REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

29/8/2014

CASE NO 2011/10614

IN THE MATTER BETWEEN:

FLUXMANS INCORPORATED PLAINTIFF

AND

LITHOS CORPORATION OF SOUTH AFRICA (PTY) LTD FIRST DEFENDANT

AND

GYENFIE, ANDRE KWAME SECOND DEFENDANT

JUDGMENT

Note: References to the bundles A – M and P, the pleadings, are in square brackets [o].

SUTHERLAND J:

Introduction

1. The Plaintiff, Fluxmans Inc (Fluxmans) is a leading firm of attorneys based in Johannesburg. The Second Defendant, Andre Gyenfe (Gyenfie) is, a director and the controlling mind of the First Defendant, Lithos Corporation of SA (Lithos), and was at all times the representative of Lithos in its dealings with Fluxmans. The business of Lithos, at the time relevant to this action, was included the prospective exploitation of mineral resources in Senegal by the marshalling of both financing and operational partners. Lithos engaged Fluxmans in 2008 to represent it in an action it instituted against Kumba Resources Ltd in the High Court, Pretoria.

2. Fluxmans was retained until April 2010. A fees dispute arose, on the probabilities, on 12 April 2010 when Gyenfie articulated certain grievances. This action concerns Fluxmans suing its former client, Lithos and Gynfie for two payments. The first payment is R456,000, being the balance outstanding of its agreed fee of R600,000. The second payment is for the balance of the fees disbursed to three counsel, including an agreed collapse fee, in the sum of R2,754,639 for which it had not received cover prior to incurring the liability to counsel.

3. Lithos denies liability on several bases, including that the work was not done, the fees were unreasonable and that counsels' collapse fees were not authorised by him and in any event were in breach of the Bar's Rules on collapse fees.

4. Gynfie, who is sued on a suretyship, and whose obligations were secured by a powers o attorney in favour of Fluxmans, enabling it to pass a bond over certain fixed property owned by Gyenfie, avers that the obligations he assumed in his personal capacity are unenforceable on grounds of duress, undue influence and fraud by Fluxmans and counsel in concert.

5. Lithos and Gyenfie also pleaded several counterclaims. In sofar as the issues do not overlap with the defences pleaded to Fluxmans' claims, they include (1) repayment of what is alleged to be fees overpaid; (2) in the event that Lithos is liable to pay the counsels' collapse fees, damages in like sum from Fluxmans owing to Fluxmans having wrongfully caused Lithos to incur such a liability; and (3) punitive damages based on a claim of Fraud to induce Lithos and Gynfie to unjustifiably pay money to Fluxmans. A claim for Defamation was withdrawn.

The issues for decision

6. There is no dispute that Lithos was obliged to provide cover for all fees to be debited to its account. An all-in-fee for Fluxmans own fees, to cover the period from 21 September 2009 to the end of the case, was agreed at R600, 000. The dispute about these fees is whether work was done to the value of R600,000. In particular, the factual disputes are about (1) the charge-out rate agreed for James Ndebele (Ndebele), the director of Fluxmans who handled the matter for Lithos; ie was it R1200 ph or R1850 ph, and (2) whether Ndebele did any necessary work which, at the applicable charge rate could tot up to R600,000. Both these issues turn on credibility findings.

7. The disputes in the second claim in respect of counsels' fees are wider. There is no dispute about the reasonableness of the rates charged; in 2010, R30,000 pd and R3000 ph for the Silks and two thirds of that for each of the two juniors. Although initially it was in dispute whether or not Fluxmans actually paid these sums to counsel, that issue was conceded during the trial. What is in dispute about counsels' fees falls into three parts:

7.1. First, whether the three counsel retained from 25 January 2010 did the work they claim to have performed and how long it really took them to do so. This applies to the period from 25 January 2010 to 7 March 2010 (the preparation period) and to the period 8 March until 1 April (the Trial Period).

7.2. The second part relates to whether or not Lithos, as represented by Gynfie, agreed to the collapse fees, and whether or not Lithos was the victim of a misrepresentation, by all the lawyers involved, that the trial would run and not be postponed when they knew full well it could not run, and upon which premise Lithos contends it was ill-served by its lawyers who acted unconscionably by billing it for such fees. Fluxman's case is that Gynfie had instructed it and counsel to take the matter to trial regardless of the risks of a postponement, which risk he grasped at all times and was willing to run.

7.3. The third part relates to the reasonableness of the collapse fee charged for the trial period after the trial was postponed. In this regard, the application and interpretation of the South African Bar's Code of Professional Conduct, rulings of the Johannesburg Bar, and the outcome of a Johannesburg Bar Council fees enquiry approving the fees charged as reasonable are the stuff of the controversy. To the

extent that Gyenfie had approved certain fees to counsel in the preparation period it is alleged that, he did so as a result of being the victim of a misrepresentation that the work was either necessary or was indeed performed.

8. Gynfie's personal liability for Lithos's obligations, as mentioned earlier, turns on factual and credibility findings about what happened at a meeting of 3 March 2010.

The Narrative

9. An account of the evolution of the matter is essential to explain the grievances of the defendants and why they refused to pay up. There are three periods to address. The second and third periods have been identified. Preceding those is the period from 2008 until 25 January 2010. (The Initial period)

I: The initial Period

10. Lithos sued Kumba in 2006. In essence, the claim arose out of the dealings that Lithos had initiated to bring Kumba, itself and Miferso, a parastatal in Senegal together to exploit the Faleme Hills iron ore deposits in the hinterland of Senegal. Gyenfie believed that Lithos was possessed of certain rights, conferred on it by way of a grant by Miferso to Lithos Canada (not a filial company) which had been ceded to Gyenfie and ceded by him to a UK company Prime Ink, controlled by him, which then ceded it to Lithos SA, a company established by Gyenfie using a shelf company. The grant of rights by Miferso was not in perpetuity and had to be expressly renewed from time to time. At some stage, so it was alleged, Kimba and Miferso cut Lithos out of the project. This was perceived to

be a violation of the rights vested in Lithos. The action against Kumba was for damages in an astronomic sum.

11. When the claim had been initially pleaded by the then counsel on brief from Okes, the formulation of the claim relied on a written agreement granting the rights upon which the claim was founded, which agreement needed to be rectified. This formulation had not sat well with Gyenfie, and he said that he had jettisoned the counsel who pleaded the rectification for what be perceived as a mistake and not following his instructions. In about December 2007, Gyenfie met Ndebele and decided to terminate the mandate of attorney Duncan Okes to run the trial and instruct Fluxmans. Okes remained Gyenfie's legal adviser, and he was described by Gyenfie as both a consultant and his friend. Okes' exact role was never fully explained, and despite Gyenfie's assertion that he was part of the team, that is flatly contradicted by all the lawyers, although he did consult from time to time, with Gyenfie, to furnish information about the history of the claim.

12. Fluxmans, upon being instructed, thereupon briefed Arnold Subel SC and Gillian Clarke. This pair of counsel remained on brief until about 15 January 2010. Among Gyenfie's grievances is the belief that Subel SC, Clarke and Ndebele were slack by not attending properly to the case during this period as manifested by a failure to bring about an amendment to the claim to remove the reference to a rectification.

13. Apparently, once briefed Subel SC formed the view that the basis of the case was the assertion and proof of an enforceable grant of the rights in Faleme. These rights, he concluded, having been granted in Senegal, must be governed by Senegalese Law, about which none of the South African Lawyers had the foggiest idea, a circumstance

aggravated by it being in French. Subel SC called for an expert in Senegalese law to instruct him.

14. What happened next is controversial. Clarke and Ndebele say that Subel SC proposed Professor Thomashausen, a UNISA academic, Professor of Comparative law, versed in several languages including French, to provide the required expertise. According to Clarke and Ndebele, Gyenfie refused to use Thomashausen. Gyenfie testified that the first time he heard of Thomashausen would be after 25 January 2010, and that Clarke and Ndebele lied about mentioning him in 2008. It is common cause that what indeed happened was that Gyenfie arranged to fly Clarke and Ndebele with himself to Dakar to meet Ibrahima Gueye, who he says is a senior legal practitioner of 30 years standing for legal advice on the grant of rights issue.

