REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: **A5074/15**

CASE NUMBER A QUO: **5741/14**

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

28.2.17

Date: WHG VAN DER LINDE

PRAXLEY CORPORATE SOLUTIONS (PTY) LTD **APPELLANT**

and

WERKSMANS INCORPORATED **RESPONDENT**

Judgment

Summary - attorney - mandate terminated by client - client having paid invoices rendered over period of a year - client seeking to avoid paying final invoice reflecting outstanding disbursement for counsel's fees until attorney will first have referred other, past and paid invoices to Taxing Master for taxation – client admitting liability for counsel's fees - client contending however for unqualified right first to insist on taxation of even past, paid invoices to determine whether overreaching in respect of those invoices may have occurred.

Held - client's debt to attorney discharged by voluntary payment – barring obligation to pay counsel's fees, parties owing no further obligations inter se - client having no right to insist on taxation once debt to attorney discharged voluntarily and without reservation - client remaining free to employ own taxing expert and if so advised, suing attorney on basis of enrichment for overreaching if shown.

Van der Linde, J:

Introduction and background

[1] This is an appeal against a judgment and order of Makume, J on 8 September 2015, with the leave of the learned judge. The matter came before the court *a quo* as an opposed application and counter-application. The former, by the respondent in this appeal, applicant *a quo*, was for judgment against the appellant in the amount of R122 094, interest, costs, and certain additional wasted costs. That application succeeded. The counter-application, by the appellant in this appeal, respondent *a quo*, was for an order directing the respondent to procure the taxation by the Taxing Master of certain fees and disbursements, and ancillary relief, and was dismissed with costs. The appeal is against the judgments and orders both in convention and in reconvention.

[2] The facts before the court *a quo*, and again before us, were largely common cause. The appellant had engaged the respondent, an incorporated firm of professional attorneys, to recover R3 million from On Digital Media (Pty) Ltd ("ODM"), being fees owed to the appellant. The fees were owed for corporate financial advisory services rendered and for the raising of equity for ODM in the aggregate sum of R300 million from the Industrial Development Corporation and the Development Bank of South Africa. ODM resisted payment, and the dispute went to arbitration.

[3] The appellant instructed the respondent in the arbitration. The basis on which the respondent would be remunerated was not discussed, but the appellant's Chief Executive Officer, Mr Els, says that he accepted that the respondent would charge a fair and

reasonable fee, regard being had to the seniority of the attorneys involved, the nature and complexity of the matter, and the time taken to render the services.

[4] The deponent also says in his answering affidavit that he has (since) been advised that a client is entitled at all times and unqualifiedly to have its bill taxed by the Taxing Master to determine whether fees were fair and reasonable; and further that it can never be a defence to the taxation of a bill that the account has been paid by the client. As will appear below, the correctness of this advice was the kernel of the judgment *a quo* and of this appeal.

[5] At all events, the arbitration was set down for Monday, 5 November 2012 to Friday, 16 November 2012. Adv. Beltramo, SC (since deceased) was briefed to represent the appellant. On 1 November 2012, the Thursday before the Monday when the arbitration was due to start, the appellant received notice that ODM had been placed under business rescue. At the appellant's request, the arbitration then stood down on Monday, 5 November 2012 to Wednesday, 7 November 2012, to see whether ODM would appoint a business rescue practitioner in terms of s.129(3)(b) of the Companies Act 71 of 2008. ODM duly appointed a business rescue practitioner in time, and in consequence of the moratorium imposed in terms of s.133(1) of the Act, the arbitration was postponed *sine die*.

[6] The respondent had billed the appellant from time to time during the course of the arbitration preparation, and the appellant had paid those invoices without demur, some eleven of them, from time to time. On 4 February 2013, three invoices were still outstanding: dated 25 October 2012, 25 November 2012, and 25 January 2013 respectively. After a telephone conversation on that day between Mr Els and Mr Van der Berg of the respondent, the appellant paid R498 113.33 to the respondent on 7 February 2013.

[7] Mr Els thought that this payment settled all the respondent's outstanding fees and disbursements. This was an error, since Mr Els had missed the outstanding invoice of Adv. Beltramo, SC dated 30 November 2012 that had formed the exclusive basis of the respondent's 25 January 2013 invoice, and that had not been paid.

