

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 855/2005

In the review between:

ESTIE MURRAY

Plaintiff

and

JURIE JOHANNES MURRAY

Defendant

JUDGMENT BY:

RAMPAI J

DELIVERED ON:

18 AUGUST 2005

[1] The matter came to this court by way of a taxation review in terms of rule 48 of the Uniform Rules of Court. The parties once lived together as husband and wife. They were married to each other at Bethlehem on 20 January 2001. On 17 July 2003 the plaintiff filed for divorce. The matter was enrolled for hearing over three days beginning on 19 October 2004.

[2] On the first day, 19 October 2004, the matter was settled.

Among others, the parties agreed that the defendant would be responsible for the payment of the plaintiff's taxed costs of the action under case no. 2479/2003 and that such costs would also include the costs of the rule 43 application for an interim relief under case no. 3839/2003.

[3] The plaintiff lived at Bethlehem. She also worked there. Her two sets of lawyers were Messrs. Crowther & Pretorius of Senekal and Messrs. Naudes of Bloemfontein. Their two separate bills of costs were drawn up and presented for taxation.

[4] On 21 February 2005 Mr. George Thompson, the taxing master of the Free State High Court, overruled the objection of the defendant, taxed and allowed the bill of Messrs. Crowther & Pretorius in addition to that of Messrs. Naudes. The total sum of the disputed taxed bill of the plaintiff's Senekal lawyers is R29 519,69 excluding the costs of the rule 43 application in the sum of R672,80 and excluding the undisputed tax bill of R15 857,39 due to Messrs. Naudes.

[5] The defendant's objection was formulated as follows:

“Verweerder se beswaar het daarop berus dat die eiseres woonagtig en werksaam is te Bethlehem en dat sy op sterkte van die beslissings in *Sonnenburg vs Moima* 1987 (1) SA Hofverslae bladsy 5571 sowel as *Niceffek* (EDMS) *BPK vs Eastvaal Motors* (EDMS) *BPK* 1993 (2) SA Hofverslae bladsy 144 nie geregtig is om gebruik te maak van 'n prokureur in 'n ander dorp (tewete Senekal), terwyl eiseres, soos voormeld, in Bethlehem woonagtig en werksaam is.”

The correct citations of the two cases are **SONNENBURG v MOIMA** 1987 (1) SA 571 (TPD) and **NICEFFEK (EDMS) BPK v EASTVAAL MOTORS (EDMS) BPK** 1993 (2) SA 144 (OPD).

[6] In the instant case the plaintiff resides approximately 250 kilometres away from Bloemfontein, a place where the divorce proceedings were initiated. She appointed her lawyers of first instance at Senekal, a place approximately

160 kilometres away from Bloemfontein. Put differently: she went about 90 kilometres nearer to the seat of the court to appoint Messrs. Crowther & Pretorius. She did not go to Harrismith for instance, a place further away from Bloemfontein. But even if she did, it would still have done no harm to the principle, in my view.

- [7] In the case of **FANELS (PTY) LTD v SIMMONS NO AND ANOTHER** 1957 (4) SA 591 (TPD) at 593 A – B Boshoff J correctly observed:

“A practice has grown up in the Transvaal and has been sanctioned by judicial decisions, that where a litigant resides away from the place where legal proceedings are instituted, he is entitled to employ an attorney in the place where he lives as well as the place where the proceedings are instituted. The reason for the practice is that it is desirable for a litigant to have an attorney at the place where he lives with whom he can consult; S.A. Railways v Kemp, 1915 T.P.D. 618 at p. 620 and cases cited therein; Commissioner for Inland Revenue v Baikie, 1932 AD 184 at p. 187.”

I am in respectful agreement with these sentiments.

- [8] Boshoff J was dealing with a 1952 taxation note which like rule 70(8) of today provides that where in the opinion of a taxing master, more than one attorney had been necessarily engaged in the performance of any legal work covered by the prescribed official tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.
- [9] The question which falls to be determined here is whether the taxing master was correct in allowing the fees and disbursements claimed from the defendant by the plaintiff for the work done by her Senekal attorneys.
- [10] If I understand the defendant's objection well, and I think I do, the plaintiff was not entitled to make use of a legal services provider outside Bethlehem since she lived and worked at Bethlehem. In my view, this is a thin argument. It

is not the defendant's case that the plaintiff was not entitled to the legal services of an attorney away from Bloemfontein. Indeed it is also not the defendant's case that the work rendered by the Senekal attorney, in respect of which the plaintiff claims remuneration, was really not work necessarily done by an attorney in the performance of work ordinarily done by an attorney appointed to execute a divorce mandate. Implicit in the defendant's argument is that had the work necessarily done at Senekal, been done at Bethlehem, the defendant would not have objected to the bill in question.