15. In June 2009 the trip was made. They all met, and Gueye gave oral advice, in French which was interpreted by Gyenfie to the Lawyers. Other persons were also seen, but nothing of moment arose from those meetings at this time. The party came home having requested Gueye to give a written opinion to back up his oral advice that the grant of rights that Lithos relied on were valid and enforceable. Clarke admits that she believed, at this time, that they had gotten what was needed. When the written opinion arrived she was forced to change her mind. About this change of mind she was challenged, because in a report on 7 July 2009 [F265], she had described the trip as 'successful'. However, as the Gueye opinion [A3A], dated 7 August 2009, which was translated on 20 August 2009 and reached counsel soon thereafter, this criticism is futile.

16. The "opinion", barely one and a half pages, is, in its English version, opaque, obscure and superficial, being little more than a ramble across several issues mentioned, rather than discussed, and is bereft of any justifications, exposition, or citation of authority for the views expressed. The statutory instruments which regulate the mining activities of Senegal are not even mentioned. The document is little more than a Thumbs Up to Gyenfie's claims. Joubert SC was gracious about its contents, saying that what was delivered depends on what was asked for. Nevertheless, even assuming the conclusions are correct, the document is unusable for forensic purposes in a South African court.

17. Thus, faced with this manifestly inadequate screed, counsel wanted clarifications. They composed queries to be sent to Gueye. The need for clarity on the issues traversed was crucial for two cardinal aspects of advancing the case, to which attention will be given hereafter. It is common cause that Gueye never responded. Gyenfie testified that he played no part in any further follow ups with Gueye and cannot throw light on the silence that followed, an odd occurrence, seeing that Gyenfie was the only French speaker available to the lawyers. This evidence is all the more remarkable because it is common cause that Gueye later presented a huge bill for the opinion, demanded a limousine, a room at the Michelangelo, and a 3% rake-off from the sum awarded in the case for his testimony. Clarke and Ndebele say that Gyenfie was angry when these demands were made and said he would negotiate with Gyeye. Subel SC rightly alerted Gyenfie to the fact that Gueye's demand to share in the claim compromised his impartiality and the value of his opinion.

18. A crucial aspect of the case which was waiting on a proper opinion was the exercise to amend the Lithos claim to replace the initial averment of an agreement in want of rectification, which Gyenfie believed was factually incorrect. Gyenfie says he believed all along he had an oral agreement in respect of the granted rights. Obviously, if a critical party to an agreement cannot support a rectification it must be abandoned, but counsel needed to be assured of what cogent alternatives were available to plead. Accordingly, the view adopted by counsel was that until there was clarity on the survival of the granted rights through the several renewals and cessions and that it could be averred that under the laws of Senegal these granted rights were current and enforceable, the drafting of the amendment could not begin; hence the queries to Gueye.

19. This perspective is a major source of controversy. Gyenfie held fast to the view that the Gueye opinion was sufficient to perform this task. Subel SC and Clarke and Ndebele were not convinced. Apparently, not even the advice of Subel SC that Gueye could not be a credible independent witness in the light of his champertous conduct shifted Gyenfie's view, or so Gyenfie said. The result of the view taken by Counsel was that no amendment was drafted throughout 2009. Gyenfie claims that he was anxious about this 'omission' which he regarded as unprofessional conduct; a complaint which he says he took up expressly in January 2010, about which, more is said later.

20. However, other than anxiety to prepare and file an amendment to the claim, there were other strains playing throughout 2009. More to the point, certain important pre-trial processes were not happening with the concomitant risk of jeopardising the ripeness of the trial which had been set down for 8 March 2010 in terms of a special directive by the Judge President, to run for 19 court days to 1 April 2010.

21. The defendant, Kumba had not discovered on time. These documents were important, given the nature of the case. What was it prudent to do? The obvious response to such non-compliance is to compel. Subel SC, Clarke and Ndebele deliberately decided not to do so. This conduct, so says Gyenfie, was negligent. The reason given by the lawyers for not compelling discovery is rooted in Kumba's stated reason for refusing. That reason was its demand that Lithos agree on a separation of merits and quantum. The quantum was huge and required expert evidence to compute. SRK Consulting was retained to prepare a report for Lithos. The Lawyers took the view that the separation demand was well founded and that it was unlikely an application be could be successfully resisted. Clarke says that this was their advice to Gyenfie but he rejected it; he was anxious to conclude the whole matter, and was allergic to a delay. An impasse continued for some time over this issue. Eventually Gyenfie relented and a separation was agreed.

22. Once that obstacle was removed, Kumba discovered on 28 November 2009 and a Pre-Trial conference followed soon after. The upshot was that when South Africa closed down for the 2009 year–end holidays, ostensibly, all was in place to go to trial, bar the amendment. Gyenfie was made to believe that Subel SC had undertaken to work the matter up during the recess. Gyenfie says that 2010 opened with him expecting to prepare for 8 March 2010.

23. According to Gyenfie, he had already taken stock of the habit of Subel SC not being accessible. Much emphasis was placed on two emails from Clarke at a six month interval in 2009 in which she remarked that she would put pressure on Subel SC to make time and that she was still waiting for a response from Subel SC. This was used as a platform to contend that Subel SC did no work on the case during that period. Clarke's emails, [F365

and F367] do not support that inference. She rebutted the notion that he was consistently unavailable, by reference to documents settled by him during the interval and by an explanation that the two emails were addressing different items and that latching onto the particular phraseology was inapposite. Her testimony disposed of this criticism. However, Gyenfie, alive to the proximity of the trial in January 2010, says that he elevated the level of his ire about the lack of work done, especially as some 18 odd months had elapsed, since they were briefed, in which to do an amendment. He threatened Clarke and Ndebele with a report to the Bar Council and to the Law Society. He says that they quailed. In response, he says, he was faced with a memo dated 15 January 2010, the 'January Memo' [A13-17] He says the memo was just a whitewashing attempt to protect themselves from the repercussions of their unprofessional conduct.

24. The January memo advised that the matter was not ripe to go to trial on 8 March 2010. It traversed the history from 18 July, the date of an earlier memo [F367] prepared by Counsel reporting to Gyenfie on what had to be done. The January memo explained the frustrations that had occurred and emphasised that the documentary record was central to the controversies. It mentioned the late discovery by Kumba and the need to digest that material. It pointed out that witnesses had yet to be consulted. Further particulars on trial had been requested by both parties and replies had to be prepared. The task of replying to the request by Kumba could not be undertaken until matters had been clarified, and further instructions had been received. The memo then stated in paragraph 9:

> "Having given careful consideration to the matter we are of the view that there is no realistic prospect of the matter being ripe for hearing by [8 March]"

It cautioned against proceeding unready to trial. Lastly it stated in paragraph 13:

> "We are accordingly of the view that attempts ought to be made to avoid unnecessary wasted costs being incurred and that full attention be given to further preparation for trial in the action. If on the other hand, our instructions are to proceed as best as can be done we consider that it would seriously compromise the plaintiff's prospects of success."

25. It is common cause that Gyenfie was outraged by this advice. What happened next is controversial. Gyenfie says Subel SC 'dropped' him. Ndebele says Gyenfie instructed him to fire Subel SC and get another Silk to take over and prepare the matter for trial as he would not brook a postponement. As for Subel SC, himself, according to Clarke, he learnt that he was fired from her.

26. Thus, at this juncture, with the waggon in the middle of the drift, a new span was led in to be yoked.

II: The Preparatory Period

27. On 25 January 2010, Altus Joubert SC and Ingrid Opperman were inspanned with Clarke who had been retained. How this new team came to be composed is in dispute. Gyenfie says that Ndebele and Clarke shared his anger at Subel's betrayal and in the face of his threat to report them all for misconduct and take the case away and give it to a pair of brothers, one an attorney and the other an advocate, who were said to practice in Hyde Park, they begged him to spare them the ignominy and promised that they had just the leader who could rescue them all from this predicament and give him what he wanted; ie

a 'seamless transition' to trial. Upon that footing, Ndebele said that Joubert SC was the man to meet this challenge. Gyenfie was then introduced to Joubert SC.

