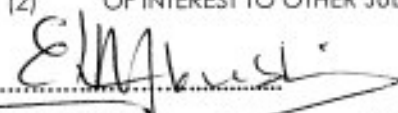




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 40882/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
	
E.M. KUBUSHI	DATE: 17-05-2021

In the matter between:

J.M LIEBEL

APPLICANT

and

ROAD ACCIDENT FUND

FIRST RESPONDENT

MOLABA INCORPORATED

SECOND RESPONDENT

MOLABA KOTISHI BERNARD

THIRD RESPONDENT

JUDGMENT

KUBUSHI J,

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 17 May 2021.

INTRODUCTION

[1] The gravamen of the applicant's claim is that, as advocate, she performed certain services for the benefit of the first respondent via instructions received from the second respondent alternatively the third respondent, and seeks in this application to hold the first respondent liable for payment of such services.

[2] The main question to be determined in these proceedings, is whether, on the basis of the facts in this matter, there is a contractual relationship (*nexus*) between the applicant and the first respondent that entitles the applicant to claim for the services, she alleges to have rendered, directly from the first respondent, instead of claiming from either the second respondent and/or third respondent who are the persons who gave her instruction to act on behalf of the first respondent.

[3] As a result, this application raises a complex and controversial question of the relationship between counsel, attorney and their mutual client, the litigant. The question sought to be answered being who ultimately is responsible for counsel's fee: is it the instructing attorney or the litigant, or both?

[4] This court has directed that the application be determined on the papers filed without oral hearing as provided for in this Division's Consolidated

Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

[5] The application is brought by JEANNE-MARIE LIEBEL, a practising advocate and a member in good standing at the Pretoria Society of Advocates who is claiming payment for the services she alleges to have rendered to the first respondent, through the brief she received from the second respondent, alternatively, the third respondent, the attorney of record for the first respondent.

[6] In essence, what the applicant seeks in these papers is payment in the amount of R874 631.00 (Eight Hundred and Seventy-Four Thousand Six Hundred and Thirty-One Rand) for fees rendered for professional services in respect of the Road Accident Fund matters. Payment is sought from the first respondent as the client, alternatively from the second respondent as the instructing firm of attorneys and further alternatively from the third respondent (the sole director of the second respondent) as the instructing attorney.

[7] The application is unopposed and served before me in the unopposed motion court of 11 March 2021 and the judgment is, therefore, sought in default. Service has been properly effected on 4 September 2020, upon the first respondent as *per* the sheriff's return of service annexed to the papers and upon the second and third respondents as *per* electronic mail.

[8] Although judgment and/or the relief in the notice of motion is sought against the three respondents in the alternative, however, in the heads of argument filed of record, the applicant is contending for judgment and/or relief against the first respondent only. The relief against the other respondents will be sought in the event that the first respondent already made payment to the second and/or third respondent and/or in the event that it is found that there is no direct relationship between the applicant and the first respondent.

[9] The first respondent by virtue of its enabling act, the Road Accident Fund Act, No. 56 of 1996, as amended, is often a litigant in court. To this end, the first respondent is said to have employed a panel of attorneys to assist in the litigation process. This litigation process also requires the services of counsel in order to finalize actions instituted against the first respondent. The second respondent was appointed by the first respondent as one of the firms of attorneys on its panel of attorneys and was, on a regular basis, instructed to represent the first respondent in some of its litigation processes. The applicant, on the other hand, was one of the counsel who were briefed on a regular basis by the second respondent to represent the first respondent in some of its litigation processes.

[10] It is the applicant's case that a contractual relationship was created between her and the first respondent through the first respondent's agents, *vis a vis* the second respondent alternatively the third respondent. The applicant

fortifies her argument in this regard by contending that she had previously performed a variety of services for the benefit of the first respondent via instruction of the second respondent and the first respondent had made payment in respect of some of those matters. Same, according to the applicant, indicates a clear practice and contractual relationship in respect of these services.

[11] In support of this argument, the applicant refers to a number of cases which, according to her, set out the legal relationship between an attorney and counsel insofar as same relates, *inter alia*, to counsel's fees.

[12] She, firstly, refers to the *dictum* in *Minister of Finance and Another v Law Society, Transvaal* ¹ which stipulates that an advocate '... *has one client and that is the litigator for whom he acts* ...' which *dictum* was tacitly endorsed in both *Bertelsmann v Per* ² and *Serrurier & Another v Korzia & Another*,³ and was further accepted by the Supreme Court of Appeal in *General Council of the Bar of South Africa v Geach and Others* ,⁴ as a principle in our law.

[13] When endorsing the principle that an advocate "...*only has one client and that is the litigant for whom he acts*..." the court in *Bertelsmann*, held that the practice whereby attorneys impliedly agreed to stand good for the payment

¹ 1991 (4) SA 544 (A).

