THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 686/07
No precedential significance

MELAMED & HURWITZ INCORPORATED **Appellant**

and

MARLENE GOLDBERG **Respondent**

Neutral citation: ***Melamed & Hurwitz Inc v Goldberg*** (686/2007) [2009] ZASCA 15 (19 March 2009)

Coram: Streicher, Mthiyane, Lewis, Mhlantla JJA and Leach AJA

Heard: 2 March 2009

Delivered: 19 March 2009

Summary: **Appeal against order that attorney's fee be referred to Law Society for determination dismissed: agreed fee found to be extortionate and the client overreached.**

ORDER

On appeal from Johannesburg High Court (Bregman AJ sitting as a court of first instance).

1 The appeal is dismissed with costs.

2 The order of the high court is replaced with the following:

'(a) The agreement between the parties as to payment of a fee of R450 000 to the plaintiff is void.

(b) Within 45 days of the date of this order, the plaintiff may submit its claim for fees to the Law Society of the Northern Provinces for it to assess the fees to which the plaintiff is entitled.

(c) Once the Law Society has made the assessment referred to in (b) the matter shall be referred back to the court below to order that the fee so determined be paid by the defendant, and to make the appropriate order as to costs.'

JUDGMENT

LEWIS JA (STREICHER, MTHIYANE, MHLANTLA JJA and LEACH AJA concurring)

[1] Mr Stephen Melamed is an attorney and a director of the appellant, the firm Melamed and Hurwitz Incorporated, Johannesburg. He was approached in October 2004 by Mrs Marlene Goldberg, who was being divorced by her husband. She and her husband had signed an agreement of settlement. Goldberg was unhappy with it. She was not sure whether it had been made an order of court or even whether it was binding: she wished to enter into a different agreement, more favourable to her.

[2] Melamed, over a period of some seven months, advised her on obtaining a better settlement. In April 2005 she and her husband entered into

an agreement more beneficial to her and a divorce was subsequently obtained. The appellant claimed R450 000 plus VAT from Goldberg, alleging that this was an agreed fee. She defended the action on the ground that she had not agreed to the fee and in the alternative that the agreement was invalid as the fee was excessive and amounted to an overreaching of her. The high court found that Melamed's fee should be determined by the Law Society of the Northern Provinces, and that once the assessment was made, either party could approach the high court for a determination of costs in the action. The appellant appeals against the order that the fees be assessed by the Law Society on the basis that there was no reason for the high court to interfere with the agreement reached between Melamed and Goldberg. The appeal is with the leave of the high court.

[3] The law is clear: an attorney is entitled to charge for services rendered in an amount agreed by him and the client. But, if the attorney has overreached the client, then a court will not enforce the agreement. In such a case the court may order that the attorney have the bill taxed and suspend the matter pending the determination of the taxing master. See, for example, *Cape Law Society v Luyt*[1] where an attorney presented an excessive bill to his client and immediately demanded that it be paid and that the client waive any right to a taxed bill: the court held that the attorney had taken undue advantage of his client. And in *Law Society of the Cape of Good Hope v Tobias*[2] the court stated:

'An attorney is not, however, necessarily guilty of misconduct because he chooses to put an extravagant value on his services. If the prospective client is a free agent, if there is neither fraud nor duress, and no advantage taken of him, then if the client chooses voluntarily to agree to an extravagant fee, the attorney will not be guilty of misconduct. . . .

The word "overreach" is defined, insofar as it is relevant to this matter, as ". . . .circumvent, outwit, cheat in dealing" (*The Oxford English Dictionary* 1961 vol 7 at 318) or "to outwit or get the better of" (*Chambers Twentieth Century Dictionary*). Where an attorney and his fees are concerned, the word "overreach" may be taken as conveying the extraction by the attorney from his client, by the taking by the

[1] 1929 CPD 281 at 290.
[2] 1991 (1) SA 430 (C) at 434G-435C.

former of undue advantage in any form of the latter, of a fee which is unconscionable, excessive or extortionate, and in so overreaching his client that attorney would be guilty of unprofessional conduct.'

See also *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC* [3] and *Mnweba v Maharaj*[4] where these principles are restated.

[4] Goldberg pleaded that she had not agreed to pay Melamed R450 000, alternatively that the agreement sought to secure for Melamed a special advantage to which he was not entitled; and again in the alternative that the amount claimed was excessive for the services rendered and thus amounted to overreaching. She counterclaimed for damages for defamation since Melamed, writing to her new attorney, asserted that she was an unmitigated liar. The high court found that the publication was privileged and dismissed the counterclaim. There is no appeal against this finding.

[5] Bregman AJ did not expressly find that there was in fact an agreement that Goldberg pay Melamed the fee he claimed, but the parties accept that such a finding is implicit in his judgment and Goldberg does not contest the correctness of this finding. Nor did he find that there had been overreaching, or that the fee claimed was excessive: indeed he expressly left the question open. Yet, after a very lengthy examination of what Melamed purported to have done for Goldberg, and his own estimate of how long it would have taken, the learned acting judge ordered that Melamed's fee be assessed by the Law Society.