28. On meeting Joubert SC, Gyenfie says that he interrogated him about the mandate to take the matter to trial. Joubert SC assured him he was up to it. Gyenfie wanted to know if Joubert had expertise in the law of unfair competition. Joubert SC thereupon supposedly swanked about a case in which he had appeared. Lastly, Gyenfie checked with his friend, consultant and former attorney of record, Duncan Okes, who endorsed Joubert SC as fit for purpose, apparently, on the basis that he had known him at Stellenbosch. Thus equipped to make an informed decision he approved Joubert SC as the man for the job.

29. The contending version is chalk to Gyenfie's cheese. Clarke and Ndebele say they were in a state of despair upon being told to carry on without Subel SC and being told to find another leader who would get the matter to trial. Gyenfie's instruction was to get a team together that would work full time from then to the end of the trial on 1 April. Clarke testified of her odyssey through the directory of Silks seeking out someone who, at that time in January, ie about 18th – 25th, who was back from holiday, and immediately available to step in and work full time on the case from then until 1 April. As she rightly pointed out, this was a hard ask. It took time and, eventually, with a shortlist and Gyenfie with Okes present, Gyenfie selected Joubert SC. Gyenfie also wanted a second Silk, apparently to match the Kumba team composed of Burger SC, Turner and Green. Clarke says that she tried unsuccessfully to disabuse him of the need for parity of presence, but eventually compromised by persuading him to settle for a senior junior, Opperman then of some 19 years standing, who together with Clarke and Joubert were in the same set of chambers which held the added logistical advantage of proximity.

30. Ndebele says that far from him recommending Joubert SC, as Gyenfie testified, he had not heard of Joubert SC before and could not have done so. The threats of misconduct complaints never happened, say Clarke and Ndebele. Precisely what each might have done that might be construed, even subjectively by Gyenfie, as constituting professional misconduct was never spelled out.

31. In this last week of January 2010, the new team addressed what to do. Two happenings occurred over the next few days which are at the heart of the saga. One was that as soon as Joubert SC had a sense of Lithos's case he advised that Thomashausen was critical, indeed, as he later testified, without Thomashausen there could be no case. The other matter was the putting up of fee proposals by the three counsel.

32. Thomashausen was called on 25 January by Joubert SC. His mandate was to advise on the Senegalese Laws and provide the input for an expert notice with which counsel could face the Kumba expert, Professsor Tosi. Opperman and Clarke met for a preliminary consultation with Thomashausen on 29 January. On 1 February a comprehensive instruction to Thomahausen was prepared. A target date for his opinion was set at 5 February. It was not achieved because of the complexity of the task. On 11 February Thomashausen give counsel a first draft. The expert summary was served on 15 February. A final amplified opinion was ready on 18 February. Throughout this period, 25 January to 18 February, and indeed afterwards too, there was incessant contact between counsel and Thomashausen, including a flurry of email and documentary communications. Queries from counsel were put to him, responses given, the various statutes on mining law in Senegal were sourced from the Bar Library and the internet, and Thomashausen's polyglot genius was harnessed to yield fresh English translations of the French documents revealing mistranslations, overcoming confusions and pointing out

nuances that would otherwise have escaped the South African Lawyers. What ultimately was produced was a rationale for the contention that, despite the difficulties identified in the linkages essential for the granted rights to have been renewed from time to time and remain valid, the claim was, according to Thomashausen, sound in Senegalese law.

33. Parallel to these efforts, the mundane matter of counsels' fees was addressed. According to Joubert SC the request put to him to take the brief was that Gyenfie wanted the matter to go to trial on 8 March regardless of the risks articulated by Subel SC. When he took the brief he had yet to acquaint himself with the matter and had no considered view on the prospects. The mandate was to drop all other work and for a period of six weeks devote himself to making the matter ripe, and hold himself available for an 19 day trial from 8 March. Opperman was in the same situation. Clarke's position was distinguished only by having already been acquainted with the matter.

34. In 2009 Subel SC and Clarke had agreed a collapse fee for the Trial of 8 March. There was no challenge of any kind to that evidence. Now, Joubert SC and Opperman put up proposed collapse fee proposals and Clarke renewed hers in line with the other two counsel. These were sent to Ndebele between 28 January and 4 February. The letter of Joubert SC of 28 January to Ndebele [H2] captures the spirit of that moment; the relevant portion reads thus:

> "I have been briefed to lead the team .....
>
> I have been called upon to stand in as a very late replacement for the previous lead counsel that has become unavailable. The matter is complex, the papers voluminous and the amount claimed is about R3 billion. The trial starts on 8 March 2010 and is scheduled to run until 1April 2010.
>
> I have been requested to prepare on a full time basis until the commencement of the trial. Thereafter I have been briefed to hold myself available for the full period up to 1 April 2010, the anticipated final day of trial. I have done so.

> My daily fee is R30,000 plus VAT and such fee extends till 1April 2010, irrespective of whether the trial runs for the full period or not. ....
>
> This fee arrangement has been discussed with you prior to me accepting the brief. This letter serves as a recordal thereof."

35. Ndebele sent the documents to Gyenfie with a request to provide him with cover for such sums and for the preparation of the case. 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 (See: Serrurier v Korzia 2010 (3) SA 166 (W) at esp 181A). What Ndebele sought from Gyenfie was an agreement that Gyenfie would cover Fluxmans for those sums. Sensibly, Ndebele did not wish to bind Fluxmans to pay the fees unless he had secured cover.

36. Initially it was the Gyenfie's case that no fee proposals were put to him and he had never seen them. In cross-examination he conceded getting these proposals by email but says that he did not apply his mind to them; the question of his agreement to cover such costs is addressed hereafter. All the fee proposals were to the effect that each counsel would charge for the full 19 days of the matter if it did not run for the whole period reserved. The question about whether this was reasonable is addressed hereafter.

37. The Counsel say they busied themselves with preparation for trial. In addition to the work directly involving Thomashausen, there were several others aspects that received attention, including consulting various witnesses, taking instructions from Gyenfie, and considering legal issues. On 22 February 2010, Kumba served a supplementary discovery of some 900 pages. This was digested and trial bundles of documents were prepared.

Among the fruits of the scrutiny of the Kumba supplementary discovery was the unearthing by Clarke of a communication from the Senegalese Ministry of Mines to Miferso which gave rise to a delictual claim against Kumba, and which found its way into the second of two amendments prepared by counsel. It was the issue of an amendment to the claim that now received the studied attention of counsel.

The first amendment

38. The most important need for an opinion from Thomashausen, as it had been from Gueye, was to confirm the cogency of an averment that the granted rights had survived several expirations and renewals which would open the way for a considered amendment of the claim invoking the appropriate principles of Senegalese law. However time was of the essence, so in advance of Thomashausen's final opinion, and acting on his oral input, the issue received preliminary attention.

39. On 11 February Counsel and Gyenfie met at Lithos's offices and debated the formulation of an amendment to supersede the rectification averment initially pleaded. Joubert SC testified that the risks of causing a postponement if an amendment was moved was explained and Gyenfie appreciated the risk and accepted it. Gyenfie says of this meeting that it was called by him in the wake of his exasperation with counsel about their tardiness in drafting an amendment. He alleges that the counsel were unable to grasp a basis for an oral agreement and he was obliged to sift through the documentation whereupon he came upon a minute of a meeting of 22 April 2003 (the Dakar Minute) which evidenced the agreement crucial to the preservation of the rights. This evidence is

puzzling because the document had long been the subject of scrutiny by counsel and its existence could not have been a revelation on 11 February.

40. It is common cause however, that counsel then drew up a draft 'position paper' articulating what they understood the basis of the contractual claim to be. On 12 February Counsel sent a draft of the formulation to Gyenfie. The draft formulated an oral agreement having occurred on that date and supported by the Dakar minute. On 15 February the notice to amend was filed. However, Joubert SC deemed it imprudent to aver a simple oral agreement but rather, for reasons of caution, decided to aver a partly written partly oral agreement incorporating the Dakar Minute; the rationale was his concern that a merely oral agreement succeeding several written agreements, seemed out of kilter with an apparent pattern and the averment of a hybrid character would offer protection from such a criticism.