- [11] Ideally a litigant who resides away from the place where the legal proceedings were initiated is entitled to employ an attorney in a place where she resides as well as another attorney where the legal proceedings were instituted. See **M Jacobs and M J Ehlers: Law of Attorney's Cost and Taxation Thereof** 1979 Edition page 82; **HUMAN v VAN WIJK** 1906 TS 8 on page 620; **COMMISSIONER FOR INLAND REVENUE v BAIKIE** 1932 AD 184 on page 187; **CORDINGLEY, N.O. v BP SOUTHERN AFRICA (PTY) LTD**

1971 (3) SA 118 (OPD); **ELDRAW MOTORS (PTY) LTD v SALZWEDEL** 1984 (2) SA 846 E. This rule should not be restrictively interpreted because it was not cast in stone. It is a flexible and equitable rule designed to protect both parties. The notion that the plaintiff who does not engage the local legal services provider, whatever the reason for such decision might be, forfeit the benefits of the rule of practice, cannot be harmonised with the spirit object and purpose of the rule with such deep roots of equity and flexibility.

- [12] Therefore, I cannot, with respect, agree with Ackermann J in **SONNENBURG v MOIMA** 1987 (1) SA 571 (TPD) at 575 F – G where he remarked:

“Die oomblik wat eiser nie sy plaaslike prokureur wou opdrag gee nie (wat die redes vir die besluit ookal mag gewees het) het hy die voordeel van die gemelde praktyksreël verbeur en was dit nie meer vir hom noodsaaklik om twee prokureurs opdrag te gee nie.”

- [13] Such a rigid application of the rule in favour of a local attorney can lead to absurd and unjust results. Consider the

scenario, for instance where both litigants live in a small town where there is only one attorney. And there are many such towns in this country. The plaintiff appoints that only one attorney to act for him against the defendant. The reality of the matter is that the defendant now has virtually no local attorney where she lives to defend her. Naturally she cannot, on ethical grounds, appoint the same attorney already appointed by her adversary. If the rule absolutely forbids the defendant from engaging a legal services provider in another town away from the town where she lives, for any reason whatsoever, as was decided in **SONNENBURG v MOIMA** *supra*, then we face an absurd situation. Such a strict and narrow interpretation of the rule may absolutely deny a litigant access to justice. Or it may force a litigant in such a situation to travel a considerable distance, at great expense from where she lives to where the court sits in order to appoint an attorney there – that while the plaintiff enjoys easy and cheap access to the sole local attorney at his doorstep. I am unable to sanction such a rigid interpretation. To do so can only lead to serious injustice

between man and man.

[14] The foregoing is but one example of absurdity. There are countless other instances I can think of to show that strictly confining a litigant to the employment of a local attorney can yield absurd and unsatisfactory results. Let me hasten to add that the scenario I have sketched above was just an example with no bearing on the real facts here. Therefore my remark is *obiter dictum*. But the point I was trying to highlight and to stress is that there can be a great variety of valid reasons why litigants may appoint attorneys outside the towns where they live. See **NICEFFEK (EDMS) BPK v EASTVAAL MOTORS (EDMS) BPK** 1993 (2) SA 144 (OPD) where Wright J held that it could not be sufficiently emphasized that each case had to be considered in the light of its own peculiar circumstances and that it was impossible to lay down a hard and fixed set of rules to determine as to when a litigant was entitled to employ two sets of attorneys.

[15] It has not been shown and it has not been contended that by

appointing an attorney at Senekal, approximately 100 kilometres away from Bethlehem where she lived, the plaintiff thereby unnecessarily saddled the defendant with an inflated and heavier bill than would have been the case had she appointed an attorney at Bethlehem. It seems to me therefore unfair and inequitable to seek to deprive her of the costs in respect of her Senekal bill merely on the grounds as advanced by the defendant in his objection. I am a proponent of liberal, equitable and dynamic approach to legal rules. Therefore I am inclined to uphold the decision of the taxing master. For the reasons advanced above I have come to the conclusion: firstly, that the decision of the taxing master represented a reasonable and a realistic discretionary determination and secondly, that the defendant had not raised convincing grounds in his objection to justify judicial interference with such decision. I would therefore dismiss the defendant's objection.

[16] Accordingly I make the following order:

- 16.1 The defendant's objection is overruled.
- 16.2 The decision of the taxing master is upheld.
- 16.3 The defendant is ordered to pay the costs hereof in the amount of R450,00.

M.H. RAMPAL, J

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