay its own costs;

31.3 The third defendant's Claim in Reconvention is dismissed with costs

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S NAIDOO J

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