41. This first amendment was withdrawn when Kumba objected on 22 February, averring that it was excipiable. The date of 22 February is significant because that was also the day the supplementary discovery from Kumba arrived, which yielded fresh data, hitherto unavailable to counsel, pleaded in the second amendment.

The second Amendment

42. Work on drafting the second amendment began on 22 February. A second expert notice for Thomashausen was also being prepared. The Second amendment was served on 1 March. It included an averment relying on a purely oral agreement supported by the evidence of the Dakar Minute. It also introduced a claim in delict, a bonus cause of action

made possible by the discovery of a damaging letter in the supplementary disdcovery of Kumba. It too was met by an objection from Kumba.

The postponement

43. On 5 March, the Friday before Monday 8 March, the set-down date, Kumba delivered an application to postpone. That weekend was spent preparing resistance to the application. However, the inevitability was reluctantly acknowledged and eventually on 8 March the only debate was about costs which ultimately, the parties agreed to be reserved.

The events concerning the procurement of cover

44. As at 25 January 2010, when the new team had been composed, Ndebele had not secured cover for the fees of counsel for the upcoming trial nor for its preparation nor for Fluxmans' own fees. Ndebele says that the two payments of R 1million had been received in the trust account for the case in 2009 from Sir Sam Jonah, who had an undisclosed relationship with Gyenfie. The first of these payments is reflected as emanating from Sir Sam Jonah in a deposit advice dated 15 April 2008.[F263]. The second sum of R1 million was received on 30 September 2009. On 25 January the trust account of Lithos was R216,304.42 in debit [B103]. By 25 February 2010, the debit balance was R149,087.74 in debit [B105] This date is significant because Ndebele had been pressing Gyenfie to provide cover and none had been forthcoming. He had asked Phillip Vallet, Fluxmans' Chairman, if the firm would agree to Gyenfie's request that Lithos be accommodated without cover. Vallet refused, in a letter to Ndebele dated that day.

45. Because Ndebele had hitherto been unsuccessful in getting is client to cover the sums of the fee proposals of counsel, he had also been unable to confirm acceptance of the collapse fees agreement to counsel. On 25 February Clarke had written to Ndebele to say that if agreements were not confirmed by 26 February counsel would cease work.[B56] On 25 February, so says Ndebele, he met Gyenfie at Lithos's offices. Together they estimated what future costs would be which had to be covered. It is common cause that they agreed to make provision for R4.5 million. As with the previous payments, Sir Sam Jonah or his son Richard Jonah were approached. Ndebele's handwritten note [B170] sets out the exact sums of the collapse fees for each counsel, the fee for Thomashausen, the balance of Fluxmans' fees still to be debited, and also a fee for Duncan Okes, a sum included at Gyenfie's insistence. The total was R4,472,430 and was rounded up to R4.5 million.

46. How the sum was computed is disputed. Gyenfie's version is addressed hereafter, but according to Ndebele, in his presence Gyenfie made a telephone call to Jonah. Ndebele too spoke to Jonah. Jonah agreed to provide a bank guarantee. This Ndebele confirmed in an email on 26 February.[B134L]. A draft bank guarantee was swiftly composed and sent to by Ndebele to Jonah. Ndebele required the guarantee to be delivered by 14h00 on 26 February. However before the deadline, Ndebele was telephoned and told that the deal was off and no funding would be made available by the Jonahs. Why the relationship between Jonah and Gyenfie went sour was not really explained. Cryptic communications from Attorney Singer, supposedly on behalf of Jonah, amounting to a threat of blackmail against Gyenfie, were alleged to have been sent, but when Ndebele confronted Sir Sam Jonah about them they were denied.[A146A] The upshot was nevertheless that there was no money available for cover. In response to the communication from the Jonahs and in

the light of Vallet's injunction not to put the firm at risk, on 26 February, Ndebele instructed counsel to cease work.

47. According to Clarke, on Friday night, 26 February, she was telephoned by Gyenfie who was in a state of distress. He begged her and the other counsel not to stop work and promised to pay their collapse fees in full. She told him to sort it out with Fluxmans. On Gyenfie's version she called him, took his part as the victim of Fluxmans' harassments, and said she would arrange what would become the meeting of 3 March. Ndebele says he arranged the meeting not Clarke, who likewise says it was not her business.

48. Gynfie's predicament was that neither Lithos nor he had cash. He wanted Fluxmans to accept assurances of future payment. He said that in his personal capacity he had R12 million worth of bond free property. He offered to divert about R1.3 million from a property sale then on the verge of transfer and being handled by Attorney Phillip Silver. He said he was arranging an access bond facility. He was expecting $ 300,000 from Mauritius. He says he raised these facts and proposals with Ndebele who, unreasonably, refused the offer of R1.3 million. Ndebele says that the money from the sale would not be available until after transfer, whenever that would happen and he needed cash at once. On 2 March Clarke wrote again to state that counsel had ceased work [A57] Ndebele then called in Vallet and Vallet called in Colin Strime, the Head of Litigation at Fluxmans, and on 3 March they all met at Fluxmans with Gyenfie to address the problem of an absence of cover.

49. At this meeting Vallet and Strime on behalf of Fluxmans agreed to forgo cash cover on the strength of certain securities. Gyenfie explained his predicament by alleging that Sir Sam Jonah who had advanced all the cash that Fluxmans had hitherto received, had reneged on undertaking given. However he had a solution, if Fluxmans would accommodate his cash-strapped position. First, he offered that about R1.3 million that Silver was about to receive from a property sale would be diverted directly to the Lithos trust account. This was agreed to. Indeed, on 25 March a sum of R1,367,976.55 was duly received. Second, Gyenfie presented a Windeed Search print out showing that he personally owned several unbonded properties.[B132A] It was agreed that Gyenfie would give an irrevocable power of attorney to Fluxmans to pass a bond over these properties for a maximum of R4.5 million [P30]. A suretyship for Lithos' indebtedness to Fluxmans was also signed.

50. The arrangements having been made, they departed. Ndebele says as they left, Gyenfie asked him to confirm the collapse fees at once. However, Gyenfie says Ndebele was not at the meeting, save to introduce Vallet and Strime, both of whom, in turn, say Ndebele was indeed there. It would have been extraordinary indeed, given Ndebele's role, that he would be absent. A remaining formality remained before the fees could be confirmed; Gyenfie had to hand over the title deeds of the several properties. This he did the next day. Ndebele fetched then from his office. Once Ndebele had what he thought were the title deeds he confirmed the fee proposals, stamped them on 4 March and marked them 'accepted' [P25 -27]. Counsel had now been secured for the duration of the trial. However, later it was discovered that the envelope with the deeds turned out to contain only one original deed and the rest were copies. Thus when Fluxmans exercised its right to pass a bond it could only be passed over one property.

51. The events as described about the meetings of 25 February and of 3 March are hotly in dispute by Gyenfie and these particular disputes are central to his case. Gyenfie says he was most aggrieved that Ndebele was unreasonable about the funding issue. He says the meeting of 25 February was to address Sir Sam Jonah's desire to become involved in the case and it was to that end that an estimate of future costs including appeals, travel and so forth was calculated. Gyenfie says that but for the prospect of Jonah coming into the case, the estimates of R4.5 million would not have been composed. He says that Ndebele came up with up figure of about R3.5million. Gyenfie bumped it up to R4.5 million, ostensibly to extract a healthy surplus from Jonah. He rubbishes Ndebele's note but has no further rebuttal of the inherent logic of its computations, nor could the sum of R3.5 million been adequate to meet the objectively shown funding requirements, absent of appeals and the rest of other disbursements as Gyenfie would have it. Moreover, Gyenfie's account cannot be true that Jonah was being brought in at that stage because Jonah had already been paid R2 million in 2009 and it is inconsistent with the sequence of events.

