

Solicitors' Duties in Witnessing Documents – yet another cautionary tale

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Even if you are “*merely*” witnessing a document, substantive duties to advise may still arise. Be very careful to ensure that you do not breach such duties.

Most, if not all, practitioners will be called on from time to time witness the execution of documents. The recent decision of Judge McEwen in *Sgherza v Sgherza* [2019] SADC – (27 June 2019) should be carefully noted.

This case involved an action by a mother (Anna) against her son (Sam) as well as a number of other defendants including a solicitor, in respect of an undocumented family arrangement.

Anna and Onofrio (Sam’s father) had owned their family home for approximately 30 years. This was a large property and exceeded the space required by an elderly couple. The arrangement (reached in 2014 and 2015) was that land would be purchased and two dwellings would be built (by Sam, who ran a building company), one to be occupied by Anna and Onofrio, and one to be rented out, providing a source of income for them. The new house, plus a \$100,000 cash payment to Anna and Onofrio, would be funded by the sale of the family home. It was expected, however, that the new property would carry a mortgage of around \$200,000.

Unfortunately, Onofrio died in September, 2015. The property was then sold, with settlement occurring on 11 January, 2016. The litigation primarily concerned the manner in which the proceeds of that sale were disbursed.

In the meantime, two dwellings on land purchased for that purpose had been constructed by entities associated with Sam, with Anna occupying a house owned by one of Sam’s daughters (Deanna) during that period. The portion of the new property which was to be available to be rented out has been rented out. Anna, however, has refused to move into the other portion of the property. Significantly,



the property now carries a mortgage of approximately \$500,000.

HOW DID ALL THIS CONCERN THE SOLICITOR?

On 28 May, 2015 (i.e. before Onofrio’s death) a number of documents were executed. These documents included a Loan Contract, a Memorandum of Mortgage and Settlement Instruction in relation to a (second)¹ Mortgage over the family home, securing the sum of \$350,000. It was Sam’s case that this loan and the (second) Mortgage were necessary steps in the implementation of the family arrangement i.e. so that the land for the new house could be purchased and for construction to commence. According to the 28 May, 2015 Loan and Mortgage documents, the signatures of Onofrio and Anna on those documents were witnessed by the solicitor.

Anna said, however, that these documents were forgeries and that she and Onofrio never signed them. Anna also alleged that her son must have acted fraudulently somehow in forging these documents and by misappropriating the proceeds of sale of the family home. Anna sued the solicitor (as the third defendant) for being part of Sam’s fraud and for fraudulently representing that he witnessed Onofrio and Anna’s signatures because, on her case, this never occurred.

PLAINTIFF UNSUCCESSFUL ON HER PRIMARY CASE

His Honour found against Anna on her case that the signatures on the Loan Document/Mortgage Document were forgeries. He found that a meeting on 28 May, 2015 **did** occur at which the documents were signed by Anna, Onofrio and Betty (Sam’s sister) and witnessed by the solicitor. Expert evidence to that effect that Anna’s signatures were not forgeries was also accepted by the Judge as supporting the version of events that the meeting occurred.

PLAINTIFF’S ALTERNATIVE CASE

Things did not, however, end there for the solicitor, because Anna’s alternative case against him, that he was negligent or in breach of his duty as a solicitor arising from the events associated with signing of the documents, still needed to be dealt with.² Whilst the alternative case against the solicitor was pleaded with “*a degree of vagueness and uncertainty*” as to just what the alternative case was there was an allegation that the solicitor made no recommendation to the plaintiff to obtain independent advice. His Honour said that the real issue raised by the alternative case was the nature and extent of the solicitor’s duty and whether there was a breach of that duty.

The Judge found that the solicitor was **engaged by Sam**³ but that the Judge found that the solicitor was **providing a service to all of the parties whose signatures he was witnessing**, i.e. Anna, Onofrio and Betty, as well as Sam.

His Honour said

“This was a fairly minimal service which did not actually require a solicitor, but on this occasion was being carried out by a solicitor. In addition to that, in relation to the statutory declarations, he was providing a service to each of the parties who signed a statutory declaration. This was a service that did need to be provided by a suitably qualified person, such as a solicitor.

.....

That is the limited scope of the services he was retained or engaged to carry out... Those circumstances gave rise to a duty of care to all four of those parties, to carry out his role, as I have just specified it, in a competent and professional manner. It can be seen that it was a fairly minimal duty.” [para.155-156]

SOLICITOR FOUND IN BREACH OF DUTY

Unfortunately for the solicitor, the Judge found that he had breached even this minimal duty to the Plaintiff in a number of ways:

1. It was important that he make it clear to the Plaintiff what his limited role was. He did not do this. [para.159]
2. It was important that he not say and

do things which would be apt to confuse the Plaintiff as to what his role was. By entering into even the brief cursory discussion and advice about the documents which his Honour found took place, the solicitor was potentially giving the impression he was in some way providing independent advice on the document. Whatever discussions took place were nowhere near what would be required to provide proper independent advice on the documents. [para.160]

3. He made no effort to comply with the formal requirements for witnessing a statutory declaration. [para.161]
4. Had the solicitor carried out his minimal role in a competent and professional manner, there were a number of circumstances which should have amounted to “alarm bells”. The Judge found that “this was a situation that cried out for something to be said to the Plaintiff on the topic of independent legal advice” and that discussion (being the raising of the topic rather than the giving of it) should plainly have occurred in the absence of Sam. [para 162]
5. Even in carrying out the minimal role outlined above, it must have been patently obvious to the solicitor that some aspects of the documents and statutory declarations were plainly incorrect or misleading, yet nothing was said. [para.163]

CAUSATION

Notwithstanding these comprehensive findings of breach, the Plaintiff was unable to prove that these breaches were causative of her loss and so damages were not ordered against the solicitor.⁴ In the circumstances of the family arrangement his Honour was not convinced that had the solicitor advised Anna to seek independent legal advice that she would have done so, or heeded that advice.

CONCLUSION

Even though damages were not awarded against the solicitor, by reason of the causation issues, these findings as to breach of duty are serious. Practitioners must take their obligations in witnessing documents seriously and be aware of additional duties which might arise.

Endnotes

- 1 The circumstances of entering into the first Mortgage and its consequences are outlined in the Judgment but are beyond the scope of this article.
- 2 The fact that there was such an alternative case for Anna to run, in circumstances where her primary case was seemingly absolute (“*the signatures are forgeries*”, “*the documents were fraudulent*”, “*the meeting never happened*”) is but one of the surprising aspects of this case.
- 3 Sam had made arrangements by telephone and text message for the solicitor to attend at his parents’ house on 28 May 2015 because “*there were some finance documents for his [Sam’s] parents and Betty for signing*”.
- 4 Damages were awarded against Sam, however, for breaching the family arrangement.