² 1996 (2) SA 375 (T).

³ 2010 (3) SA 166 (W).

⁴ 2013 (2) SA 52 (SCA) para 144.

of the fee owed by the client to counsel "*...did not mean that the attorney has replaced the client as contracting party vis-a-vis the counsel...*".

[14] When that principle was endorsed in *General Council of the Bar of South Africa*, that court held that "... Attorneys may be obliged to procure services for their clients, such as the services of the Sheriff, an advocate or an expert witness. However, those services are rendered to the client, not the attorney."

[15] The submission by the applicant is that the principle afore stated, exposes the relationship between the attorney and her/his client. In particular, it references the approach that an attorney is the agent of her/his client, the litigant. The litigant contracts through her/his agent, the instructing attorney, with counsel. Such a relationship, according to the applicant, entitles her to recover fees for services rendered directly from the client and not from the instructing attorney.

[16] The applicant's approach that counsel may claim fees for services rendered directly from the client, is supported by the author *Albert Reinecke*.⁵ In an article titled *The Attorney's Liability for Counsel's Fees*,⁶ when dealing with this approach, *Reinecke* opines as follows:

⁵ Albert Reinecke is the author of *The Legal Practitioner's Handbook on Costs* Second Edition (2011).

⁶ The article is dated 24 January 2011 contained in *Tech4Life Practical Practice Guide Journal*. The article was printed again in *The Forum Access to Justice: Fees Journal* titled *Standing in for Counsel's Fees: Fact or Fiction?*

"It is trite that the type of contract entered into when legal assistance is required, is one governed by the principles of mandate. It involves an instruction by the mandator to the mandatary to carry out a task for him, and the mandate may or may not confer authority on the mandatary to enter into contracts on the mandator's behalf. However, the mandate might be influenced by either agreed (express or tacit) or implied terms (*naturalia*), such as the argument that it is a trade usage that an attorney automatically stands in for the fee of counsel, where it has not been received from client."

[17] *Reinecke*, in this article, cautions that it is to be noted that when briefed, the advocate is not mandated in any way to act on behalf of the attorney, or his firm, because, ordinarily there is a contract of mandate between attorney and client in terms whereof counsel is briefed.

[18] According to the author, the trade usage that an attorney automatically stands in for the fee of counsel, does not mean that the attorney has replaced the client as contracting party *vis a vis* the counsel. According to the author, the trade usage over the years has been that the advocate is required to make use of the attorney as a go-between both where he attends on his brief, and in resolving his fee. Thus, the attorney acts as the agent for a disclosed principal, and contracts – *per* brief – with counsel in terms of the mandate furnished to him by his principal. Reciprocally, the client is bound to pay counsel a reasonable fee, whilst being entitled to proper performance. And, this, as *per Reinecke*, is what entitles counsel to approach client directly for payment of her/his fees. *Reinecke's* rationale, therefore, is that counsel's entitlement to a

fee from the litigant stems from work done for her/his client, not for the attorney, and the attorney assists counsel with the collection of his fee *pro amico*.

[19] Contrariwise, the court in *Advocate Lindon Clifford Leysath v The Legal Practitioners Fidelity Fund Board of Control on behalf of The Legal Practitioners Fidelity Fund previously known as The Attorneys Fidelity Fund Board of Control and The Attorneys Fidelity Fund*,⁸ when dealing with the principle that services rendered by counsel are rendered to or on behalf of the attorney's client, and not to or on behalf of the attorney, *vis a vis* counsel's entitlement to fees for services rendered, held that

"[12] ... although counsel renders services on behalf of the attorney's client, he does so at the instruction of, and by agreement with, the attorney – and not the client."

[20] In coming to such a conclusion, Van Nieuwenhuizen AJ (as she then was) reasoned, in that regard, as follows:

"[12.1] In *Serrurier and Another v Korzia and Another* 2010 (3) SA 166 (W) ("*Korzia*") at 180F – 181A, Jordaan AJ found as follows:

"My personal view is that the defendant is liable for the fees of the plaintiffs in view of the following:

1. The obligation to pay fees must flow from an agreement between parties.
2. This agreement can either be an express agreement or by necessary implication.
3. Counsel is not allowed in terms of his ethical rules to receive instructions or payment from a

⁸ *Leysath v Legal Practitioners Fidelity Fund Board of Control* (51027/19) [2021] ZAGPPHC 7 (14 January 2021)

client. General Council of the Bar of South Africa v Van der Spuy (supra); and De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) (2001 (6) BCLR 531). These two cases illustrate that an advocate will be suspended from practice even if he is not subject to the rules of the General Bar Council and even if the constitution of his own professional body allows receiving instructions and payment from members of the public.

