

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON)**

CASE NO EL 18/2019

Reportable	Yes /No
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In the matter between:

LOYISO NTLOKO

Applicant

and

MZWANDILE TONY CEDRIC BOBOTYANA

Respondent

JUDGMENT

RUSA AJ:

[1] This is an application in which the applicant seeks an order in the following terms:

1. Directing the respondent to furnish the applicant with the itemized bill of costs as between attorney and client.
2. Directing the respondent to deliver to the applicant his file within 5 days from the date of judgment.

3. Granting applicant leave to amend Notice of Motion and supplement his papers after receipt of the itemized bill and the respondent's file.
4. Directing the respondent to pay the costs of the application and if opposed, on the scale as between attorney and client.

BACKGROUND

[2] The applicant, Loyiso Ntloko sustained serious facial injuries during a motor vehicle accident, which took place on 2 April 2014. Following the accident, he instructed, Mzwandile Bobotyana, the respondent to lodge a claim for damages against the Road Accident Fund (RAF). A few years later, the RAF settled the claim and made payment of the sum of R650 000 (settlement amount) to the respondent's Trust Account. The RAF further issued an undertaking for the applicant's future medical expenses in terms of section 17(4) of the Road Accident Fund Act (RAF Act).

[3] It is common cause that the applicant received only the sum of R10 000 from the respondent and that the latter never accounted to the applicant for his fees. It is for this reason that the applicant brought this application.

[4] On 1 August 2019, the respondent brought an application in which he sought an order to nullify these proceedings on the basis that the applicant's attorney, Mr Matiwane, was not in possession of a certificate issued by the Attorneys Fidelity Fund (the Fund) when he instituted the application. The respondent brought his application two days after the Judge President of this division had issued a directive concerning the filing of the heads of argument by the parties and at a time when a date for the hearing of the main application had been allocated. On 2 August 2019, the respondent lodged a

further application, which he termed ‘application for consideration of an interlocutory application’.

[5] At the commencement of the hearing of the main application, the respondent sought to argue his second application and submitted that Mr Matiwane was precluded from representing the applicant as he was not in possession of a certificate from the Fund and that the main application was thus a nullity. In the interest of justice, I allowed the respondent to argue the point so that I could dispose of his application and so that I could deal with the main application.

[6] The law dealing with the obligations of legal practitioners to possess a certificate is contained in section 84 of the Legal Practice Act 28 of 2014 (LPA). Section 84(1) provides that:

“(1) Every attorney or any advocate referred to in section 34(2)(a) [of the LPA], other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practises or is deemed to practise—

(a) for his or her own account either alone or in partnership; or

(b) as a director of a practise which is a juristic entity, must be in possession of a Fidelity Fund certificate”.

Section 84(2) provides as follows:

“No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property unless the legal practitioner concerned is in possession of a Fidelity Fund Certificate.”

[7] In *S v Mata*¹, Pickering J quoted, with approval, a passage from the judgment of *Blignaut J* (concurrent in by Cleaver J) in *S v Heji*² in which the Court held that “the possession of a Fidelity Fund Certificate had no relevant connection with the qualification or competence of the attorney and that, accordingly the contravention by an attorney of the provisions of the then section 41 of the Attorneys Act (now repealed) did not result in the invalidity of the criminal proceedings.”

[8] There is no merit in the respondent’s applications. It is clear that the fact that a legal practitioner is not possession of a certificate from the Fund does not preclude him or her from practising. Given the time lines involved in bringing these applications, it is my view that the respondent did so in order to seek postponement of the main application. In all the circumstances, the interlocutory applications brought by the respondent fall to be dismissed. I now turn to the main application.

[9] The applicant’s case is that on 2 April 2014, he was involved in a motor collision near Qamata Great Place, in Cofimvaba. He was a passenger at the time of the accident and he suffered the following injuries, namely compression fracture of the fifth cervical vertebra and multiple facial bone fractures with resultant facial asymmetry. He was admitted to St Dominics Hospital, East London.

[10] On 6 May 2015, the applicant then instructed the respondent to lodge a claim with the RAF. This was done by the respondent on 24 August 2015. The amount claimed by the applicant was the sum of R1 768 540. On 14 January 2016, the RAF made a written offer of the settlement amount in full and final settlement of the applicant’s claim for general damages in respect of pain and suffering he sustained

¹ *S v Mata* CA&R 307/2017 (ECDZA) 20 OCTOBER 2017 (unreported).