52. Gyenfie alleges that he was railroaded into signing the powers of attorney on 3 March. This is refuted by Vallet, Strime and Ndebele. They all say he offered the security in lieu of the cash that Fluxmans need to run the matter. Moreover, Strime and Ndebele confirm that Strime expressly invited Gyenfie to take the draft powers to his personal Attorney. He declined. Gyenfie says he had no chance to do so as he was forced to sign at once to get counsel back to work. Gyenfie goes further; he testified that the meeting of 3 March was a ruse to extort his personal property from him at a time when all the lawyers knew the case would not proceed. Indeed, he says that he went straight from that meeting directly to the chambers of Joubert SC who told him two things: first, that he had been litigating for thirty years and there was no way that the case would proceed on 8 March,

and, second he was preparing at that very moment a letter to Kumba that the costs of the postponement be shared. Gyenfie says that he left Joubert SC knowing that he had been defrauded by his own lawyers.

53. Apart from the improbabilities that vitiate this version, it cannot be true because on 3 March, the application by Kumba to postpone was still two days away and at 3 March there was no stance adopted by counsel that resigned them to a postponement. On 3 March counsel were responding to a letter from Kumba in which the appropriateness of a postponement was being strenuously resisted. What is indeed said by Joubert SC is that he had always been frank with Gyenfie that if an amendment was moved the chances of a postponement were strong, and that Gyenfie, with open eyes, supported the decision to move it. Moreover, Fluxmans were, on Gyenfie's own version, offered the security. Okes, apparently Gyenfie's confidant, had, ostensibly, never been inaccessible to Gyenfie. Before he handed over the title deeds the next day, he had time to take advice and on his version he already knew he had been defrauded, yet handed over the deeds nonetheless. On the probabilities alone, his plea of duress is unfounded, given these surrounding circumstances. A basis to allege fraud is also absent.

III: The Collapse Period

54. According to Joubert SC he had undertaken to Gyenfie when the inevitability of the postponement was realised that counsel would nevertheless use the time to continue with the preparation of the trial to bring it to ripeness. Various witnesses, including most importantly, Pierre Goudiaby from Senegal and Guy Gouley from Canada had come to Johannesburg and, taking advantage if their presence, lengthy consultations were held. On 1 April, the last day of the collapse period, Counsel furnished a memorandum.[A348]

It set out what they say had been done and what remained to be done. In this memo the case of Lithos is summed up, and problematic aspects addressed in detail, especially the concerns about proof of a critical cession of the granted rights by Lithos Corporation of Canada, about which Goulay was a critical witness, hitherto unavailable to counsel who was a party to the cession of the original grant of rights to Gyenfie which ultimately was ceded to Lithos SA. The witnesses seen and those still to be seen are listed. Reference is made to the witness statements taken, which statements are lengthy and are annotated with comment by counsel relating the available evidence with forensic difficulties.

IV: The period after 1 April 2010

55. Fluxmans sent a bill to Gyenfie and he responded by calling for a meeting on 12 April 2010 where he tabled an agenda. [A360]. It set out complaints. He alleged Subel SC had withdrawn suddenly and inexplicably from the case and that the fees paid to him had been wasted. He suggested that Clarke, who had been in the matter from inception, had simply duplicated work she had already done and she deserved no further payment. This perspective, even if bona fide held is unfounded, as none of the work to be done in 2010 duplicated work done in 2009; rather some work which might have been done in 2009 was delayed because of Kumba's late discovery and the absence of a credible expert opinion. Lastly he said the delay in moving the amendment until the last moment after months and months caused the postponement which was the fault of Subel SC and Fluxmans. The gravamen of all the complaints was the question of who should bear the costs. What was not said was that no work was done by counsel or Ndebele after 25 January, nor that the collapse fees were questionable. His focus was on lack of value for his money. No criticism was addressed towards Joubert SC, or Opperman or, save as

alluded to, to Clarke in respect of the work she did in 2010; that attack came only after C&A Friedlander took on Gyenfie as a client. An exchange of correspondence followed in which contending views were expressed. On 16 April 2010 Gyenfie wrote an extensive letter. [A378] In this letter the refrain was that Subel SC had wasted his money. He terminated Fluxmans' mandate and went to C&A Friedlander, and later to Mario Martins and still later back to Duncan Okes to represent Lithos and himself.

56. Later, under the stewardship of C & A Friedlander, the second amendment was moved and was substantially granted, as admitted in a reply to a request for further particulars on trial. [P61] A trial before Tuchten J eventually occurred in which after hearing only Gyenfie's testimony, absolution was granted to Kumba. Thomashausen was not called. Tuchten J made several seriously damaging remarks about Gyenfie's mendacity in that matter.

Evaluations

Was the work claimed to have been done really done?

57. The challenge to counsel ultimately boiled down to the accusation that they exaggerated the time spent on the case and that their fee notes were inflated. Counsel testified that although they had huffed and puffed about stopping work they had in truth never done so because they could not risk being unready if the fees arrangement became resolved and the trial proceeded.

58. The first time counsel were alerted to the allegation that their fees were unreasonable was 15 months after 1 April 2010 when a complaint was laid by one, Williams, of C & A Friedlander to the Johannesburg Bar council.

59. A tribunal was appointed, composed of two Silks and an attorney, the customary procedure employed by the Bar. As is customary Gyenfie was asked to submit to the jurisdiction of the tribunal. Gyenfie refused and did not participate further. Nevertheless, as is customary, once an allegation of unreasonableness is lodged the Bar Council requires an enquiry to proceed premised on its role independently of a litigant's role, to regulate the conduct of counsel in the public interest.

60. The Tribunal held that the fees charged were not objectionable. The counsel were obliged in that enquiry to show that they had done what they claimed to have done. Prior to this enquiry Fluxmans had called upon counsel and taken all their papers to send to a costs consultant. In that process some of counsels' documents were lost and not available to counsel for this exercise. What they did was to recreate as best they could a 'trail' of emails, and compose a bundle of the documents generated during the case. This information was adduced as bundles H,J, K, L, and M in this trial. The 'trail' is just that and was not offered as a comprehensive' record' of work done. That 'trail' together with the fee notes detailing what they did and charged for up to 8 March was the hard evidence adduced, to which was added their oral testimony that they did work as they had claimed.

61. In respect of the second phase, the period reserved for trial, they each charged the collapse fee; ie 18 court days. But for this period, they also worked. They rightly say that there was no obligation do so but it was the right thing to do. Axiomatically, they did not keep a strict record of the times worked. Again the email 'trail' and the memo of 1 April

[A348] serves to capture the scale of their efforts. Joubert SC estimates he worked 12 days, Opperman 13.5 days and Clarke, 15 days during the 18 day period of the collapse. These were the periods given at the fees enquiry; at trial they amplified their recollection of the periods worked by reference to documents that had become available since the fees enquiry, and indicated that they had worked for longer than initially thought when they reconstructed the trail for the Fees Tribunal.

62. From the defendants there was no rebuttal. Indeed, as the record shows, Gyenfie was present at many consultations and was sent many memos and so forth. The cross-examination was driven by a false premise. The email 'trail' and the fee note notations of work done was used in a superficial and inapposite way to suggest that the items of work mentioned were a comprehensive account of all that was done and thereupon to suggest that the tasks described could have been done in much less time. None of this was substantiated and some of it was plainly implausible.

63. Inconsistent with the claims of no or less work being done, and attacks made on the fee notes for January and February, was the common cause evidence that Gyenfie had signed off on those fee notes. He repudiated his approval on the basis that he was bona fide and did not scrutinise the data, which he claims misrepresented the true position. These claims are absent from his complaints ventilated on 12 April and in his letter of 16 April.

64. Accordingly, I find that that claims by counsel to have done the work they aver to have been done was proven.

65. The challenge to Ndebele's claim to have worked differed in that it was suggested that Ndebele had not accounted for the money that had been paid to Fluxmans. A Bill had been prepared for taxation at Gyenfie's insistence.[P 52] The bill was not taxed because, at the behest of Gyenfie, the rate to be charged by Ndebele had been put in dispute and the taxing Master had refused to address the bill until a court had pronounced on that issue. A chance to interrogate the 638 items was passed up.