4. If there is not an express agreement between counsel and attorney the necessary implication is therefore that it can never be an implied term of the agreement that counsel look to the client to pay his fees.
5. Counsel will not be permitted to conclude an express agreement that his fees be paid by anyone else than his attorney.
6. It therefore in my view follows logically that an attorney will always in our law be liable for counsel's fees, even in the event of the client not paying him. ..."

[12.2] In ***Fluxmans Incorporated v Lithos Corporation of South Africa Ltd and Another (No 1)*** 2015 (2) SA 295 (GJ) at paragraph 35, Sutherland J said that:

"What counsel is to charge is the subject-matter of an agreement between counsel and attorney, not between counsel and the client. The client does not approve what Counsel charges; that is the function of the attorney who is liable to pay the fees (See: *Serrurier and Another v Korzia and Another* 2010 (3) SA 166 (W) at esp 181A). What Ndebele [a director of Fluxmans] sought from Gyenfie [a director of the client of Fluxmans] was an agreement that Gyenfie would cover Fluxmans for those sums. Sensibly, Ndebele did not wish to bind Fluxmans to pay the fees unless he had secured cover."

[12.3] In ***Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)*** 2015 (2) SA 322 (GJ), Victor J at paragraph 26 stated that:

"It is clear that counsel cannot contract with the members of the public directly. It is a referral profession and it is a professional practice or trade usage that the legal nexus between counsel and their fees is the attorney and not the member of the public. See *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) ([2012] ZASCA 175); *Minister of Finance and Another v Law Society, Transvaal* 1991 (4) SA 544 (A); and *Serrurier and Another v Korzia and Another* 2010 (3) SA 166 (W)."

[13] It follows that there are two distinct separate legal arrangements in the trinity of

counsel, attorney, and client.

- [13.1] Firstly, there is a contractual relationship between the attorney and the attorney's client, which is wholly separate from counsel. Secondly, there is a contractual relationship between an attorney and counsel, which but for the fact that the services requested by the attorney are to be rendered on the client's behalf, has otherwise no bearing on the client.
- [13.2] As the authorities demonstrate, the agreement between an attorney and counsel renders the obligation for payment of counsel's fees on the attorney. That position cannot in law not be altered by passing the obligation to the attorney's client. Pursuant to that contractual arrangement, counsel had a right to claim his fees from the attorney, and the attorney was obliged to make payment towards counsel of counsel's fees. Whether or not the client had paid the attorney was irrelevant insofar as that contractual relationship was concerned, unless their agreement was qualified in some manner whereby counsel would not render any work unless satisfied that counsel's fees were secured by the attorney in the form of a deposit.
- [13.3] Irrespective of the agreement between counsel and the attorney, in contrast, in the contractual relationship between the attorney and the attorney's client places an obligation on the client to pay the attorney, and thus the attorney is vested with the right to claim from the client payment, in respect of services rendered by the attorney, as well as disbursements for which the attorney would be liable, such as counsel's fees.
- [13.4] Put differently, in the contractual relationship between counsel and attorney, counsel is the creditor, and the attorney the debtor. In the contractual relationship between the attorney and client, the attorney is the creditor, and the client the debtor."

[21] I am inclined to agree with the conclusion of Van Nieuwenhuizen AJ that the agreement between an attorney and counsel bestows the obligation for payment of counsel's fees on the attorney. The Judges' reasoning that there are two distinct separate legal arrangements in the trinity of counsel, attorney, and client: the contractual relationship between the attorney and the attorney's client, which is wholly separate from counsel and the contractual relationship between an attorney and counsel, which but for the fact that the services requested by the attorney are to be rendered on the client's behalf, has otherwise no bearing on the client, is well-made.

[22] My inclination in this regard is fortified by the decisions taken firstly in *Serrurier* and secondly in *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)*.⁹

[23] In *Serrurier*, even though the court endorsed the *dictum* in *Minister of Finance*, its view was that the defendant (the client) is liable for the fees of the plaintiffs (counsel) in view of, amongst others, the obligation to pay fees must flow from an agreement between parties. And in *Fluxmans (No 2)*, the court opined that "*What counsel is to charge, is the subject-matter of an agreement between counsel and attorney, not between counsel and the client. The client does not approve what Counsel charges; that is the function of the attorney*

⁹ 2015 (2) SA 322 (GJ) at para 26.

who is liable to pay the fees."¹⁰

[24] Therefore, the applicant's reliance on *Bertelsmann* for its approach, is totally misplaced. Although *Bertelsmann*, a decision of the Full Court (Full Bench as it then was), endorsed the *dictum* in *Minister of Finance, Bertelsmann* is, however, no authority that an instructing attorney is not liable to pay counsel where she/he has not received payment from client.¹¹

[25] In *Bertelsmann*, counsel sued his instructing attorney for unpaid fees for professional services rendered. The attorney pleaded that he acted as an agent for a disclosed principal, that he engaged counsel on behalf of his client, and that he could not be (personally) sued on the principal obligation between principal and plaintiff. Plaintiff excepted that once briefed: "... the attorney was as a matter of law responsible for payment of counsel's fees."

