**HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**
**COMMERCIAL COURT**

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED: Yes

02 September 2021 Judge P.A. Meyer

Case No: 37003/2019
Case No: 37456/2019

In the matters between

**RICHARD ALAN SOLOMON** First Applicant
**ARLETTE MARY MACMANUS** Second Applicant

and

**VISHAL JUNKEEPARSAD** Respondent

***Case Summary*:**

**Advocate - Fees - Whether attorney liable for fees charged by advocate whom he or she has instructed - Developments in the regulation of the legal profession subsequent to the *Bertelsmann v Per* 1996 (2) SA 375 (T) decision have evolved the 'professional practice or trade usage' that the attorney is liable for the fees charged by the advocate he or she has briefed to a hardened rule of law that must be implied in the contract between the attorney and advocate as a matter of law, if not so expressly agreed. Legal Practice Act 28 of 2014 (LPA) - Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published under GenN 168 in *GG* 42337 on 29 March 2019 under authority of s 36 of the LPA.**

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**JUDGMENT**

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**MEYER J**

[1] The hearing of two applications, which have been instituted under case numbers 37003/19 (the Marimuthu application) and 37456/19 (the Isseri application),

has been consolidated. The applications have been instituted by two members of the Johannesburg Bar, Adv Richard Alan Solomon SC and Adv Arlette Mary MacManus (who are cited as the first and second applicants in each application), against Mr Vishal Suresh Junkeeparsad (who is cited as the respondent in each application). He is a practising attorney and the sole director of Vishal Junkeeparsad and Company Inc., Umhlanga, Durban.

[2] In the Marimuthu application the first applicant seeks payment in the amount of R1 653 880.00 plus interest and the second applicant seeks payment in the amount of R829 399.50 plus interest from the respondent, being outstanding fees owed to them as counsel in respect of legal services they rendered to his client, Mr Marimuthu, and members of his family. In the Isseri application the first applicant seeks payment in the amount of R1 016 640.85.00 plus interest and the second applicant seeks payment in the amount of R657 642.00 plus interest from the respondent, being outstanding fees owed to them as counsel in respect of legal services they rendered to his client, 'Dr Isseri, and various corporate entities controlled by or through him and of which he is the controlling mind'.

[3] Instead of filing answering affidavits, the respondent elected to file notices in terms of r 6(5)(d)(iii) of the Uniform Rules of Court of his intention to only raise a question of law in each application and setting out such question of law, which is identical in each application. Subsequently the respondent sought condonation for his failure to also have filed answering affidavits within the time fixed by an order of this court and that he be granted an extension of time to file them. I dismissed his interlocutory application for condonation and extension of time: *Junkeeparsad v Solomon and another* (37003/2019; 37456/2019) [2021] ZAGPJHC 48 (7 May 2021). What remains to be determined in each application, therefore, is the point of law raised by the respondent. The allegations in the applicants' founding affidavits must be taken as established facts: *Boxer Superstores Mthatha and another v Mbenya* 2007 (5) SA 450 (SCA) para 4.

[4] The question set forth in each of the respondent's amended notices in terms of r 6(5)(d)(iii) is this:

'The question of law that the above Honourable Court will be called upon to determine at the hearing of the above application is whether or not:

4.1 the Respondent in his personal capacity can be sued and a judgment entered against his personal name; alternatively

4.2 the Respondent be held directly and personally liable for the alleged obligations of a separate and distinct juristic entity, namely the registered professional firm that briefed the Applicants, without suing the said professional firm; and

4.3 the privity of contract exists as between the Applicants and the Respondent or whether it lies as between the Applicants and the clients.'

[5] The advocates profession in South Africa was largely self-regulatory in the past, in the sense that no statutory or other body had the power to prescribe rules of professional conduct to members of the profession. The practice, in the past, had been for voluntary associations of advocates to regulate the conduct of their members by laying down rules of professional conduct: *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) at 599D-E. The General Council of the Bar of South Africa is an umbrella organisation of various constituent Bars in South Africa, including the Johannesburg Society of Advocates (the Johannesburg Bar). The ethical rules of the Johannesburg Bar in particular include the rules that an advocate may not be briefed by a member of the public, an advocate may not receive payment directly from a client, and that fees charged for any professional services rendered by an advocate may only be paid by or through an attorney, or by the Legal Aid Board. There are certain exceptions to these rules which are not applicable in this case. It is contrary to the etiquette of the Johannesburg Bar for an advocate to sue an attorney for fees; his or her remedy being contained in the ethical rules. In special circumstances an advocate may apply to the Johannesburg Bar Council for leave to sue an attorney for outstanding fees. The applicants *in casu* applied to and obtained the permission from the Johannesburg Bar Council to sue the respondent.