[6] Without a finding that the agreement was void, the client having been overreached, or for another reason, the order that the fee be referred to the Law Society is inexplicable: there is no basis for interference with the agreed fee absent such a finding. The appellant's argument on appeal is thus that the order of the high court was wrong, and that the agreement is enforceable.

---

[3] 1998 (3) SA 608 (D) at 611C-612F.
[4] [2001] 1 All SA 265 (C) at 274i-278h.

[7] The only question before this court, therefore, is whether Melamed in fact overreached Goldberg, such that the agreement was invalid. In answering that question it is necessary to consider, briefly, the background to the agreement.

[8] As I have already mentioned, Goldberg and her husband had signed an agreement in anticipation of a divorce. Both were represented by attorneys. She was nonetheless unhappy with its terms, particularly since it made no provision for a lump-sum payment to her after the divorce and she regarded the maintenance payable as insufficient. She arranged a consultation with Melamed, and asked him to establish whether the agreement had been made an order of court (her husband had not yet issued summons for divorce but Goldberg was obviously unaware of the niceties of legal processes), and whether a new agreement could be negotiated.

[9] During the course of this consultation Melamed phoned Mr Goldberg's attorney and ascertained that the divorce proceedings had not yet commenced and the agreement had thus not been made an order of court. Melamed testified that at the first consultation he had discussed with Goldberg the question of his fees: he advised her that he usually required a deposit of between R30 000 and R50 000, and that his hourly rate was R2 500. When she said that she did not at that stage have the funds to pay, he offered to waive the deposit and to determine a fee after the negotiations had run their course. She agreed. He explained the possible courses of action that might be taken to achieve a better settlement for her, and their cost implications. She realized, he said, that the process would be expensive. She offered (he claimed but she denied), to pay him ten per cent of the total settlement she received. But having regard to the extent of her husband's assets (or, at least, what she thought that might be), he advised her that that might be excessive. He would wait to see what transpired. Mrs Santin, Melamed's secretary, sat in on this consultation and all others save one.

[10] I do not consider it necessary to discuss in any detail the work that Melamed testified he had done for Goldberg. Suffice it to say that he

consulted her, wrote several letters, had telephone conversations with an accountant, and spoke to her regularly on the telephone (she phoned him frequently and often arrived at his office to see him, despite having no appointment, he said). He spent some time advising her how best to negotiate directly a better settlement with her husband. But he could not even estimate how much time he had spent on the matter. I shall revert to Melamed's inability to estimate the number of hours he had spent dealing with the Goldberg settlement agreement.

[11] Goldberg denied that he had spent as much time as he claimed on her matter, and insisted that she had done the work necessary to make her husband agree to a more generous settlement. It is impossible, on the evidence presented to the high court, to assess how much time Melamed actually spent. When cross-examined, and despite asserting that he spent 'vast vast hours' in her service, he could not even say whether he spent about 12 hours consulting with her. He did not keep a record of all consultations, phone calls made on her behalf or phone calls that she made to him. No record was necessary, he said, because they had agreed a fee (although even this was in conflict with his evidence that the fee had been agreed only after her husband had signed a settlement agreement on her terms). Santin, who testified for the appellant, also could not say precisely what work had been done or how much time it had taken. She too kept no records.

[12] On 1 April 2005 the Goldbergs reached a further settlement agreement. This time, Mr Goldberg undertook to pay a lump sum of R5m to Goldberg on the divorce, in addition to the payment of maintenance in the sum of R50 000 for Goldberg (additional maintenance was payable for their two daughters) and the transfer of his share of the matrimonial home to Goldberg. Moreover, Melamed testified, as a result of his advice to Goldberg, she had secured an undertaking, not reflected in the written agreement, that her husband pay her a further R40 000 to R50 000 a month in cash. She denied that there was such an undertaking or that she had ever received the additional maintenance, in cash or otherwise, but nothing turns on this.

[13] The circumstances under which the fee agreement was reached are significant. Melamed's evidence, confirmed by Santin, was to the following effect. On 1 April Goldberg came to Melamed's offices to sign the settlement agreement that her husband had already signed. Goldberg was delighted with the settlement: she appeared to be euphoric. She exclaimed that she loved Melamed. He asked her what he should charge for having helped achieve such a generous settlement.

[14] He suggested payment of R450 000 plus VAT. She asked if that was not 'steep'. He reminded her that she had initially offered to pay 10 per cent of what she was promised over and above that which her husband had formerly agreed to give. (The fact that R450 000 amounts to almost 10 per cent of the additional sum that Goldberg was to be paid under the new agreement does not seem to have occurred to Melamed who had been so assiduous not to claim ten per cent of a large amount.) And he reminded her that she had paid, over the course of seven months, only about R14 000 and had paid no deposit. What he had done was worth R450 000, he told her. And she responded that he was right.