[26] This exception was dismissed – with costs – in the Magistrate's Court, as

[a] there was no authority for this 'rule of law', and

[b] no evidence could be led in hearing an exception to establish such a practice.

¹⁰ At para 35.

¹¹ See Fn. 2 at 380 – 381.

[27] On appeal (noted against the costs order only) the exception's dismissal was upheld. Southwood J pointed out as significant that Messrs Bertelsmann could not refer to any rule of law or any judgment stating that an attorney was liable for counsel's fees. As no evidence could be led in hearing an exception, the appeal court concluded that the magistrate was quite right to dismiss the exception.

[28] Thus, the issue that came to be decided in *Bertelsmann* was not based on whether an instructing attorney was liable to pay counsel's fees, but on whether the trade usage of attorneys standing for the fees of counsel, can be accepted as a rule of law. Both courts, in the court *a quo* and on appeal, held that there was no authority for such rule. The plaintiff (appellant) having failed to refer the court to any such rule or judgment stating that an attorney was liable for counsel's fees, the court held that the trade usage that was relied on had not yet been established, and that no judicial notice had been taken of it. Both courts held further that evidence has to be led in order to establish the practice as a rule of law.

[29] The applicant referred to other cases which I am afraid do not, also, assist in taking her case any further.

- 29.1 *Cedric Eldrid Puckrin & Another v HAG J Accounting Software Services (Pty) Ltd and Another*,¹² in my view, was wrongly decided as it was decided on the basis of the wrong interpretation of the decision in *Bertelsmann* as already indicated in paragraph [27] of this judgement. The case was, also decided, on the decision in *Serrurier*, which decision was misconstrued by that court. As already stated, although the court in *Serrurier* endorsed the *dictum* in *Minister of Finance*, it, however, did not follow its conclusion but held that the client is liable for the fees of counsel in view of, amongst others, that the obligation to pay fees must flow from an agreement between parties.
- 29.2 The passage the applicant refers to in *Fluxmans (No 1)* as to the question of reasonableness of counsel's fees and how same is to be determined, is definitely of no assistance to her case. I have, in this judgment referred to two passages from *Fluxmans (No- 1)* and *Fluxmans (No 2)* which supports the notion that counsel's fees must be recovered from the instructing attorney.¹³
- 29.3 The two judgments that were recently decided in this Division, namely, *C P J Strydom v The Road Accident Fund*,¹⁴ and *S Meyer v Road Accident Fund*,¹⁵ are of no assistance as they are merely

¹² (40439/2012) [2012] ZAGPPHC 292 (16 November 2012).

¹³ See paras 20.

¹⁴ Case number: 40881/2020, decided on 11 March 2021.

¹⁵ Case number: 40880/2020, decided on 11 March 2021.

orders granted in the unopposed motion court without reasons provided for such orders.

[30] The argument by the applicant that she has previously performed work, for the first respondent via instruction from the second respondent, and was paid for such work, is not sustainable, as such performance and payment does not establish a contractual relationship between the applicant and the first respondent.

[31] I am, thus, persuaded to follow the approach taken by Van Nieuwenhuizen AJ in *Leysath* and cases cited therein. That court's reasoning is, further, sustained in *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)*,¹⁶ wherein the court stated that:

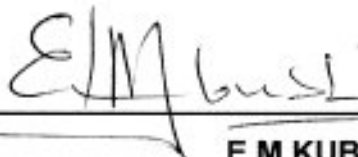
"It is clear that counsel cannot contract with the members of the public directly. It is a referral profession and it is a professional practice or trade usage that the legal nexus between counsel and their fees is the attorney and not the member of the public".

[32] I am, thus, satisfied that the applicant has not been able to establish the relationship between her and the first respondent, entitling her to claim her fees for services rendered on the instruction of second respondent.

¹⁶ 2015 (2) SA 322 (GJ), Victor J at paragraph 26.

[33] Consequently, I make the following order

1. The application against the first respondent is dismissed.
2. The application against the second respondent and third respondent is postponed *sine die*.
3. No order for costs is made.



E.M KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel : Adv. J Van Wyk

Applicant's Attorneys : Shane White Inc

First to Fourth Respondent's Counsel : None

First to Fourth Respondents : None

Date of hearing : 11 March 2021

Date of judgment : 17 May 2021