[6] From my own experience as a member of the Johannesburg Bar (21 years), I can only echo what Southwood J (Smit J concurring) said in *Bertelsmann v Per* 1996 (2) SA 375 (T), that he knows from his 'own experience at the Bar (some 22 years) that attorneys have invariably paid [his] fees and [he] always accepted that that was the practice, if not the law.' 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: Sutherland J in *Fluxmans Incorporated v Lithos Corporation*

*of South Africa (Pty) Ltd and another (No 1)* 2015 (2) SA 295 (GJ) para 35. In their minority judgment in *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) paras 144-145, Wallis JA (Leach JA concurring) said the '[a]ttorneys 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. . . . The fact that advocates look to their instructing attorney for payment of their fees does not affect this'.

[7] Our case law illustrates that an advocate may be suspended from practice or struck from the roll of advocates even if he or she is not subject to the rules of the General Society of Advocates and even if the constitution of his or her own professional body allows receiving instructions and payment from members of the public. *Van der Spuy* is an example. There, Swart J (Du Plessis J concurring) said this (608A-F):

'The present state of our law is that, subject to exceptions referred to above, an advocate may not accept instructions directly from a lay client. It is not necessary to decide whether an agreement between an advocate and his client that the former's fees are to be paid in advance might in law be possible. However, as our law presently stands, such an agreement, is highly undesirable. The practice insofar as it is relevant, flowing from the fact of a divided Bar, is and has been that the advocate in the first instance looks to the attorney for payment of his fees. To take payment directly from the client negates the essential role of the attorney as the principal representative of the client with a general duty to attend to the interests of the client, including liaising on behalf of the client with the advocate concerning his fees. To negate the role of the attorney would be to deprive the lay client of essential protection. In view of the fact that respondent states that where work is accepted directly from a client, payment from the same source will be a natural concomitant, it will also be a natural concomitant that the advocate will take a deposit to cover his fees and possible expenses. Respondent has not stated whether this was done. If such deposit is taken, it does not go into a legally designated trust fund, does not constitute trust moneys which do not fall into the estate of the advocate and which are protected against the advocate's creditors and the client does not have recourse to a fidelity fund in case of theft. In addition, the advocate is not liable to keep proper books of account and the client does not enjoy the protection which he has *vis-à-vis* an attorney in that the Law Society is entitled to inspect his books.'

[8] In *Bertelsmann* at 380D-381H, Southwood J said the following:

In *Minister of Finance and Another v Law Society, Transvaal* 1991 (4) SA 544 (A) eminent counsel (R S Welsh QC) advanced the following propositions in argument with regard to the

relationship between attorney and counsel and the attorney's liability for counsel's fees (at 552D-553D):

"The appellants sought to mount a case that attorneys engage advocates as principals. The advocate is, in other words, engaged as subcontractor to the attorneys; as between the attorney and his client, the advocacy service is one rendered by the attorney to his client through his subcontractor, the advocate. This contention is erroneous on the facts and in law. The advocate only has one client and that is the litigant for whom he acts. That fact should not be obscured by the machinery created by the payment of his fee: (1) In Roman-Dutch law, counsel was entitled to sue his client for his fee. (2) English law does not recognise any contractual relationship between a barrister and either his instructing solicitor or his client. He can accordingly sue neither. The solicitor is bound to pay the barrister's fees only under the rules of etiquette of his profession. *Halsbury's Laws of England* 4th ed vol 4 at 664 paras 1198 and 1201. (3) The Cape practice in the previous century was initially for counsel's fees to be prepaid. That practice was, however, ultimately found to be impractical. The practice increasingly became for counsel to look to his instructing attorney for his fee. That practice has by now probably hardened into law, which would mean that the advocate is today entitled to sue either his client or his instructing attorney for his fee once the necessary permission has been obtained from his professional body. Van Zyl 'Can an Advocate Sue for his Fees?' 1896 *CLJ* 169 at 174-5 and 181; Joubert (ed) *Law of South Africa* vol 14 at 213 para 230, and at 248-50 para 257. (4) The practice that has developed whereby the attorney impliedly agrees to stand good for payment of the fee owed by the client to counsel does not mean that the attorney has replaced the client as contracting party *vis-à-vis* counsel. There is no reason to infer that the contractual relationship between counsel and client recognised in Roman-Dutch law has changed in any way. It remains open to counsel to sue his client. The only change has been that the attorney has interposed to stand good for the client's debt owed to counsel. The appellants would have it that the attorney acts only as principal and not also as his client's agent when instructing counsel. On that construction, the attorney contracts with his client to provide the services rendered by counsel, and then subcontracts those services to counsel. That construction is untenable.

