REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14/05741

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

WERKSMANS INCORPORATED Applicant

And

PRAXLEY CORPORATE SOLUTIONS (PTY) LTD Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the Applicant seeks judgment in the following terms:

1.1 That the Respondent be ordered to pay to the Applicant an amount of R122 094,00 being in respect of counsel's fees

alternatively to 1.1 above that an order be granted permitting the Applicant to submit counsel's fees to taxation by the taxing master.

1.2 That the Respondent be ordered to pay costs in respect of liquidation proceedings instituted by the Applicant against the Respondent in case number 30127/2013.

[2] The Respondent in its counter-application seeks the following relief:

2.1 That the Applicant be directed to tax all its fees and disbursements in addition to the taxation as per the alternative prayer in 1.1. above.

2.2 That the liquidation proceedings instituted by the Applicant in case number 30127/2013 be declared malicious and vexatious as contemplated in section 347(1A) of the Companies Act 61 of 1973.

HISTORICAL BACKGROUND

[3] The sequel to this matter originates from a dispute that arose concerning fees due to Adv Paulo Beltramo SC (Beltramo) which were paid by the Applicant. It is when the Applicant claimed payment of what they had

disbursed from the Respondent that triggered the episodes leading to this application and the counter-application.

[4] During or about the year 2009 the Chief Executive Officer of the Respondent a Mr Greg Els (Els) concluded a verbal agreement on behalf of the Respondent with the Applicant Law Firm Messrs Werksmans Incorporated. Mr Dewald Nel van der Berg (Dewald) an attorney in the employment of Werksmans received the instruction on behalf of the Applicant.

[5] The instructions concerned arbitration proceedings between the Respondent and a company known as On Digital Media (Pty) Ltd (ODM). Els chose Beltramo to handle the matter on behalf of the Respondent. Applicant duly complied and briefed Beltramo.

[6] The arbitration was set down for hearing before retired Judge P Conradie and was to commence on the 5th November 2012 to Friday the 16th November 2012 a period of 10 days.

[7] On or about Tuesday the 30th October 2012 the Respondent received a notice from ODM to the effect that its board of directors had passed a resolution to place ODM under business rescue in terms of section 129 of the Companies Act No 71 of 2008. This would by law result in the staying or suspension of all legal proceedings against ODM in terms of the provisions of section 133 of the Companies Act No 71 of 2008.

[8] When the section 129 notice was received Beltramo was already on brief for the period 5th November 2012 to the 16th November 2012. The Respondent did not instruct its attorneys the Applicants to stop arbitration proceedings but it was agreed to await the appointment of a business rescue practitioner and only then stop the arbitration.

[9] It is common cause that a business rescue practitioner was appointed on the 7th November 2012 thus causing the suspension or staying of the arbitration proceedings.

[10] On the 30th November 2012 Beltramo sent to the Applicant his invoice indicating fees due to him for the period 1 November 2012 to 19 November 2012 in the sum of R176 814,00 including VAT. It is this tax invoice that is the subject of this litigation.

[11] It appears that all was well for some time after the 7th November 2012 to the extent that on the 7th February 2013 the Respondent paid to the Applicant an amount of R498 113,33. This payment was in respect of Applicant's tax invoice number 426565 dated the 25th October 2012 in the amount of R41 528,06 and tax invoice number 428716 dated the 25th November 2012 for the amount of R456 585,27. The payments included fees due to Advocate Beltramo in the sum of R6 156,00 in respect of his invoice dated 28th September 2012 as well as the amount of R246 240,00 in respect of his invoice dated the 31st October 2012.

[12] On the 12th February 2013 Els on behalf of the Respondent addressed a letter to the Applicant for the attention of Mr Jonathan Stockwell the letter reads as follows:

> "*Dear Jonathan,*
>
> *ON DIGITAL MEDIA (PROPRIETARY) LIMITED (IN BUSINESS RESCUE) ODM*
>
> *We would like to formally advise that Werksmans are no longer mandated to act for Praxley Corporate Solutions (Pty) Ltd in respect of the abovementioned matter given what we consider to be a material conflict of interest.*
>
> *We confirm that ODM and their respective attorneys will be advised of this matter in due course.*
>
> *Would like to thank you for the time spent on this matter.*
>
> *Yours sincerely.*
>
> *Greg Els*
> *Chief Executive Officer*"

[12] On receipt of this letter the Applicant addressed a letter of demand in terms of section 345(1) of the Companies Act 61 of 1973 to the Respondent seeking payment of the sum of R176 896,08 which amount is solely made up of fees paid to Advocate P Beltramo. Applicant had forwarded a copy of the invoice to the Respondent for payment on the 25th January 2013.

[13] It was this last letter that triggered a series of acrimonious exchange of correspondence between Els and Dewald eventually leading to an application for the liquidation of the Respondent. The first of such letters is dated the 27th February 2013 in which Els writes to Dewald as follows:

"*Dear Dewald,*

I confirm that all monies owing to Werksmans have been paid in full when the payment for R498 113,33 on 25th February. There was no 'collapse fee' discussed or agreed.

After Praxley has paid Werksmans in excess of R1 million in this matter, I see that the firm is now suing Praxley for R176k. You must be joking.