[8] Thereafter, on 12 February 2012, the appellant terminated the respondent's mandate when the latter declined the appellant's request that it should in the future act on a contingency basis.

[9] When by 27 February 2013 the appellant had not yet settled the respondent's 25 January 2013 invoice containing Adv. Beltramo, SC's invoice of 30 November 2012, the respondent delivered a letter of demand in terms of s.345 of the 1973 Companies Act to the appellant. Mr Els then studied the invoice, saw that it was wholly comprised[1] of Adv. Beltramo, SC's invoice, and appreciated then that the invoice was unpaid. However, he says that he noticed that included within counsel's invoice was a collapse fee.[2] Mr Els says that since a collapse fee was never agreed to, the appellant refused to pay the whole invoice, even those portions of counsel's fees that were uncontentious.

[10] He then consulted new attorneys and a taxing consultant, both of whom said to him that having considered the respondent's invoices it *prima facie* appeared that the appellant had been overcharged by the respondent.[3] In subsequent correspondence the appellant relented and conveyed that it would pay Adv. Beltramo, SC's fees up to and including the first day of the aborted hearing, but not the four subsequent days making up the balance of the collapse fee. It also conveyed then that it disputed all of the respondent's accounts, meaning those previously rendered and paid, and it requested taxation by the Taxing Master of these. This was declined, and on 16 August 2013 the respondent applied to wind up the appellant.

[11] After the appellant had provided security for the amount claimed, the winding-up application was withdrawn by agreement, the parties agreeing that its costs would be determined by the trial court hearing the respondent's intended action for payment for the balance (in effect Adv. Beltramo, SC's outstanding fees) due. The respondent resolved not to institute action but instead to apply on motion for the outstanding payment. The application

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[1] Barring R82.03; see annexure FA2, vol 2, p135.
[2] The fee, including VAT, was R176, 814, of which R136,800 was described as "collapse fee at reduced fee of R24,000 per day"; see annexure FA2, vol 2, p136.
[3] Neither the attorney nor the taxing consultant supported this assertion by means of an affidavit.

proceedings before the court *a quo* then followed. In those proceedings the appellant made it clear that it was insisting that the respondent first subjected to taxation by the Taxing Master its fees and disbursements from when it was first mandated back in September 2011.

[12]As regards Adv. Beltramo, SC's fees the appellant made it plain that its dispute was only with the collapse fee, because it said that there never was an agreement entitling counsel to raise such a fee. Later in his answering affidavit, Mr Els concedes that since the arbitration stood down from Monday, 5 November 2012 to Wednesday, 7 November 2012 at his insistence, Adv. Beltramo, SC was entitled to his day fee for those three days. That left only two days' fees in dispute; still, on the basis of an asserted right first to have all past paid invoices of the respondent taxed by the Taxing Master, none of Adv. Beltramo, SC's outstanding fees were paid.

[13]The appellant's position was set out in its answering affidavit[4] in these terms:

"All the payments made by the Respondent (appellant) to the Applicant (respondent) were made on the assumption that the fees charged by the Applicant were fair and reasonable. The Applicant made all these payments in the bona fide and reasonable belief that the fees charged by the Applicant were fair and reasonable. Should it be found that the Respondent was overcharged or overreached or that the fees debited by the Applicant were not fair and reasonable, such reasonable belief would have been mistaken and the payments made would constitute overpayments. The Applicant was enriched at the expense of the Respondent as a result of such overpayments."

[14]Finally, just prior to the hearing of the opposed application by the court *a quo*, the respondent abandoned the portion of the claim that was said to represent an objectionable collapse fee, being the two day fees for Thursday and Friday 8 and 9 November 2012.[5] That

[4] Vol 4, p395, para 3.17. Note especially that it is not suggested that, if only at a prima facie level, there had been fraud, overreaching or error in the respondent's accounts.
[5] Appellant's heads of argument, para 1.7.

reduced the capital amount of the claim to R122,094, all of it representing counsel's undisputed fees.

The issue on appeal

[15]In summary, the question that confronted the court a quo, and now confronts this court on appeal, is this. