Vic & Dup/Jhb/dm

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NUMBER:98/26077

DATE:1999.05.13

26/7/99

In the matter between:

ELIZABETH ANN ANDERSON — PLAINTIFF

and

INTEGRATED HEALTH TECHNOLOGIES LIMITED — DEFENDANT

J U D G M E N T

WILLIS J: This is an action in which the plaintiff, an attorney, claims fees for services allegedly rendered to the defendant.

The /...

The plaintiff alleges that it was a tacit, alternatively an implied term of the contract between herself and the defendant that upon the conclusion of her mandate, the defendant would pay to the plaintiff reasonable remuneration for her work and in addition recompense her for all disbursements necessarily made by her in carrying out her mandate.

The defendant disputes that the fees of the plaintiff were reasonable, and in any event, alleges that there was an agreement that fees would be charged at a fixed rate per hour. The matter was set down for trial today. The plaintiff raised what she termed a point *in limine* relating to the status of an allocatur by the Law Society.

At this stage it is not even clear whether there was in fact an allocatur by the Law Society relating to this particular action. Nevertheless the plaintiff has sought a ruling in order to assist the presentation of the case.

C3.0015

In the case of *Ashersons v Panache World (Pty) Ltd 1992 4 SA 611 (C)* the facts bear a certain similarity with those ventilated in the pleadings in this particular case. The plaintiff had rendered services to the defendant. Despite monthly reminders thereafter the defendant failed to pay the account. The plaintiff thereupon drew a bill of costs and submitted it to the Law Society to be assessed in terms of rule 17.4 of the rules of the Society, that is the Cape Society, as prescribed in section 69H of the Attorneys Act 53 of 1979. On 3 October 1990 the Law Society wrote to the defendant's attorneys notifying them that the bill of costs would be assessed on 21 November 1990. The letter contained the following paragraph -

Please /...

"Please note that the Law Society, when considering an attorney's charge, cannot take into account any allegation that he was not instructed to carry out part of the work charged for or that he has agreed to limit his fee or in any dispute involving a question of law or professional conduct. A certificate is given without prejudice to any such matter and to the liability of any other person for the payment of the charge."

At 615E of that judgment, Tebbutt J, referring to various other cases and learned writings said -

"The Taxing Master's function was to decide whether the services had been performed, whether the charges were reasonable or according to tariff and whether disbursements properly allowable had been made. His function was to determine the amount of the liability, assuming that liability existed (my emphasis)."

The emphasis is that of Tebbutt J. Later on at 615H Tebbutt J said as follows -

"The same considerations apply, in my view, to an attorney and client bill and a *fortiori* where the bill is assessed by the Law Society which specifically disavows any consideration of the client's liability to pay but is clearly only an arbiter as to the reasonableness of the amount charged, as is the position in the present case."

I would wish to emphasise the word reasonableness.

Similar principles may in my respectful view be gleaned from the case of *Benson and Another v Walters and Others 1984 1 SA 73 (A)* /...

1 SA 73 (A) where the following is said at 87H -

> "It seems to me that the court lost sight of the fact that the only functions of a taxing master in regard to an attorney and client bill of costs, are to determine whether the work charged for has been done (and has been done in execution of the alleged mandate) and to quantify the client's indebtedness. It is not for the Taxing Master to determine whether the client is in fact liable to pay the amount taxed, thus he must refrain from deciding whether the attorney was in fact given a mandate by the client, whether set-off applies, whether the debt has been prescribed, or whether as a result of his negligence the attorney is not entitled to recover fees and disbursements from his client."

Section 69H of the Attorneys Act 53 of 1979 provides that the council of a law society may "prescribe the manner of assessment of the fees payable by any person to a practitioner in the respect of the performance of any work, other than litigious work, and in respect of expenses reasonably incurred by such practitioner in connection with the performance of that work and *mero motu*, or at the request of such person or practitioner assess such fees in the prescribed manner."

Rule 80.1 of the rules of the Transvaal Law Society provides as follows -

> "It shall be competent for the council or any committee appointed by the council for that purpose at the request of any person or member, to assess the fees and reasonable disbursements payable by such person to a member in respect of the

"performance of work in his capacity as a practitioner, provided that the council or the committee shall not assess fees or disbursements

(1) in instances where a state official is empowered to do so;

(2) where the work concerned is already covered by a statutory tariff;

(3) in litigious matters, unless the parties agree that the fees and disbursements are subject to assessment by the council or a committee appointed by the council for that purpose."

As to the meaning of the phrase "litigious matters," I believe that guidance may be drawn from the meaning of litigious work in rule 70(1)(a) of the rules of the High Court.

By reason of the fact that this judgment is given extempore, I am sure I may be forgiven for quoting directly from *Erasmus* at B1-430 rather than the relevant authorities. Erasmus refers to various authorities and says the term "litigious work" in this sub-rule includes work pertaining to courts of law in the strict sense, as well as other bodies which bear the name "court" and function as if they were courts of law applying legal principles and not administrative discretion in the settlement of disputes.

It is clear from the pleadings that the fees in this matter relate not to litigation in a court of law or any similar tribunal, but to the drafting of joint venture agreements between the defendant and various other bodies. It therefore seems that the exception provided for in (3) does not apply in an instance such as this where fees are being claimed for the drafting of a joint venture agreement.

Ms Buikman accepted that it would be necessary for her to prove the allocatur. She also accepted that it would be necessary for her to prove the liability of the defendant. She furthermore accepted that it would be necessary to place evidence before the court that there was no agreement concluded as to a fixed rate per hour as is alleged by the defendant.

It seems to me that the interests of justice require that I should give a ruling to assist the parties in the expeditious resolution of this dispute.

Mindful in particular of the case of *Ashersons v Panache World (Pty) Ltd* as well as the case of *Benson and Another v Walters and Others supra*, I make the following ruling -

1.1 Provided the plaintiff proves the allocatur of the Law Society; and

1.2 Proves that the allocatur relates to the claims as set out by the plaintiff in her particulars of claim; and

1.3 Provided the plaintiff proves that the allocatur assessed these fees in terms of the rules of the Transvaal Law Society as prescribed in section 69H of the Attorneys Act 53 of 1979.

Such allocatur shall be *prima facie* proof of the reasonableness of the fees of the plaintiff.

2. The defendant is to pay the costs of this application.

COURT: After giving my ruling in this matter, Mr de Bruyn who appears for the defendant, sought clarity as to whether my ruling was interlocutory in nature or intended to be a final order on the matter. In my view it is clear from the nature of the application and the nature of the ruling that it was intended to be interlocutory. I also wish to record for the sake of completeness that I think it would be wrong for me to bind my successor who will be hearing the evidence in this matter absolutely by my ruling.

In any event, Ms Buikman, having taken instructions, has advised the court from the bar that she has no objection if it is recorded that the effect of the ruling is that it is interlocutory in nature and in order to avoid any confusion and to assist the parties, I record that the order is indeed interlocutory.

MR DE BRUYN: As your lordship pleases.

COURT ADJOURNS