66. In cross examination an attempt was made to challenge Ndebele's claims to have worked by calling for the supporting documentation for the items in the bill. This approach was in my view irregular; it was an inappropriate method of doing what Rule 35(3) exists for and was nothing more than a fishing expedition, not a genuine challenge to the assertions made and for which a record had been available for scrutiny for months. No prior interest in these documents had been shown, despite the advantages of the matter being case managed by Victor J, and firm assurances given that all that was required to go to trial was in a state of readiness. I invited the defendants to bring a substantive application under Rule 35(3) if they believed it could be justified. No application was brought. Thereafter, there was no substantive challenges or any rebuttal of Ndebele's evidence on this score.

67. Accordingly, I find that Ndebele did the work he claims he did, and incurred the expenditure set out in the Fluxmans account.

68. One tangential and misconceived attack was made on the management of the funds deposited with Fluxmans. It was suggested that Clarke had been double paid. This was refuted by both Ndebele and Clarke. The source of the belief is a misreading of the Trust

ledger account and a failure to appreciate the evidence that debits to the client's Trust account, earmarked for counsel, do not indicate a payment to counsel, but merely a transfer of funds to the Firm's business account, from which, at a later time, a disbursement is made to counsel.

The Fluxmans' fee claim and dispute about Ndebele's agreed rate

69. It is common cause that the mandate to Fluxmans was oral. A stipulation from Gyenfie was that he expressly authorise all payments from the cover deposited. Ndebele says that the rate he initially agreed upon was R1850 per hour, with an annual escalation of 10%. In 2010 the rate would have been R2000 per hour. That is corroborated by the Power of attorney of 3 March. [P30] Gyenfie says the agreed rate was R1200 ph since inception. Ndebele says that for a director of Fluxmans to have charged at rate, during 200 -2010, of R1200 ph is nonsensical; the junior counsel were charging R2000 ph without demur. The probabilities favour Ndebele's evidence, even in the absence of the plethora of other factors to disbelieve Gyenfie.

70. The claim made by Fluxmans is for the unpaid balance of the agreed capped maximum fee of R600,00; ie, R460,000. An examination of the work done and listed and the fees charged at R2000 ph demonstrates in my view that at the sums submitted for taxation far exceed R600, 000. An examination of Ndebele's timesheet [B165] reflects in the period after 21 September 2009, he marked 513 hours. At the proven rate of R2000 per hour the sum payable is R 1,032,000. Even at the incredible rate of R1200, the sum is R615,600. The cap of R600,000 is exceeded on that aspect alone. It was also conceded in cross

examination by Gyenfie that R600,000 was a reasonable fee, albeit by implication, if the work was done, which I have found to be the case.

71. In the circumstances, the claim for Fluxmans' own fees has been established.

The Credibility of Gyenfie

72. The credibility of Gyenfie was challenged on several grounds. Even before he testified before me, he was branded as untruthful by Tuchten J (Lithos Corporation of SA Ltd (Pty) Ltd v Kumba Resources Ltd Case No 2006/35078 [GNP] at [9], [36], and [96]) A telling point made was that in the petition to the SCA for leave to appeal, no attempt was made to challenge the adverse findings on credibility by Tuchten J. Accordingly, those findings must stand.

73. However, Gyenfie, even without that legacy made a stout effort in this trial to replicate the impression he created before Tuchten J. In the narrative. Several criticisms have already been noted. Further, he elevated evasion of an answer to a question into an art form. Moreover, he continually embellished the account with nuggets that were not put to the witnesses.

74. He had it put to Clarke categorically that she did no work on 11 January and that she had lied flatly in charging for a day's work. When he testified, he was driven to say he had no knowledge of whether she worked or not and glibly said he thought the day in question was 11 February. It was not possible for such confusion to occur; when the cross examiner put the question, I had sought clarification that there would be evidence to rebut her assertion and it was stated that Gyenfie would testify to her having done no work on 11 January. Gyenfie sat beside the cross examiner throughout the episode. What this

illustrated was a blind and reckless cross examination impugning the witnesses' integrity without real thought about how to substantiate the allegations being put. Gyenfie then lied blatantly to dodge the implications of the false accusation.

75. Throughout the cross-examination, Nbedele directly, and counsel indirectly, were accused of telling a falsehood that he was given the fee proposals and thus he knew of them well in advance of the meeting of 3 March. In cross examination he was forced to concede he had got the fee proposals but he then purported not to have read them. The probabilities of Gyenfie ignoring information about the case that he was anxious to bring to trial are remote. Ndebele's evidence of the 25 February meeting where the proposals were discussed was implausibly denied. Further, there is Clarke's evidence that on Friday 26 February he promised to pay their collapse fees if they went back to work, which is consistent with Ndebele's evidence of the meeting of 25 February. Gyenfie lied shamelessly.

76. The extravagant claim that the meeting of 3 March was a lure to dispossess him of his property inspired by fraud is bereft of any support either on the facts or with regard to probabilities. The rationale for the meeting was to grant him an indulgence. He alone knew of his personal wealth. He alone could offer it.

77. The central lie upon which all else is founded is the claim that Joubert SC and all the other lawyers had in effect guaranteed that the trial would, regardless of anything, proceed on 8 March, and that they had, 'in concert', concealed the truth from him until they had induced him to commit to the fees. The probabilities are so against such an assurance that it must be dismissed. The team of counsel had taken a matter, late in the

day, unprepared, in the face of advice by an experienced litigator, Subel SC that it could not be made ready in time. The objective circumstances shout loudly that to proceed at all was risky. To try to meet that challenge counsel devoted their full attention to this one case, an exceptional arrangement. Joubert SC says he was candid with Gyenfie that he would do his best. The tactics adopted by Kumba was an unpredictable dimension. On top of that was the perennial vulnerability - the amendment - which could not prudently be done until Thomashausen had spoken. The assertion that a trial was assured and that his lawyers misled him about that prospect is improbable. The notion that he did not, as an experienced businessman appreciate the risk, is also improbable.

78. To this list there are many more examples of mendacity, but I do not deem it essential to catalogue every one. I find that Gyenfie is an unreliable witness and that where contradicted by other witnesses, their versions are preferable.

The reasonableness of the Collapse fees

79. The reasonableness of the collapse fees was put in issue. The allegations relating to an exaggeration of the time spent working has been addressed elsewhere and dismissed. The rates charged by counsel have never been in dispute as being unreasonable. What remains is the allegation that the counsel breached the ethical rules of the South African Bar. These Rules are described as the Uniform Rules and are published by the General Council of the Bar of South Africa (GCB). (The Uniform Rules are accessible on the GCB website: www. sabar.co.za) These Rules are recognised by the courts and are enforced by the courts. (See, eg: Society of Advocates of SA (Witwatersrand division) v Cigler 1976 (4) SA 350 (T) at 354A – 354 G, a decision of the full Bench of the Transvaal Provincial

Division (Cillie JP, Trengove et Eloff JJ) a matter dealing with dealing with overreaching by counsel.

80. It is customary for counsel to be briefed by attorneys to reserve themselves for a trial from the date upon which the trial is set down. The general approach is to estimate how long a trial might take and for counsel to undertake to hold themselves available for that duration. In this Division, where the trial roll is a running roll, counsel might find themselves in a quandary if the trial runs longer than was estimated, for in such circumstances they must surrender any other briefs for court work in order to remain in attendance in the trial. The opposite of this quandary also might arise because it is an occupational hazard that a given trial will not proceed for the full estimated duration or might not proceed at all. The reasons are several. The case might settle and there is no need for a trial. One or other side may not be ready or are aggrieved by some non-compliance by their adversaries and be prejudiced, for which reason a postponement is sought and granted. Sometimes a witness becomes unavailable without whom the case cannot prudently be presented.

81. The act of reserving time by counsel results in a sterilization of other income earning opportunities in favour of a given client. When a trial is likely to run for only a few days, say 1- 3 days, but certainly less than a week, the sudden collapse of the trial does not result in serious prejudice. However, if a lengthy period is reserved, say a week or more, a collapse of the trial can result in material financial prejudice. It is in this context that the Bar recognises what has come to be called a 'collapse fee.'

82. The primary Bar Rule is that counsel shall charge a reasonable fee. Rule 7.1 provides:

"Fees must be reasonable

7.1.1 Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his lack of means may require a lower charge, or even none at all.