As outlined earlier, your firm was patently conflicted in this matter and we are taking legal advice in respect of taxing your entire account, instituting damages claim and reporting you and the firm to the Law Society.

Please be guided accordingly.

Kind regards

Greg Els
CEO-Praxley"

[14] The battle lines were drawn and in the process Senior Counsel Beltramo entered the fray and attempted to cool off the tempers. The issue was the "*collapse fee*" charged by Beltramo. Beltramo addressed an email to Mr Els on the 27th February 2013 which reads as follows:

"*Greg*

I am something perturbed by your email sent to Werksmans concerning my fee.

We agreed in my office to the collapse fee.

Furthermore three of the days concern the matter standing down, at your instructions and to see whether an appointment could be made. If not the arbitration would continue. Dewald's correspondence addressed to the arbitrator and on which you received will bare.

During those three days pending appointment you attended consultations at my office with Dewald.

Fees for those three days have been included in the collapse fee. Perhaps I ought to have described them on the invoice as On arbitration. I am happy to amend my invoice to reflect that but you are well aware of the facts.

Notwithstanding the agreed 5 day collapse fee I only charged you 2 days as the arbitration collapsed when the appointment was made on 7th November.

As you will see from my invoice I also elected to reduce my fee for that period.

Your threat to Werksmans is entirely unjustified and should the need arise will testify at any disciplinary enquiry as threatened or in any proceedings that have a bearing on the collapse fee. I trust that sense will prevail and you will pay the account.

Paolo"

[15] The letter from Beltramo elicited a rather strange response couched in some unsavoury language the long and short of that letter written by Els was that Applicant can do their damnest he will not pay Beltramo's fees.

[16] Prior to the letter from Beltramo there was a series of correspondence relating to the continuation of the arbitration dispute and/or an application to uplift the moratorium brought about by the business rescue process. Dewald and Els failed to reach an agreement in respect of fees going forward. Els indicated that he had now been in discussion with Advocate South who had referred him to an attorney who would be prepared to accept instructions on risk and work on a contingency fee basis. As this was not acceptable to the Applicant, Dewald addressed a letter to Els on the 11th February 2013 accepting termination of their mandate, part of the e-mail reads as follows:

"*However I take note of your position and respect your views and hope to be of assistance to you again in future.*

I will nevertheless write-off the unbilled time on this file and will not invoice you again.

Thank you for payment of our October and November invoices. I noticed though that payment for our January invoice has not been paid (see attached). This invoice is solely made up of Paolo's fee. If you have paid it please send me proof so that I can allocate it and if not please attend to same."

[17] On the 12th February 2013 Els addressed a letter to the Applicant formulating the termination of mandate and said nothing about the outstanding invoice referred to in the letter from Dewald dated the 11th February 2013.

[18] It is common knowledge that between the 13th and the 26th February 2013 Dewald addressed three letters to Mr Els requesting payment of Beltramo's fees. Els did not respond to any of those e-mails until Dewald decided to dispatch to the Respondent a letter of demand in terms of section 345(1) of the 1973 Companies Act. That letter was delivered to Respondent's registered address on the 27th February 2013.

[19] It was only on the 27th February 2013 that Els decided to respond to a letter addressed to Respondent dated the 26th February 2013 in that letter Dewald had demanded payment from the Respondent of the fees due to Beltramo. Els' response read as follows:

"*Dear Dewald,*

> *I confirm that all monies owing to Werksmans have been paid in full when the payment of R498,113.33 on 25 February 2013.*
>
> *There was no 'Collapse Fee' discussed or agreed.*"

[19] The significance of this letter is that as on the 27th February 2013 the Respondent only objected to the fees charged by Beltramo and raised no dispute in respect of the fees raised by the Applicant.

[20] It is evident from the correspondence exchanged between Els and Dewald that the whole issue was about the collapsed fee due to Beltramo. In response Dewald wrote to Els in the following words on the 27th February 2013:

> "*Furthermore, to suggest that the collapse fee was not agreed is most alarming, considering that you agreed in Paolo's chambers that you will pay the collapse fee. Paolo expressly informed us in chambers that he will be charging Praxley for 5 days and to which you agreed. In fact, when the resolution placing ODM in business rescue was received you instructed us (after we deliberated) to have the matter stand down to see whether they will appoint a business rescue practitioner. This we did for 3 days, as the appointment was only done on 7 November 2012. If regard is had to Paolo's invoice it is clear that he has in fact only charged you a collapse fee for 2 days and a reduced fee for the 3 days. Also, I point out that approximately R40 000 of the invoice is for work done by Paolo prior to 5 November 2012 i.e. not part of the collapse fee.*"

[21] Having terminated the mandate of the Applicant Els engaged the services of Dolph Jonker Attorneys who on the 12th March 2013 addressed a letter to the Applicant responding in the main to the section 345(1) letter of demand. The contents of this letter extended the dispute further than the

collapse fee issue. I deem it appropriate to quote those sections of Dolph Jonker's letter that are relevant for purposes of this matter. It reads thus:

> "*1. Praxley is willing to pay an amount of R40 014 (forty thousand and fourteen rand), VAT inclusive, in respect of preparation and consultation as per the account of Advocate Beltramo.*
>
> *2. Praxley is further willing to pay the collapse fee for one day of R27 360-00 (twenty seven thousand three hundred and sixty rand), VAT inclusive, as per the account of Advocate Beltramo.*
>
> *3. At no stage did either Advocate Beltramo or any representative of Werksmans discuss and or negotiate a collapse fee with Praxley and or any of its representatives in respect of the fees of Advocate Beltramo.*
>
> *…*
>
> *5. Praxley is disputing all accounts received from Werksmans in respect of the On Digital Media matter and hereby requests that all your accounts be referred for Taxation.*
>
> *…*
>
> *7. Take further note that should you apply for the winding up of Praxley as per your paragraph 5, such an application will be vehemently opposed and Praxley will further seek punitive damages against you for bringing such application. Such an application would be deemed mala fide especially in the light of the fact that Praxley has paid you in the excess of R1,2 million in fees in this particular matter.*
>
> *8. Should Werksmans not be satisfied with the amount of R60 374 00 (sixty thousand three hundred and seventy four rand) as tendered by our client, we will have no option but to refer the matter to the Bar Council with regards to this dispute.*"

[22] In response to this letter the Applicant rejected the offer to pay only an amount of R60 374,00 in respect of Beltramo's fees and made a counter-proposal that the Respondent should pay an amount of R40 014,00 being fees for preparation by Beltramo and a further amount of R72 000,00 being in

respect of counsel's fees when the arbitration matter stood down during the period 5 November 2012 to the 7th November 2012 making it a total of R112 014,00.

[23] It appears to me that the amount of R72 000,00 should actually read R82 080,00 to be in line with the Applicant's claim as articulated in the heads of argument wherein the total amount being claimed is the sum of R122 094,00. The Applicant abandoned the claim of R54 720,00 being the collapse fee for two days charged by Beltramo.

[24] This counter-offer was promptly rejected by the Respondent who repeated their demand that all the previous statements of account submitted and paid by the Respondent to the Applicant be taxed.

[25] A deadlock was reached solely on the insistence by the Respondent that the Applicant tax his whole fees past paid and present. The Applicant informed the Respondent in their e-mail addressed to them dated the 22nd March 2013 that if payment of R122 094,00 was not received by the 27th March 2013 then the Respondent will be deemed unable to pay its debts which will result in the Applicant proceeding to apply for the winding up of the Respondent in terms of the Companies Act.

[26] Instead of directly replying to this letter the Respondent's attorney reacted on the 27th March 2013 by informing the Applicant that it has lodged a complaint against the Applicant with the Law Society of the Northern Province

to investigate unprofessional conduct against Applicant and Dewald by reason of them failing to have their fees taxed. Secondly, the Respondent advised the Applicant that should they proceed with an application for winding up of the Respondent a punitive costs order will be sought.

[27] In the letter of complaint to the Law Society the Respondent repeated that it wants the Law Society to compel the Applicant to comply with the provisions of Rule 89.24d of the Rules of the Law Society by submitting a draft bill of costs for taxation.

[28] Having failed to make any payment to the Applicant as claimed in the letter of the 27th February 2013 and the 22nd March 2013 the Applicant issued liquidation proceedings against the Respondent on the 16th August 2013. The Respondent filed a notice to oppose the liquidation.

[29] The Respondent did not file an opposing affidavit to the liquidation application instead addressed a letter to the Applicant dated the 28th August 2013 contents of which read as follows:

> "*2. The winding-up application is based on the assertion that Praxley is indebted to your firm the sum of R176,896.08. This amount is disputed by Praxley on a number of bases, including:*
>
> *2.1 that the overall fees charged by your firm are not fair and reasonable and should be taxed;*
>
> *2.2 that the payment of the final amount of Praxley was made in full and final settlement of all amounts owing to your firm;*

2.3 that a portion of the fee charged represents counsel's collapse fee, where there was no agreement for the payment of such fee.

3. Praxley is, in fact, able to pay its debts. In order to demonstrate this, the capital amount (R176 896-08), together with a provision for the costs of the winding-up application to date hereof, in an amount of the sum of R50,000.00 (i.e. R226,896.08) has been paid into our trust account. We undertake to hold these monies, pending the institution and finalisation of an action by your firm against Praxley for the fees, which your firm contends are outstanding. Praxley furthermore reserves the rights afforded to it in terms of Section 347(1A) of the Companies Act 61 of 1973 ('the Old Companies Act').

4. Please advise us whether you have drawn a bond of security in terms of Section 346(3) of the Old Companies Act? If not, and since our client has paid the sum of R226,896.08 into our trust account, we require an undertaking, within 24 hours, that no bond of security will be drawn, as such will have prejudicial consequences for Praxley. If no bond of security has been drawn and if no undertaking is forthcoming, we require an opportunity until Tuesday, 3 September 2013, to serve an urgent application interdicting and restraining your firm from drawing a bond of security in the aforesaid circumstances."

[30] In response the Applicant accepted the Respondent's undertaking to secure payment of the capital amount by depositing it into the Trust Account of its Attorneys Dolph Jonker pending the outcome of the litigation to be instituted by the Applicant. In addition the Applicant proposed that the amount of R50,00 being the estimated cost of the liquidation application be paid to it whereupon the liquidation application must be withdrawn.