² *S v Heji* 2007 (2) SACR 527 (C).

because of the accident but did not make a tender for payment of the applicant's legal costs. On 20 January 2016, the respondent accepted the offer made, without consulting the applicant. The RAF made an undertaking in terms of section 17(4)(a) of the RAF Act dated 3 February 2016.

[11] On 22 June 2016, the RAF made payment of the settlement amount into the trust account of the respondent, held with First National Bank. As the applicant did not receive any feedback on the status of his claim from the respondent, in September 2017, the applicant directly contacted the RAF and was informed that payment of the settlement amount was made into the respondent's trust account of as far back as June 2016.

[12] Upon hearing about this, the applicant approached the respondent who made an undertaking to the applicant that he would make payment to him. It is not clear how much was to be paid to the applicant. However, on 14 December 2017, the applicant noticed a cash deposit of the sum of R10 000 was made into his personal bank account, which had reference details containing a mobile phone number as well as the name 'Bobotyana' written on the confirmation slip. The applicant assumed that the respondent made such payment, as he (the applicant) was not expecting any funds apart from the respondent.

[13] The applicant then instructed his present attorneys to demand from the respondent payment of the whole settlement amount and a letter in that regard dated 18 January 2018 was sent to the respondent. As there was no response to that letter, an application was made to the RAF in terms of Promotion of Access to Information Act 2 of 2000 in which the applicant requested the file contents of his claim. The RAF

acceded to the request made and furnished the applicant's attorneys with a copy of their file.

[14] From the reading of the RAF's file contents, it was not clear on what basis the remainder of the settlement amount was retained by respondent as the documents contained in the file did not justify fees amounting to R640 000. As the respondent failed to provide clarity on this, the applicant then now approached this court for the relief set out in the Notice of Motion.

[15] The respondent raised a point *in limine* of non-joinder of a *curator* and the National Director of Public Prosecutions (the NDPP) as well as Bobotyana and Company Attorneys, which the respondent submitted have interest in this application. The respondent also contended that his mandate had not been terminated when this application was lodged by the applicant.

[16] On the substance of his defence to the application, the respondent's contention was that he communicated the settlement proposal made by the RAF to the applicant and was instructed by the latter to accept the offer. The respondent further contended that he and the applicant agreed to consult, but for the reasons known to the applicant the consultation was delayed.

[17] More importantly, the respondent contended that he deducted, from the settlement amount, 25 per cent contingency fee and monies he loaned to the applicant as cash advance.

[18] In reply to the non-joinder point, the applicant denied that either the *curator* or the NDPP has any interest in this matter. It was contended that the respondent has not alleged any direct and substantial interest. As regards the respondent's mandate, the

applicant has disputed that he had not terminated such mandate. To that end, the applicant referred to the special power of attorney he gave in favour of Mr Matiwane. Lastly, the applicant denied that the respondent proposed any meeting and that the applicant did not receive any telephone call from the respondent in that regard. On the issue of contingency fee, the applicant averred that the respondent was not entitled to deduct 25 per cent as he did, as that was contrary to the Contingency Fee Act 66 of 1997 (Contingency Fee Act). The applicant further denied that there were any loans advanced to him by the respondent.

[19] I now deal with the joinder issue raised by the respondent. As was argued by counsel for the applicant, the test for joinder is whether a party has a direct and substantial interest in the subject matter of the action. The interest referred to is a legal interest in the subject matter of litigation, which may be affected prejudicially by the judgment of the Court³. The relief sought by the applicant is for a disclosure of the bill of costs and the respondent's file pertaining to the applicant's claim. Such relief has nothing to do with the *curator* or the NDPP and, in any event, the respondent has not demonstrated any interest, which the two might have on the relief the applicant seeks. The respondent has failed to demonstrate any legal interest by the *curator* or the NDPP. The non-joinder point in this regard must fail.

[20] As regards the non-joinder of the respondents' own law firm, it is common cause that the respondent is the sole director of his firm and that he was the person handling the applicant's claim. It makes no difference whether or not Bobotyane and Company is

³ See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953(2) SA 151 (O) at 167D – F. See also *VB v SB* 2016(1) SA 47 at 53D – F)

joined in the present proceedings. I agree with the submission by the applicant's counsel that the defence advanced by the respondent in this regard was merely form over substance.

[21] On the issue of the authority to act, the respondent argued that his mandate had not been terminated and that the applicant's legal representatives were not entitled to represent the applicant in these proceedings. The respondent thus disputed the authority of the applicant's attorneys to act in this matter. Rule 7(1) of the Uniform Rules of this Court regulates the procedure by which a party disputes the authority of anyone acting on behalf of a party. This sub-rule reads as follows:

“ Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on the good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[22] The respondent did not deliver a notice as contemplated by the sub-rule referred to above. In any event, the applicant has attached power of attorney in favour of Mr Matiwane. In my view, that addressed the complaint the respondent raised. There is, accordingly, no merit to the point raised by the respondent in this regard.