It would constitute an unwarranted departure from Roman-Dutch law. It would mean that the attorney is an independent middle man between the client and counsel. He would be liable to his client in contract for the advocacy service rendered by counsel. He would in his charge to his client be entitled to add his own mark-up or profit margin to counsel's fees, something which attorneys have hitherto not been entitled to do. He would no longer be obliged to retain in trust payments received from his client on account of counsel's fees, but would be entitled to deal with the money so received once the services had been rendered, whether or not counsel has been paid. See s 78 of the Attorneys' Act 53 of 1979. There would no longer be

privity of contract between counsel and client. That would have implications for both of them. The client would not have a claim in contract against counsel for breach of his duties. Counsel would no longer be entitled to sue the client for his fee. All these implications are so foreign to the relationship between client, attorney and counsel as we understand it today that the construction from which they flow contended for by the appellants, cannot be correct."

The comments relating to the liability of the attorney for counsel's fees coincide with my own understanding of the position. It is also significant that no reference was made in the very comprehensive heads of argument to any rule of law, common or statutory, or to any judgment of any Court stating that an attorney is as a matter of law liable for advocates' fees.

In giving the judgment of the Court in *Minister of Finance and Another v Law Society, Transvaal (supra)* Goldstone JA said (at 556I-557B):

"The moneys now in question are in nowise paid to the attorney, notary or conveyancer for a service rendered by him. They are paid in respect of the service rendered by counsel, correspondent attorney, notary or conveyancer, expert witness, deputy sheriff or messenger of the court, as the case may be, on behalf of the client. The moneys may not be claimed from the client by the instructing attorney, notary or conveyancer save in respect of the service performed by the third party. In no way does the fee or other amount accrue to and in no way is it received by the attorney, notary or conveyancer for a service rendered by him. The fact that because of a professional practice or a contract the attorney, notary or conveyancer may be personally liable to pay for the service performed by the third party in no way has as a consequence that the attorney, notary or conveyancer himself performs that service. The respondent correctly accepts that the fee charged by an attorney, notary or conveyancer for the work performed by him in relation to instructing counsel or other third party is properly to be regarded as part of the fee of such attorney, notary or conveyancer and that the levy would be payable thereon."

It would seem that the Appellate Division regarded the arrangement that an attorney is liable for the fees charged by the advocate he has briefed as something arising from contract or as a professional practice.'

[9] The *Minister of Finance* judgment to which Southwood J referred dealt with the question whether certain moneys received by an attorney for disbursements amounted to a 'consideration' for taxation purposes. Southwood J continued by rejecting counsel's argument that the practice that exists between attorneys and advocates has evolved to such an extent that it has become a hardened rule of law and accordingly that attorneys are liable for counsel's fees. He concluded as follows:

'I am not satisfied that the term contended for must be implied in the contract as a matter of law. It depends upon the existence of a professional practice or trade usage which would have to be established by evidence.'

[10] While regarding himself bound by the *Bertelsmann* decision, Jordaan JA in dealing with the liability of an attorney for the fees of an advocate in *Serrurier and another v Korzia and another* 2010 (3) 166 (W), opined that an attorney would always be liable for counsel's fees in view of the following (p 180G-181A):

'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 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 (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.'