[31] This proposal to pay the R50,00 to the Applicant was not acceptable to the Respondent and eventually it was agreed that:

31.1 Applicant would withdraw the liquidation application.

31.2 The costs of the liquidation application would be determined by the trial court that would be hearing the claim for payment of the amount claimed by Beltramo fees.

[32] Ultimately in a letter dated the 1st October 2013 Dolph Jonker Respondent's attorneys addressed the following letter to the Applicant:

> "*Praxley not only requires Adv Beltramo SC's fee to be taxed, but also your firm's fees. It is trite law that a client is entitled to taxation of his/her attorney's account [See Blakes Maphanga Inc v Outsurance Insurance Co Ltd 2010 (4) SA 232 (SCA) at para 17]. It is further trite law that the amount of a disputed bill of costs is not liquidated until such time it is taxed [See Blakes Maphanga supra also at para 17].*
>
> *Your reluctance to have the reasonableness of your firm's fees taxed is noted. There was certainly never a waiver on the part of Praxley to contest the fair and reasonableness of your firm's accounts simply because Praxley paid your firm's invoices.*"

[33] On the 30th October 2013 Applicant informed the Respondent that the invoice of Advocate Beltramo SC has been sent to their cost consultant for purposes of having same taxed and that as soon as the aforesaid account shall have been taxed they will proceed to issue motion proceedings against the Respondent claiming payment of the taxed amount.

[34] In response to this letter the Respondent wrote to the Applicant on the 11th November 2013 informing the Applicant that taxation of Beltramo's account in isolation would be meaningless and accordingly to them such

account cannot be taxed without being accompanied by the attorneys' bill of costs.

[35] On the 4th November 2013 the Applicant duly issued a notice of taxation in respect of the account of Beltramo. On the 12th November 2013 the Respondent filed a notice of objection to the bill of costs. The reason for objecting to the bill was given as that the amount being a disbursement could not be taxed on its own. This objection simply meant that the paid bills of the Applicant also had to form part of the bill to be taxed. Taxation could not take place and was postponed pending the outcome of his application.

[36] On the 19th February 2014 the Applicant launched these proceedings the Respondent filed its answering affidavit as well as a counterclaim in which it seeks a punitive costs order against the Applicant for having commenced liquidation proceedings against the Respondent at a time when there was evidence that the Respondent is able to pay its debt and was accordingly not insolvent.

THE ISSUES

[37] In my view the issues that require determination by this Court are:

37.1 Is a party entitled to demand that fees and disbursements that had already been paid by it to its attorneys be subjected to taxation by the Taxing Master?

37.2 Is there a justification to proceed with liquidation proceedings against a client who withholds payment because of a dispute in respect of the fees and disbursements of counsel if so under what circumstances, put otherwise when can it be said that a debtor is unable to pay its debt and thus falls to be wound up in terms of the provisions of Item 9 of Schedule 5 of the Companies Act 7 of 2008 as read with section 345 and section 344(f) of the Old Companies Act.

COMMON CAUSE ISSUES

[38] The following are common cause issues between the parties:

38.1 During or about September 2011 the Respondent duly represented by Mr Els concluded a verbal agreement with the Applicant to claim from ODM an amount of R3 million.

38.2 This mandate developed over time with the institution and prosecution of arbitration proceedings against ODM.

38.3 With the consent and knowledge of the Respondent the Applicant briefed Beltramo to represent the Respondent during the arbitration proceedings.

38.4 Between the 25th September 2011 and 25th November 2012 the Applicant billed the Respondent for fees and disbursements which disbursements included Beltramo's fees in the total amount of R1 278 216,57 which amount the Respondent paid without any query the last invoice for R456 585,27 was paid on the 7th February 2013.

38.5 The arbitration proceedings were set down for hearing during the period Monday 5th November 2012 to Friday 16th November 2012 before retired Judge Conradie.

38.6 On the 30th October 2012 ODM passed a resolution to place itself under business rescue. As a result of that resolution the arbitration proceedings stood down from Monday 5th November 2012 to Thursday 7th November 2012 pending the appointment of a business rescue practitioner.

38.7 A business rescue practitioner was appointed on the 7th November 2012 thus resulting in a moratorium in respect of all legal proceedings against ODM.

38.8 Beltramo as usual sent his invoice for his fees to the Applicant totalling the sum of R176 814,00 which amount is made up as follows:

1/11/2012	On preparation for arbitration	R 30 780,00
2/11/2012	On consultation re business rescue (09h00-12h00) 3 hrs	R 9 234,00
5/11/2012 to 9/11/2012	On arbitration Collapse fee at reduced fee of R24 000	R136 800,00
	TOTAL	R176 814,00

38.9 The Respondent initially queried the "*collapse fee*" portion of the statement saying that there was no agreement to pay the collapse fee.

THE DISPUTE

[39] After the Applicant had sent three e-mails reminding Els about the outstanding account for fees due to Beltramo, Els replied on the 27th February 2013 by saying that when the Respondent made a payment of R498 113,33 to the Applicant it was in full payment and then said that there was no agreement that a collapse fee would be charged.

[40] The collapse fee was reduced by Beltramo from 5 days to 3 days being the period 5th, 6th and 7th November 2012 when the matter stood down pending the outcome of the appointment of a business rescue practice. The total amount thus being claimed being the sum of R122 094,00 which is arrived at as follows:

- R 30 780,00 (VAT incl) on preparation for arbitration
- R 9 234,00 (VAT incl) on consultation
- R 82 080,00 (VAT incl) on arbitration hand down

Total R122 094,00 for 5th, 6th and 7th November 2012

[41] In its counteroffer the Respondent conceded that the amounts of R30 780,00 and the R9 254,00 was due and payable to Beltramo and offered to pay the amount of R40 014,00 to the Applicant. As far as the balance of the R82 080,00 Respondent offered to pay only the amount of R27 360,00 being a fee for one day of the arbitration standing down instead of three days.

[42] With its counteroffer the Respondent still insisted that Applicant should refer all its bills for taxation and further indicated that if the Applicant was not prepared to accept payment of the sum of R60 374,00 in full and final settlement then the account of Beltramo was to be referred to the Bar Council. The Respondent did not file a complaint with the Bar Council instead it referred the matter to the Law Society of the Northern Province.

[43] In the complaint to the Law Society the Respondent does not ask the Law Society to determine the validity or not of the fee due to Beltramo. The Respondent asked the Law Society to compel the Applicant to comply with the provisions of Rule 89.4A of the Rules of the Law Society by submitting a bill of costs or to tax the bills.

[44] It is common cause that on the 10th June 2013 the Applicant in a lengthy letter responded to the complaint lodged with the Law Society. Included in the response to the Law Society are contents of an e-mail addressed to Els by Dewald portion of which reads as follows:

> "*Moreover, no amount is due to Werksmans for services rendered by Werksmans. Considering that you have paid our account you have waived your right to a taxation. Besides, you paid the amount referred to below on 7 February 2013 and not 25 February 2013 and did this without demur or objection. Likewise, when you and I spoke on 4 February 2013 I asked you to please pay our invoices and you undertook to do so. In fact this is why you paid on the 7th. You did not raise your supposed objection to the collapse fee during the conversation and neither did you do it in response to my many emails recently asking for payment of Paolo's account. You in fact raised this now for the first time and this after we delivered a formal letter of demand threatening legal action. Your contentions are nothing more than a strategy to avoid paying your debts and quite frankly, astounding.*"

[45] It does not seem as if the Law Society could reach any conclusion whether to charge Dewald or the Applicant with any professional misconduct.

[46] It is common cause that it was only after the Applicant had issued liquidation proceedings that the Respondent deposited the amount being claimed into the account of his attorneys to be held in trust pending the outcome of an action to be instituted.

[47] In a letter addressed to Applicant dated the 1st October 2013 Respondent's attorneys say the following:

> "*Praxley not only requires Adv Beltramo SC's fee to be taxed, but also your firm's fees. It is trite law that a client is entitled to taxation of his/her attorneys' account. [See Blakes Maphanga Inc v Outsurance Co Ltd 2010 (4) SA 232 (SCA) at para 17.] It is further trite law that the account of a disputed bill of costs is not liquidated until that time it is taxed.*"

[48] The Applicant submitted the account of Beltramo for taxation the Respondent apposed it on the basis that the whole account for fees charged since 2011 should also be taxed. The taxing master postponed the taxation *sine die* awaiting the outcome of this application.

THE RESPONDENT'S COSTS

[49] In its answering affidavit Mr Els at paragraph 3.3.7 says that the bulk of Beltramo's accounts dated the 30th November 2012 consists of a 5 day "*collapse fee*" the Respondent refused to pay this account as no collapse fee was agreed upon. In paragraph 5.5.7 Mr Els says the following:

> "*At the commencement of the arbitration on 5 November 2012 I requested that the arbitration stand down until Wednesday 7 March 2012 in order to ascertain whether ODM would comply with certain of the pre-emptory provisions of the New Companies Act in particular section 129(3)(b).*"

[50] It must be recalled that Beltramo in his letter addressed to Els he indicated that the fees charged from the 5th to the 7th November 2012 are not 'collapse fees" but should read "*on arbitration stand down*". The Respondent confirms that he requested that the arbitration stand down until the 7th

November 2012 and if that is the case I find no reason why the Respondent should not pay counsel's fees for the three days when the matter stood down on his instructions. There is no claim for a collapse fee because that was abandoned by the Applicant on the basis that a business rescue practitioner was appointed. Mr Els himself says the following at paragraph 5.5.8:

> "*I have however been advised that as the matter stood down at my insistence from 5 to 7 November 2012 that Beltramo SC is entitled to charge a fee for 5, 6 and 7 November 2012.*"

[52] It is clear that there is no dispute concerning the first three items of the account of Beltramo which total an amount of R122 094,00 and I see no reason why the Respondent should not have paid this amount to the Respondent instead of paying same to its attorneys. The Applicant submitted Beltramo account's for taxation that was opposed on the basis that the Applicant must now submit its whole file. It also does not seem that the Respondent is saying that the fees charged by Beltramo are not fair and reasonable. What the Respondent says is that the fees charged by its attorneys the Applicant are not fair and reasonable hence he demanded that same be submitted to taxation. At paragraph 1 of his answering affidavit Els says the following:

> "*I have however been advised that Beltramo SC is entitled to charge a fee for 5, 6 and 7 November 2012. I however deny that the fees charged by the Applicant are fair and reasonable and require the Applicant to tax its fees. There is in my view no reason why the sum of R122 094,00 was not paid because it is the amount that the Respondent does not dispute.*"

[53] In paragraphs 14-17 of the founding affidavit the Applicant details that since September 2011 it rendered 15 invoices to the Respondent in which was set out fees for work performed including disbursements in respect of Beltramo's charges and that the Respondent paid all the amounts without any query. In his answer the Respondent avoids to deal with the real issue which is why only now raise the dispute that the fees charged and which he paid are not fair and reasonable. His answer does not deal with the central issue made by the Applicant in the founding affidavit.

[54] The Respondent chose not to deal with each of the contentions of the Applicant as set out in paragraphs 18 to 99 and once more avoided to deal specifically with the central issues raised in the correspondence that was exchanged. In dealing with the fact whether there was a collapse fee agreement or not the Respondent chose to deal with that aspect in a very flimsy and unconvincing manner by saying at paragraph 15.3 that:

> "*I have consistently denied the existence of the so-called collapse fee agreement. I simply did not want to involve Beltramo SC in this issue. It must be recalled that Beltramo in his letter to Els specifically said that there was an agreement about the collapse fee when he consulted with Els. It is therefore strange that Els does not challenge what Beltramo said which was corroborated by Dewald. The only reason he Els does not deal with that letter is because he knows of such agreement.*"

IS THE RESPONDENT ENTITLED TO DEMAND THAT APPLICANT SUBMIT ALL ITS PAID BILLS TO TAXATION TOGETHER WITH THE ACCOUNT OF BELTRAMO

[55] Rule 69 of the Rules of the High Court deals specifically with taxation of counsel's fees. Although Rule 69 deals with taxation of such fees on a party and party bill it is my view that the same principles apply when taxing an attorney and client bill. Where counsel fees are referred to taxation the taxing master has jurisdiction to determine not only quantum of counsel's fees but also whether counsel's fees should be allowed at all in a particular case (see *Rosenberg v Prima Toy Holders (Pty) Ltd* 1972 (3) SA 791 (C) at 794B-C and *Brivik Bros (Pty) Ltd v Balmoral Sales Corporation (Pty) Ltd* 1978 (4) SA 716 (W) at 723.

[56] In my view there is nothing that prohibits a taxing master from taxing an account by counsel in the absence of a bill from the attorney. After all Rule 70(2) empowers the taxing master to call for such books, documents, papers or accounts as in his opinion are necessary to enable him to properly determine any matter arising from such taxation.

[57] In the present matter the Applicant insists that Beltramo's account for the period 1st November 2012 to 7th November 2012 be taxed in conjunction with bill of accounts submitted from September 2011 comprising some 14 invoices which have already been paid. I see no reason why this should be done. The Respondent who is in possession of all the invoices since 2011 is

free to indicate to the taxing master what documents should be called up and submitted to justify the fees due to Beltramo and not to ask for a Submission of bill covering 14 invoices.

[58] The judgment of the SCA in the *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 on which the Respondent relies heavily is in my view distinguishable and not of application in the present matter. In that matter the dispute arose when Attorneys Blakes Maphanga set-off an untaxed bill of costs due to them against monies that they held in trust for the client. The court found that since there was a dispute in connection with certain amounts charged that it was incumbent on the attorneys to submit their attorney and client account to taxation before set off.

[59] In the present matter there is firstly no set off. Secondly, there was no dispute raised by the Respondent in respect of all the invoices from September 2011 until October 2012.

[60] The Applicant's argument that it should not be compelled to tax bills that have already been paid is in my view correct. In *Allison v Massel & Massel* 1954 (4) SA 569 (T) Ramsbottom J found in favour of the attorneys in a matter closely similar to the present matter. In that matter at page 572 the learned Judge says the following:

> "*I think it is clear that if there was an agreed fee, the appellant had no right to sue for an account of the respondents' fees and disbursements in the matrimonial proceedings. It is not necessary to consider whether or not, if there were no set-off, he would be entitled to resile from that*

> *agreement and demand that a bill of costs should be taxed; that question does not arise. I am clearly of the opinion that a client who has agreed that there shall be no taxation and who has agreed to pay a fixed sum cannot thereafter and without demanding taxation sue for an account, debatement thereof, and payment of what may be found due.*"

[61] In the present matter the only basis that the Respondent raises in demanding that all paid bills and accounts be taxed is that they say that the fees charged are not fair and reasonable this the Respondent says was the advice given to them after they had consulted their new attorneys and a cost consultant. There is no affidavit by the cost consultant pointing out specifically to items charged by the Respondent which they say are not fair and reasonable. It is a bald general statement unsubstantiated by any real evidence. Secondly, Mr Els in his answering affidavit at paragraph 5.5.8 says that he has been involved in a number of litigation matters as a previous employee of First Rand Bank, Standard Bank and whilst a board member of ABN Amco. He clearly says that he has previously been involved in briefing both senior and junior counsel and boasts that he knows about an animal called "*collapse fee*" and how it operates.