[15] Nonetheless, immediately after this discussion, Goldberg asked Santin whether the fee was appropriate and was told that it was. Santin confirmed this version of events. Thus it is clear that Goldberg had, even on the Melamed and Santin versions, immediately had reservations about the fee asked.

[16] Goldberg, on the other hand, proffered different versions of what had happened at that meeting. She denied in court that she had ever agreed to the fee. Yet she had told her new attorney (the third) that she had no recollection of any agreement. Both versions are in conflict with her testimony that she had subsequently stalled paying Melamed the R450 000, telling him, when he asked for payment, that it was in a 32-day call account. They conflict too with her evidence that she had been shocked when Melamed asked for such a large payment. However, as the high court implicitly found that there was an agreement by Goldberg to pay the fee charged by Melamed, and as

Goldberg does not appeal against that finding, it is not necessary to determine which of her versions is to be accepted.

[17] Goldberg subsequently requested an itemised account, on the pretext that her bank required it before making any payment to Melamed. Since Melamed had not kept records of all consultations or phone calls, he had to set out the details of the work he had done from memory. The account he created, and which the court below was at pains to analyse, bears no relation to reality and was but a guess at what was done. So too, a witness for Goldberg who testified as to usual charges for the work alleged to have been done, had to concede that the hours of work and figures he suggested were speculative – a 'thumbsuck'.

[18] In my view it is not possible on the evidence to determine how many hours' work was done and what should be charged. What is clear, however, is that the sum of R450 000 is grossly in excess of what a reasonable fee might be, given that Melamed could not even say that he had done at least 12 hours' of consultation work. If Melamed had charged his standard hourly rate of R2 500 he would have had to work for some 180 hours to reach the sum of R450 000. The calculation demonstrates that the fee agreed is clearly not just extravagant but excessive. While he was not bound to charge at his usual rate, and it is open to an attorney to agree a fee, the agreed fee should, I consider, bear some relationship to the work performed. Melamed's fee clearly does not.

[19] It remains to consider whether Goldberg was overreached, such that the agreement between her and Melamed must be set aside. Goldberg's evidence, as I have said, was that when asked to pay R450 000 she was shocked. She considered that Melamed had done very little for her. The agreement by her husband to settle a capital sum of R5m on her had been the result of her hard work. She had negotiated with her husband: Melamed had not. And she had not visited or telephoned Melamed on a constant basis. Again, it is not necessary to determine the truth of her testimony given that on

Melamed's own version he could not account for the time that he had spent on the achievement of a better settlement for her.

[20] In my view, the fact that when Goldberg came to see Melamed to sign the agreement she was in a state of euphoria, elated by winning a substantial capital payment, should have made Melamed wary about exacting an agreement to pay an excessive fee without waiting for her to calm down, and before giving her the opportunity to consider the fee and possibly negotiate it. She was clearly anxious about the sum asked, to his knowledge, for she talked to Santin about it immediately afterwards, and Santin reported this to Melamed. I consider that the fee was extortionate and that Goldberg was outwitted by Melamed – overreached.

[21] In the circumstances, the agreement must be set aside, and the claim for fees should be submitted to the Law Society of the Northern Provinces for assessment (neither of the parties contended that the matter should have been referred to the taxing master and not to the Law Society). This means that the appeal must be dismissed, save for one matter. Bregman AJ made no order that the fee determined by the Law Society be referred back to the court for an order that it be paid, or for an order as to costs. The learned judge required instead that either party could approach the court for an order as to costs. Counsel agree that that part of the order requires amendment. The amendment is of no great moment and either of the parties could have applied to the high court to amend the order (r 42(b)). The omission did not warrant an appeal to this court and no cost consequences should accordingly follow.

[22] The following order is made:

1 The appeal is dismissed with costs.

2 The order of the high court is replaced with the following:

'(a) The agreement between the parties as to payment of a fee of R450 000 to the plaintiff is void.

(b) Within 45 days of the date of this order, the plaintiff may submit its claim for fees to the Law Society of the Northern Provinces for it to assess the fees to which the plaintiff is entitled.
(c) Once the Law Society has made the assessment referred to in (b) the matter shall be referred back to the court below to order that the fee so determined be paid by the defendant, and to make the appropriate order as to costs.'

_____
C H Lewis
Judge of Appeal

Appearances:

For the Appellant:	S P Pincus
Instructed by:	Melamed & Hurwitz Incorporated Johannesburg
	Rosendorff, Reitz & Barry Bloemfontein
For the Respondent:	L Hollander
Instructed by:	Gavin Morris Attorneys Johannesburg
	Hill McHardy & Herbst Incorporated Bloemfontein