[11] I respectfully subscribe to the view expressed by Jordaan AJ in *Serrurier* that the attorney would always be liable for the fees charged by an advocate whom he or she has instructed. Nevertheless, developments in the regulation of the legal profession subsequent to the *Bertelsmann* decision have evolved the 'professional practice or trade usage' that the attorney is liable for the fees charged by the advocate he or she has briefed to a hardened rule of law that must be implied in the contract between the attorney and advocate as a matter of law, if not so expressly agreed.

[12] The advocates' profession in South Africa is no longer self-regulatory. The Legal Practice Act 28 of 2014 (the LPA), which commenced on 1 November 2018, created a single unified statutory body, the South African Legal Practice Council (the Council), that now regulates all legal practitioners and all candidate legal practitioners. In terms of s 34(2)*(a)*(i) of the LPA, an advocate may only render legal services in

expectation of a fee, commission, gain or reward upon receipt of a brief from an attorney. Only an advocate who, *inter alia*, is in possession of a Fidelity Fund Certificate may, in terms of s 34(2)*(b)*, render legal services upon receipt of a request directly from a member of the public. The Council determines the standards of professional and ethical conduct of all legal practitioners and all candidate legal practitioners. In terms of s 36 of the LPA, the Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct. The code of conduct and every subsequent amendment must be published in the *Gazette* and the rules. It serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct.

[13] Under the authority of s 36 of the LPA, a Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities was published under GenN 168 in *GG* 42337 on 29 March 2019 (the Code of Conduct). It serves as the prevailing standard of conduct and will be enforced by the Council. It consists of the following parts: (I) Definitions; (II) Code of conduct: general provisions; (III) Conduct of attorneys; (IV) Conduct of advocates contemplated in section 34(2)*(a)*(i) of the LPA; (V) Conduct of advocates contemplated in section 34(2)*(a)*(ii) of the LPA; (VI) Conduct of legal practitioners and candidate legal practitioners in relation to appearances in court and before tribunals; and (VII) Conduct of legal practitioners not in private practice. Failure to adhere to the Code of Conduct will constitute misconduct and transgressors will be subjected to disciplinary proceedings in terms of the rules promulgated under sections 95(1), 95(3) and 109(2) of the LPA in *Government Gazette* 41781 of 20 July 2018.

[14] Paragraph 1 of the Code of Conduct defines 'advocate' to mean 'a legal practitioner who is admitted and enrolled as such under the [LPA]', 'attorney' to mean 'a legal practitioner who is admitted and enrolled as such under the [LPA]', and 'counsel' to mean 'an advocate referred to in section 34(2)*(a)*(i)'. We are *in casu* not concerned with an advocate practising as such referred to in s 34(2)*(a)* (ii) of the LPA. That is an advocate who *inter alia* is in possession of a Fidelity Certificate and who may render legal services upon receipt of a request directly from a member of the public.

[15] Paragraph 27.2 of the Code of Conduct provides that '[c]ounsel shall accept a brief only from an attorney, and counsel shall not accept a brief directly from any other person or entity for either litigious or non-litigious work of any kind, save that counsel may accept a brief . . . from a justice centre . . . [or] perform professional services on brief from an attorney or legal practitioner in another country, including the equivalent of a state attorney or the attorney general or director of public prosecutions, without the intervention of a South African attorney'.

[16] It is clear from the provisions of para 26 of the Code of Conduct that counsel may only decline the acceptance of an offer of a brief in certain circumstances, *inter alia*, 'if agreement between counsel and the instructing attorney cannot be reached on the fee to be charged by counsel' (para 26.5). Counsel undertakes to perform legal professional services in court-craft and knowledge of the law only upon the offer and acceptance of a brief (para 27.1). Counsel shall receive fees charged only from or through the instructing attorney who gave the brief to counsel, except where such attorney, for reasons of insolvency or any other reason, is unable to pay, in which circumstances, with leave from the Provincial Council, counsel may receive fees due from another source 'in discharge of the indebtedness of the attorney' (para 27.4).

[17] Paragraphs 34.2 and 34.3 of the Code of Conduct provide that '[c]ounsel shall render accounts to the instructing attorney . . . and shall receive payment only from the instructing attorney' and 'shall not submit an account directly to a client except by agreement with the instructing attorney and client and on condition that the same account is simultaneously submitted to the instructing attorney, nor receive payment directly from a client'. And para 35 provides that '[c]ounsel may sue an attorney . . . for fees due and payable to him or her'.