[62] I have no doubt that Mr Els indeed has that experience he is not a layperson when it comes to method of fees charged on attorney and client in litigation matters and this explains why he paid all the invoices as and when he received same from the Applicant. He did so because he had satisfied himself that what the Applicant billed was not only fair but was reasonable taking into consideration the complexity of the matter and the time spent thereon. This argument that the accounts are not fair and reasonable is a

new thing which he created when the Applicants refused to continue the arbitration on risk. His new attorneys were prepared to proceed with the matter on risk and he therefore had to find a reason to justify his terminating the mandate of the Applicant.

[63] His Lordship Wessels J in the matter of *Ritch v Bhyat* 1913 TPD 589 dealt with a claim where the bill of costs had not been taxed at the date of summons. In such a case the debt though due, cannot be recovered in a court of law and in that sense it is not payable. Nevertheless if the client pays the debt he cannot claim repayment. This view was supported by Schreiner J in the matter of *Incorporated Law Society v Lakofski* 1939 TPD 289 where he said the following:

> "*That as far as Supreme Court costs are concerned while these are not recoverable without taxation by reason of Section 2 and although that section was introduced for reasons of public policy this does not mean that the scope of the section which in terms only makes taxation a condition precedent to a claim for payment of a bill of costs, is to be extended to prohibit the receipt by the attorney of sums on account of costs which the client is prepared to pay without taxation.*"

[64] Ramsbottom J in the *Allison v Massel and Massel* matter (*supra*) concluded at page 576 with the following words:

> "*Although the debt was one which could not be recovered by action, payment was not forbidden and if the money was paid it could not be recovered by a conditio indebiti. It was in my opinion a natural obligation.*"

[65] I remark unpersuaded that the Respondent has made out any case to compel the Applicants to submit their paid invoices for taxation. The Respondent received the accounts scrutinised same and was satisfied and proceeded to pay same without asking for taxation it cannot now demand that the bills be taxed.

WAS THE APPLICANT JUSTIFIED IN LAUNCHING LIQUIDATION PROCEEDINGS IF NOT WAS IT AN ABUSE OF THE LEGAL PROCESS AS CONTEMPLATED IN SECTION 347(1A) OF THE COMPANIES ACT 61 OF 1973

[66] The Respondent argues that by issuing liquidation proceedings against the Respondent at a time when the Applicant had been warned not to do so and when in fact the Applicant knew that the Respondent was in a position to make payment and was not insolvent constitutes an abuse of the legal process.

[67] The Respondent points out that it had already paid in excess of R1 million in fees and disbursements to the Applicant and there was accordingly no reason to believe that Respondent would not be able to pay the sum of R176 814,00.

[68] The Respondent further argues that the amount claimed in the liquidation application was not liquidated as there was still a dispute. The Respondent argues that until such time that the disputed amount shall have

been taxed by the taxing master it was not due and could not be used to sue thereon.

[69] The question to be answered firstly in this instance is whether an untaxed bill can be used to sue thereon or not. In support of their argument the Respondent referred me to the case of *Blakes Maphange Inc v Outsurance Co Ltd (supra)* as well as the matter of *Alton Coach Africa CC v Datcentre Motors t/a CMH Commercial* 2007 (6) SA 154 (D) at 164 as well as to the matter of *Marks and Holland v Palmer and Another* 1915 TPD 246.

[70] In the *Marks and Holland* case (*supra*) a client had signed an acknowledgement of debt agreeing to pay Marks and Holland being his attorneys a specified sum of money in respect of fees. When the client failed to perform in accordance with the deed of acknowledgement Marks and Holland petitioned the court to sequestrate the estate of their client. In dismissing the application for sequestration the court referred to Law No 12 of 1889 which provides that an attorney practising in the lower courts shall not be entitled to payment on his bill of costs before it has been taxed.

[71] The court further held that the provision of Law 12 were based on public policy and could not be waived accordingly that an agreement by the client to pay his attorney a lump sum for costs instead of having such costs taxed was not enforceable.

[72] That decision is not relevant in the present matter. Firstly, that law referred to costs in respect of civil matters instituted in the magistrate or lower court. Secondly, the requirement to tax a bill was in terms of a law passed by parliament. In the present matter the costs on which the application to liquidate were not incurred in the lower court or the magistrate's court. Secondly, there is no Act of Parliament like in the *Marks and Holland* case that requires that the bill of costs in respect of Beltramo fees should be taxed.

[73] De Villiers JP writing for the court in the *Marks and Holland* matter says the following at page 249:

> "*Law No. 12, 1899, is not an easy law to construe. The following appears to be clear however: All bills of costs in lawsuits, whether in the Supreme Court or in the magistrate's court, have to be taxed. The Supreme Court has the power of dispensing with the necessity of taxation by the Taxing Master of the Supreme Court so far as bills of costs in that Court are concerned.*"

[74] The fact that De Villiers JP concluded that the Supreme Court has the discretion to dispense with the requirement to that is in my view supportive of my reasoning that the *Marks and Holland* decision is not relevant or applicable to decide the issue.