[23] The only substantive ground of opposition raised by the respondent was that he was entitled to charge a fee of 25 per cent as per the contingency fee arrangement he had with the applicant and retain the balance of the settlement amount to settle the

amounts he loaned to the applicant. The respondent did not give any details of the alleged amounts. The respondent did not produce any invoice or statement of account detailing how he disbursed the settlement amount.

[24] During argument, the respondent was specifically asked by the Court whether or not he had prepared a bill of costs, itemizing his attendances. His response was that he would prefer not to answer the question. I further enquired from the respondent that if I were to be against him, whether or not he would comply with the court order. The respondent replied that he would rather await the judgment of this court. I found his responses to be extra ordinary. It is clear that the respondent does not have a bill of costs and neither is he prepared to draft one.

[25] The respondent then referred to the Contingency Fee Agreement (CFA) which, he submitted, was signed by the applicant and himself. Even though the respondent did not attach the CFA to his answering affidavit, I allowed the CFA to be handed up from the bar, in the interest of justice as reference was made to it in papers. I hasten to point out that the Court is not asked to make a ruling on the validity or otherwise of the CFA. However, I deem it necessary to make a few observations about it.

[26] The respondent submitted that in terms of the CFA, he was entitled to charge 25 per cent of the amount awarded to the applicant.

THE CONTINGENCY FEE ACT

[27] The Contingency Fee Agreement is regulated by the Contingency Fee Act, section 2 of which reads as follows:

“2. Contingency fees agreements.— (1) *Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed—*

- (a) *that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
- (b) *that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.*

(2) *Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the ‘success fee’), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.*

[28] Clause 5 of the CFA, concluded on 6 May 2015, provides that:

“the attorney hereby warrants that the fees on an attorney and own client basis to perform work in connection with the aforementioned proceedings are

calculated on the following basis: ***“See Annexure A attached hereto detailing the basis of the applicable rate agreed upon.”*** (sic).

There is no Annexure A to the CFA.

[29] On the other hand, clause 6 provides that:

“the parties agree that if the client is successful in the aforementioned proceedings and amount shall be payable to the Attorney, calculated at 25% of the awarded claim.” (sic).

In other words, the respondent would deduct 25 per cent of the settlement. This is clearly not permissible by law.

[30] In *Johannes Matthy Erasmus v Mark William*⁴, Plasket J said this concerning section 2 *“it is not intended to be a licence to plunder up to 25% of any award paid to the client who was entered a contingency fee agreement (and who is usually indigent). All that s2 does is to allow an attorney who is party to a contingency fee agreement to recover from an award to his or her client a success fee based on the work done at a maximum of twice his or her usual fee. The amount may not, however, exceed 25 per cent of the award, no matter how much work the attorney has done. What an attorney has is certainly, not allowed to is 25% of the client’s award”*.

[31] In *Masango v RAF and Others*⁵, Mojaelo DJP held that *“there is no basis for the practitioner to charge 25% of client’s capital as his or her fees. The 25% of the client’s capital is introduced only as a capital in the attorney charges and success fee which shall not exceed 25% of the client’s capital award. Twenty five percent of the capital claim is therefore not a fee”*.

⁴ Case No 3364/2016 (ECDZA) (2 November 2016) (unreported).

⁵ *Masango v RAF and Others* 2016 (6) SA 508 (GJ).

[32] As noted in the CFA at clause 6 thereof, the agreement provides for the respondent to charge 25% of the capital award as fees. The Act does not sanction such a provision and thus there is no basis for the respondent to charge as per that clause. Mojapelo DJP went further to say that *“an agreement or practice that makes an attorney a partner to the injuries suffered by his client in contra bonos mores and is therefore unlawful and illegal at common law under the CFA”*.⁶

[33] As I was not called upon to make a ruling on the validity of the CFA, I make no ruling in that regard. It is evident that the applicant, in his Notice of Motion, has foreshadowed further litigation against the respondent concerning his claim. It is possible that the issue pertaining to the validity of the CFA could be raised in further legal proceedings the applicant may institute in future, if any.