[18] Paragraph 18.18 of the Code of Conduct reads thus:

'An attorney shall pay timeously, in accordance with any contractual terms or, in the absence of contractual terms, in accordance with the standard terms of payment, the reasonable charges of an advocate whom he has instructed to provide legal services to or on behalf of a client; such liability shall extend to every partner of a firm or member of an incorporated practice, and if the firm is dissolved or the incorporated practice is wound up, liability shall remain with each partner or member, as the case may be, the one paying the other to be absolved.'

Furthermore, para 21 provides *inter alia* that the failure of an attorney to comply with the Code of Conduct or any rule with which it is the attorney's duty to comply constitutes misconduct.

[19] By virtue of the LPA and the Code of Conduct made and promulgated in terms s 36 thereof, an attorney, as a rule of law, is liable for the fees charged by the advocate he or she has briefed. What counsel is to charge is the subject-matter of an agreement between counsel and attorney, not between counsel and the client. It is the attorney who offers the brief to counsel and counsel who accepts the brief or declines the acceptance of the offer of the brief, *inter* alia, if agreement between counsel and the instructing attorney cannot be reached on the fee to be charged by counsel. Fees owed to counsel are the indebtedness of the attorney. The attorney's liability for payment of counsel's fees who he or she has instructed, also extends to every partner of a firm of attorneys or member of an incorporated firm, and if the firm is dissolved or the incorporated firm is wound up, such liability remains with each partner or member. Also, where such attorney, for reasons of insolvency or any other reason, is unable to pay, counsel may, with leave from the Provincial Council, receive the fees due to him or her from another source 'in discharge of the indebtedness of the attorney'.

[20] I am not suggesting that there is not also privity of contract between counsel and the client for whom counsel is briefed to render legal services, or that such client would not have a claim in contract against counsel for breach of his or her duties. Those are matters I need not decide *in casu*. The acceptance by counsel of an offer by an attorney of a brief, what counsel is to charge and the legal liability for payment of the fees charged by counsel are the subject-matter of a contract between the instructing attorney and counsel alone. The client for whom counsel is to render the legal services is not in privity of that contract, although counsel renders the professional services to the client, and not the instructing attorney.

[21] The applicants do not rely on any contractual terms contemplated in para 18.18 of the Code of Conduct. The respondent, therefore, is liable to pay their reasonable charges timeously. Their allegations that the respondent, in his professional capacity as an attorney, instructed them, in their professional capacities as advocates, to provide legal services to or on behalf of his clients, and that it was an express, implied or tacit term of their agreement that the respondent would be liable for payment of their

fees charged in respect of such legal services rendered by them, must be taken as accepted facts. Their allegations that they indeed rendered such professional services to or on behalf of his clients, that their fees charged and claimed in the present applications were for such professional services rendered, and that all such fees are due, owing and payable to them, must also be taken as accepted facts. The reasonableness of the applicants' charges for the professional services they rendered has not been challenged.

[22] The respondent as the 'attorney' who instructed the applicants in their capacities as advocates to provide legal services to or on behalf of his or his incorporated firm's clients, therefore, is liable to pay the reasonable charges of the applicants, although his liability also extends to every member of his incorporated firm, if there are any other member or members. The applicants need not sue the respondent's incorporated firm or any other member thereof. He may legally be sued personally and a judgment can legally be entered against him.

[23] In the result the following orders are made:

(a) In case no: 37003/2019:

(i) The respondent is to pay to the first applicant the amount of R1 653 880.00 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R829 399.50 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(iii) The respondent is to pay the costs of this application, including those of senior counsel.

(b) In case No: 37456/2019:

(i) The respondent is to pay to the first applicant the amount of R1 016 640.85 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R657 642.00 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(iii) The respondent is to pay the costs of this application, including those of senior counsel.

**P.A. MEYER**
**JUDGE OF THE HIGH COURT**

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| Judgment: | 02 September 2021 |
| Heard: | 01 September 2021 |
| Applicants' Counsel: | Adv P Stais SC |
| Instructed by: | Ian Levitt & Associates, Sandton, Johannesburg |
| Respondent's Counsel: | Adv DJ Saks |
| Instructed by: | Mohamed Hassim Attorneys, Musgrave, Durban |