In determining the amount of the fee, it is proper to consider:

(a) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;

(b) the customary charges by counsel of comparable standing for similar services; and

(c) the amount involved in the controversy and its importance to the client.

No one of the above considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

83. The eventuality of a trial not proceeding is expressly recognised and is provided for in

Rule 5.2.4

"Reservation of Hearing Date

If counsel, at the request of an attorney, has agreed to reserve a hearing date and has done so, he is entitled to charge a fee on hearing, even when no brief has been delivered, unless informed by the attorney a reasonable time beforehand that his services will not be required on that date."

Rule 5.2.4 however addresses a fee for a single day; ie, the first day of trial or

the set-down day.

84. Rule 7.1.2 is relevant. The pertinent portion provides:

> 7.1.2.1 Save as set out below, counsel shall at the earliest possible opportunity after having been offered a brief *endeavour to agree with the attorney* –
>
> 7.1.2.1.1 the fee to be charged by counsel, or where this is not practicable;
>
> 7.1.2.1.2 the basis upon which counsel will compute or arrive at his fee.
>
> 7.1.2.2 Without derogating from paragraph 7.1.2.1 above, such endeavour should be undertaken at the latest before the brief is marked.
>
> 7.1.2.3 *An agreement relating to counsel's fees may include a proviso as to unforeseeable circumstances.*
>
> 7.1.2.4.....
> 7.1.2.5.....
> 7.1.2.6 *No agreement between counsel and attorney shall justify an excessive fee.*" (emphases supplied)

85. None of these Rules uses the terminology of a 'collapse fee'. However, Rule 7.1 2.3, by contemplating 'unforeseeable circumstances' must, in my view, be read to encapsulate an eventuality of a trial not proceeding. Indeed, a possible collapse is the prime example of an uncertain future event. Logically, what is literally unforeseeable cannot be guarded against and the phrase must be understood in the sense in which I have construed it.

86. The Johannesburg Bar gives Rulings from time to time on the interpretation and application of the rules, either when counsel seek a ruling about contemplated conduct, or in the course of resolving a dispute or the application of discipline.

87. A Ruling of the Johannesburg Bar, as recorded in the Johannesburg Bar compendium of Rulings) Ruling 211/22 (1982) provides:

> "In determining a proper trial fee in a civil action, members should take into, inter alia, the estimated length of the trial. In doing so, members will have regard to the fact that they have to make themselves available for the expected duration of the trial and they will also have regard to the fact that the trial may be settled and accordingly not run its full course. It is not unprofessional for counsel to accept a brief which requires him to reserve a long period of time on the basis that a special fee will be payable if the case is settled, provided that the terms of such an agreement are not unreasonable. The Bar council would not, save in exceptional circumstances, look favourably upon an arrangement that counsel will be entitled to be paid for the whole period reserved by him irrespective of the actual time that the trial may eventually run.
>
> The fact that such arrangements will not be viewed favourably is in conformity with –
> (a) the principle that fees should be reasonable in the interests of the litigating public; and
> (b) the ordinary rule which is that save in respect of the trial fee, which includes time set aside for the case, counsel charges refreshers only for the period for which the case continues.
>
> Each case will depend on its own circumstances. It should be pointed out however that it is not permissible for a member to charge a trial fee on a provisional basis, and to adjust it if the trial is settled by giving credit for other briefs which he undertakes during the period he has reserved for the trial."

88. This 1982 Ruling was given in the context of settlements; however, that aspect seems incidental to the true gravamen of the reasoning which is the non-continuation of the trial. A postponement, logically, ought to make no difference to the principle articulated in the Ruling. The reference to refreshers needs, in terms of current practice, to be read as the stipulated Trial Day fee

89. A definition of a collapse fee, and the first apparent employment of that terminology appears in a Johannesburg Bar Ruling of 1991: Ruling 234/34 states:

> " Members appeared to be confused by the term 'collapse fee' and the Bar Council issued the following definition:
>
> > 'A' collapse fee' is a fee charged in addition to a trial fee and/or refreshers as compensation for counsel where a trial does not run for the full period for which counsel had been reserved'(1991)"

This text clarifies that the eventuality to be regulated by contract is the non-continuation of the trial, regardless of the reason for such non-continuation.

90. In 2009 the Chair of the Fees Committee of the Johannesburg Bar Council, Stockwell SC, circulated a memorandum to the members of that Bar on the subject of fees. In the main the memorandum was advice on giving effect to the Rules. In paragraph 9.2 it states that:

> "In situations where a collapse fee is agreed upon in addition to the first day fee described in the previous sub-paragraph [which dealt with charging generally when a trial did not proceed and counsel were released before the set down date], and the trial or arbitration is settled or postponed or has already commenced and is then settled or postponed, a collapse fee may be charged in addition to the fees charged as described in the previous sub-paragraph up to the maximum collapse fee agreed upon, where the trial or arbitration does not last the full period for which the member has been reserved. Any collapse fee needs to be expressly agreed upon in advance of the trial between a member and the instructing attorney. If no collapse fee has been agreed upon as aforesaid a member is not entitled to charge a collapse fee nor any other fee over and above the aforementioned first day fee. *A collapse fee will be regarded as reasonable if it equals no more than half of the time a member is required to reserve himself/ herself.*" (emphasis supplied)

91. The circular's purpose is a guide to counsel on how the Fees Committee would assess a collapse fee if its reasonableness was questioned. The reference to a deemed reasonable fee of not more than half the reserved period was not echoed in any other Ruling given but indeed does resonate with the 1982 Ruling which stipulated that it would be exceptional that a charge for the full reserved period would be entertained as reasonable. The Fees Tribunal of the Johannesburg Bar which enquired into the defendants' complaints seems to have taken this view and these considerations were the point of departure for its enquiry.

92. It seems plain from the aforegoing that the object of a collapse fee is Risk Allocation. The default position under the Bar Rules is that counsel carry the risk of a trial not proceeding. The rationale for requiring an advance, written agreement about a collapse is to facilitate the transference of that risk to the attorney and to do so formally and on a fully informed basis.

93. Naturally, one of the key considerations in determining the reasonableness of a collapse fee, at all, would be the financial capacity of the client of the attorney to cover such a risk, a factor to be weighed by the attorney who contemplates such an agreement and also a factor to be contemplated by counsel, in keeping with general import of Rule 7.1, cited above. In this case that capacity to cover the risk was never in doubt; Gyenfie represented that he was a man of great wealth and his alter ego, Lithos was litigating for many millions.

94. In the trial, as in the Bar fees enquiry, all three counsel motivated the proposals to charge for the full period of the trial on grounds that may be summarised as follows:

94.1. They were asked to work full time and exclusively on the matter from the time they were briefed on 25 January and keep themselves available until 1 April 2010. This was a period of 66 consecutive calendar days in total.

94.2. The circumstances were that the matter had been pronounced unripe and their mandate was to do all that they could to overcome the state of un-readiness and try as best to carry the matter to trial. The risk of the matter not running was manifest from the outset and to sterilise 18 days for the trial warranted a collapse fee for the full duration. (18 days constituted 81% of the court days in a month)

94.3. Their exclusive devotion to one case for so long meant that they could not undertake preparation for any other matter offered to them that would go to court immediately after 1 April or, probably, for a couple of weeks thereafter.

95. In a case where a matter settles and no trial is necessary, counsel are in truth being paid compensation for the sterilization of their income earning capacity. They may or may not be offered other work during the reserved time. In a case where the matter is postponed and will come to trial again, the reserved time can sometimes be employed to the client's advantage. In this case, because there was further preparation to be done, that was what happened.

96. Of the 18 days reserved, the three counsel worked the lion's share. Indeed, the payment for the actual days worked and not worked was as follows:

96.1. Joubert SC – 12 of work and 7 days of compensation

96.2. Opperman -13.5 days if work and 5.5 days of compensation

96.3. Clarke -15 days of work and 4 days of compensation.

An extrapolation of these figures shows that of the 54 'work days' (ie 3X 18) 16.5 days were not devoted to work: ie, about 30% of the time and of the fees payable in terms of the collapse agreement. This is what, in truth, constituted the true compensation portion of the fees levied, a figure comfortably below the half designated as a threshold in the 2009 guideline. In each individual case, the compensation was less than half too.