[75] The second decision in this is *Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial* 2007 (6) SA 154 (D). That case is also distinguishable from the present matter in that the amount claimed for liquidation purposes was based on a claim for loss of profits which still had to

be determined as a damages claim. In the present matter the amount claimed whilst not taxed is liquid and was admitted by the Respondent the only portion of the amount not admitted is the collapse fee amount which has been changed. In the matter of *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 469F the court determined that a liquidated debt sounding in money was one which was either admitted or its money value has been ascertained or in the sense that it is capable of prompt ascertainment. (See also *Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia) and Others* 1992 (2) SA 66 (Nm) at 72-73.) The amount of R122 074,00 is easily determinable and a substantial portion of it namely the consultation fee is not in dispute it amounts to about R40 014,00.

[76] The court in the *Alton Coach* matter (*supra*) found that the Respondent's claim is clearly an illiquid claim for damages as a result of the cancellation of order resulting in the Respondent suffering damages being for loss of profits. This is not the case in the present matter.

[77] In my view at the least the sum of R40 014,00 was not only liquid but had been admitted but not paid despite a letter of demand in terms of section 345 of the Old Companies Act. The reasons for not paying were an afterthought and not genuine. The Respondent commenced by saying there was no agreement to pay a collapse fee it then changed its stance and says the attorneys' fees which had been paid were not fair and reasonable and when the Applicant submitted Beltramo's account for taxation this was opposed.

[78] Section 347(A) of the Old Companies Act reads as follows:

> "*Whenever the court is satisfied that an application for the winding up of a company is an abuse of the court's procedure or is malicious or vexatious the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit.*"

[79] The court's power to grant a winding up order is a discretionary power irrespective of the ground upon which the order is made. Similarly the granting of an order declaring winding up proceedings as being vexatious and frivolous and thus amounting to an abuse of the court's procedure is discretionary. The discretion must be exercised on judicial grounds.

[80] The Respondent contends that since it has been able to pay more than R1 million in fees and disbursements this indicates that the Respondent is solvent and able to pay its debts which are due. In the result I have come to the conclusion that the dispute raised by the Respondent regarding the amount claimed is not genuine. The question is therefore was the Applicant abusive of the process of court in filing liquidation proceedings.

[81] It is common cause that prior to forwarding the section 345 letter of demand to the Respondent the Applicant had sent three e-mails calling for payment which e-mails were ignored. A period of 5 months went by since the Respondent received the letter of demand warning it of the consequences in failing to pay.

[82] In the English case of *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 (Ch) Hartman J in dealing with the effect of a section that corresponds with section 345(1)(a) of an Old Companies Act held that the taking up of winding up proceedings was not an abuse of process since the company had failed to pay the claim and that the creditor could properly aver that the company was unable to pay its debts despite the patent ability to do so. The court held further that where the creditor debt is clearly established the court will not in general interfere even though the company appears to be solvent for the creditor as such is entitled to apply for winding-up and the company has its own remedy i.e. to pay the debt and if it persist in the non-payment it may suggest inability to pay. The learned judge further referred to other English decisions where a company is well known and wealthy it is the more likely that delay in settlement of its obligations will create some suspicion of financial embarrassment and that such company only has itself to blame if such suspicion is created.

[83] In the matter of *Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (NPD) Miller J held that an applicant was entitled to a provisional sequestration order against a company which averred in its answering affidavit that its assets exceeded its liabilities. Miller J quoted with approval the *dicta* by Caney J in the matter of *Rosenbach & Co (Pty) Ltd v Singh Bazaars (Pty) Ltd* 1961 (4) SA at page 623 wherein he ruled as follows:

> "*If the company is in fact solvent in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order. The circumstances particularly to be taken into consideration against the making of an order are such*

as show that there are liquid assets or readily realisable assets available out of which or the proceeds of which the company is in fact able to pay its debts."

[84] I am not persuaded that in launching the liquidation proceedings the Applicant acted maliciously or vexatiously. The Applicant had established a debt which was due and payable and the Respondent resisted payment on unreasonable grounds and under circumstances that raised a suspicion that the Respondent was unable to pay its debts. I can accordingly not find that this amounts to an abuse of the process.

[85] I accordingly make the following order:

In the main application

1. The Respondent is ordered to pay to the Applicant the amount of R122 094,00.

2. The Respondent shall pay interest on the amount in 1 above at the rate of 15,5% per annum from the 31st January 2013 until date of payment.

3. The Respondent is ordered to pay the Applicant's wasted costs occasioned by the liquidation proceedings instituted under case number 30127/2013 in the South Gauteng High Court.

4. The Respondent is ordered to pay cost of this application.

In the counter-application

1. The Respondent's counter-application is dismissed.

2. The Respondent is ordered to pay Applicant's wasted costs of the counter-application.

DATED at JOHANNESBURG on this the 8th day of SEPTEMBER 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPLICANT'S COUNSEL	C ELOFF SC
INSTRUCTED BY	WERKSMANS ATTORNEYS Sandton Ref: Mr D Hertz Tel: (011) 535-8287
RESPONDENT'S COUNSEL	A G SOUTH
INSTRUCTED BY	DOLPH JONKER ATTORNEYS Bryanstan Ref: P118/W/S Tel: (011) 875-4340
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