DUTY TO ACCOUNT BY A LEGAL PRACTITIONER

[34] It was argued on behalf of the applicant that the respondent was obliged to account to the applicant and that failure to do so was a breach of the respondent's statutory obligation as set out Rule 3.8 of the Code of Conduct for Legal Practitioners, which provides that:

“Legal practitioners, candidate legal practitioners and juristic entities shall:

3.8 account faithfully, accurately and timeously for any of their client's money which comes into their possession, keep such money separate from their own money, and retain such money for as long only as is strictly necessary.”

[35] One of the acceptable methods of accounting to client by a legal practitioner is to draft and furnish client with a detailed bill of costs itemizing all such practitioner's

⁶ Id at 22H.

attendance in the matter. It is remarkable that the respondent has not furnished a bill of costs, despite numerous requests from the applicant. Apart from the contingency fee on which I have already commented, the respondent appears to believe that he had a licence to deduct the amounts he loaned, on his own version, to the applicant without accounting. The respondent failed to produce evidence of any of the amounts he allegedly loaned the applicant. He could not furnish a statement of account or an invoice reflecting the loan amounts, his fees and disbursements.

[36] Lastly during his argument, the respondent referred to some payment, which was apparently made to the applicant by the Attorney Fidelity Fund (the Fund). He did not give details as to how such payment came about. The applicant's counsel, later in argument, confirmed the payment and handed up a document titled 'notification of payment' which showed payment on 4 June 2019, of the sum of R457 262,00 to the applicant's bank account. As a result of this payment, the respondent argued that the matter had been resolved. That submission is incorrect. Even if payment was made by the Fund, the respondent still has a legal obligation to account fully to the applicant. In any event, it is still open to the applicant to investigate the circumstances under which this payment was made to him as it appeared that he had no knowledge of how such payment came about. Once such an investigation has been conducted, the respondent may again approach this Court for further relief as may be necessary.

[37] All in all, the applicant is entitled to the relief he seeks and there is no reason why the respondent should not furnish the applicant with his attorney and client bill of costs as well as a copy of the respondent's office file pertaining to the applicant's claim. The respondent should be in a position to furnish the bill and his file to the applicant's attorneys within 10 (ten) days from the date of delivery of this judgment.

COSTS

[38] This brings me to the issue of costs. It was argued on behalf of the applicant that the respondent should be ordered to pay applicant's costs of this application on a punitive scale. The reasons advanced on behalf of the applicant were, *inter alia*, that the respondent was an officer of this Court who was duty bound to account to the applicant and that he failed to respond to the written correspondence from the applicant's attorneys in which the respondent was requested to furnish his file and a bill of costs. The respondent is of the view that, if unsuccessful in his opposition to this application, he should not be ordered to pay costs on a punitive scale.

[39] There was no reason for the respondent to refuse to furnish his bill of costs and file to the applicant. No valid explanation was advanced by the respondent either in his answering affidavit or in argument at court in that regard. Furthermore, when I asked the respondent about his bill of costs, he was unable to confirm if he would comply with a court order and produce such bill in the event that I were to find against him. The respondent's attitude in that regard clearly demonstrated that he owed no duty to the applicant, had no regard for him and showed no interest in him at all. The conduct of the respondent in refusing to account to the applicant and furnish his bill of costs is unprofessional and deplorable. To make matters worse, the respondent brought two spurious applications which, in my view, were designed to delay finalising this application and ultimately avoid accounting to the applicant. *"These factors, the spurious defences that the respondent had raised and the way in which he generally conducted this litigation are clearly red flags as to his suitability as an attorney."*⁷ I am thus of the view that an award of attorney and client costs against the respondent is

⁷ Erasmus, above fn 4 at page 5.

justified. Lastly, there is no reason why this judgment should not be brought to the attention of the Legal Practice Council of the Cape.

[40] In the result, I make the following order:

- (a) The respondent is directed to furnish the applicant with an itemized bill of costs on the attorney and client scale within 10 days from the date of this order.
- (b) The respondent is directed to deliver to the applicant's attorneys the applicant's litigation file within 10 days from the date of this order.
- (c) The applicant is granted leave to amend the Notice of Motion and supplement his papers after receipt of the itemized bill and respondent's file for any appropriate relief the applicant may seek.
- (d) The respondent is directed to pay the costs of this application, including the application for the nullification of these proceedings, on an attorney and client scale.
- (e) The Registrar is directed to furnish the Cape Legal Practice Council with a copy of this judgment.

M RUSA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant:

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Instructed by:

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Quigney

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For the Respondent:

In Person (Mr Bobotyana)

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QUEENSTOWN

Date Heard:

08 August 2019

Judgment Delivered:

23 August 2019