97. A point of importance is what the appropriate time ought to be when the reasonableness of a collapse fee should be assessed; ie, at the time of agreement or at the time when counsel present their fee notes. It could matter in a case like this, where work was indeed done during the reserved period, and the de facto collapse compensation is much reduced.

98. The Fees tribunal of the Johannesburg Bar empanelled to enquire into the fees dispute (G I Hoffman SC, A Kemack SC and M P C Manaka of Werkmans Attorneys) approached the matter on the footing that the counsel had to justify a collapse fee of more than half the reserved duration. It invoked Rule 7.1.5.3 which stipulates that when the reasonableness of a fee is challenged:

"counsel must satisfy the Bar Council that the fee was in the circumstances a reasonable one."

99. The Tribunal's report was given on 1 August 2013.[D634] It seems to me that the tribunal understood that the procedure in the Rules which imposed an onus on counsel to justify their fees when challenged, implied that the enquiry was one that examined all the circumstances, and on that footing, the time to assess reasonableness was upon presentation of the fee note when the client would be expected to pay, and was not restricted to the time when the agreement was concluded. In my view that approach was correct in terms of the Rules, and moreover, enjoys the value and advantage of enabling a tribunal to achieve its proper purpose, which is the protection of the litigating public from over-reaching, because by a comprehensive examination, unfettered by confinement to inferences, drawn retrospectively, about what was or might have been thought by the contracting parties when the agreement was concluded, the true effect, on a client, of the fees levied, can be determined.

100. It has been held that some deference is due to a professional body's views on the question of reasonableness of fees. In Cambridge Plan AG v Cambridge diet (Pty) Ltd & Others 1990 (2) SA 574 (T) Swart J in a review of a taxing master's bill, the court remarked upon the impact on an attorney's fees of what view of the Law Society took of such charges. At 601J – 602C, it was held that it would be proper for a taxing master to have regard to the ruling of the fees committee of the Law Society on a rate of fees charged as 'a norm sanctioned by the profession'. In my view it is appropriate to accord a similar standing to the fees tribunal of a Bar. Ordinarily, a court should not be asked, of first instance, to decide whether the fees of counsel (or of attorneys) are reasonable; that

ought to be the task of the regulatory bodies, whose decisions are subject to Review by a court.

101. In all the circumstances, there is no basis shown upon which to conclude the counsel have breached the Bar Rules nor that they have overreached their clients. Thus, the fees for the collapse were reasonable.

The Fate of the counterclaims

102. Four counterclaims were pressed. They fail for the reasons traversed above; there was no overreaching and no overpayment. There was no fraud.

The appearances for the defendants

103. It is appropriate to record that an exceptional arrangement took place in regard to the representation of Lithos and Gyenfie. They had no legal representatives. Gyenfie represented himself. Lithos, a juristic person, was represented by a director. This arrangement was with the consent and support of Fluxmans. The director in question was Mr E S Crabbe (Crabbe). He informed the court that he was a legal practitioner in Ghana.

104. In Navy Two CC v Industrial Zone Ltd [2006] 3 All SA 263 (SCA) the question of allowing a sole member of a close corporation to represent it was considered. The denial of that opportunity in the court a quo was reversed. The majority of the court remarked as follows:

> " [10] Following and applying the rule in *Yates Investment (Pty) Ltd v Commissioner for Inland Revenue* (*supra*) Hurt J held in *Hallowes v The Yacht Sweet Waters2* that a

juristic person can only litigate and appear before a court through a representative duly qualified and admitted to practise as such and that for practical purposes the doors of the court were closed to the close corporation.

[11] The decision in *Hallowes v The Yacht Sweet Waters* has been severely criticised in *Lees Import & Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd* as having overlooked the caveat placed upon the rule, recognising the court's residual power to regulate its own proceedings unless fettered by legislation. The caveat embodies a power which a court has, in the exercise of its discretion and in the interests of justice, to permit a person other than a legal practitioner to appear before it on behalf of a corporate entity, but only if exceptional circumstances so warrant it.

[12] There is a lot to be said for the above criticism. It is clear that the rule limiting representation of a corporate entity to legal practitioners is not inflexible. In *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd and others* while accepting that the normal rule was that a body corporate must appear by counsel or solicitor, the court recognised that in certain exceptional circumstances, a director who is a party to litigation to which a company is also a party may be allowed to appear in person for purposes which are also those of the company

[13] In *California Spice Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd v others; Fair O'Rama Property Investments CC v others; Tsaperas; and Tsaperas* after tracing the history of the rule in the English common law Wunsh J came to the conclusion that a court should be entitled, in an appropriate case and to avoid injustice, to allow at least a one-person company to be represented at a court hearing by its *alter ego. The learned Judge said that the inconvenience caused to the court as a result of an unqualified person appearing before it had to be weighed up against the injustice of a juristic person being denied access to the courts. In this regard I agree with the reasoning of Wunsh J.*
(emphasis supplied; footnotes omitted)

105. There are certain distinguishing features between the situation in the Navy Two case and the present case. Most importantly, Crabbe was not the alter ego of Lithos, Gyenfie was. Secondly, Lithos is not, ostensibly, a micro business. The example in the Navy Two case does not set a precedent for allowing Crabbe to represent Lithos.

106. However, in my view the concern which is articulated by Wunsh J ought not, on any rational basis, be confined to one–man companies. The mischief sought to be averted is

the twin horror of undermining expeditious litigation and of denying a litigant access to court within its means to effectively put its case. The idea that a natural person may appear in person but that a corporate entity cannot be represented by a person other than a legal practitioner is difficult to justify on either principle or policy, a point by no means novel. If the proper value choice is access to justice, then it must follow that a judicial discretion must exist to give effect to that value and circumvent undesirable outcomes. Axiomatically, such a discretion must be applied to fact-specific circumstances.

107. In the particular circumstances of this matter, to have denied Crabbe a representative role, might have precipitated a predicament that could have warranted a postponement or, in the alternative, the spectre of Gyenfie, representing Lithos, with Crabbe at his elbow, thereby reducing Gyenfie to a ventriloquist's doll and reducing the proceedings to a farce. The plaintiff's decision to consent was doubtless motivated by a desire to expedite the matter and avoid a delay, of which this matter had already had its full share, having been postponed twice before at the defendant's instance. The allowance of Crabbe's role was to the advantage of expediting the matter and to the advantage of the plaintiff.

108. Nevertheless, the decision to allow Crabbe under these particular circumstances, with the consent of the other party was a decision of extreme pragmatism, is likely to be rarely resorted to, and must be recognised as extraordinary.

The Costs

109. Both parties have sought attorney and client costs.

110. The basis advanced by Fluxmans is in part the utter lack of merit of the defences and the unlikelihood that there was any bona fide belief in them and in part the scandalous allegations of fraud and of professional misconduct levelled at the lawyers without a proper evidential foundation. Such conduct has always been condemned as improper. (See: Preston v Luyt 1911 EDL 298 at 230; Findlay v Knight 1935 AD 58; Gluckman v Schneider 1946 AD 151.)

111. In my view the latter behaviour was reckless and disgraceful which fully warrants such an order against both defendants.

The Order

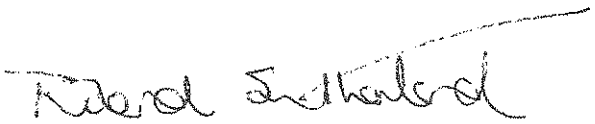
112. The first and second defendants, jointly and severally, the one paying the other to be absolved, shall make payment to the plaintiff of:

112.1. R2754639.80

112.2. R456,000.00

112.3. Interest on each sum at the rate prescribed from time to time a tempera morae from 2 April 2010 until date of payment.

112.4. Costs of suit on the attorney and client scale.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division
Hearing: 11 – 22 August 2014
Judgment 2 June 2014

For Plaintiff: Adv C. Eloff SC
Instructed by Fluxmans Inc.
Ref: C. Strime

For first Defendant: Mr E S Crabbe (Director), with leave if the Court.
Second Defendant in person.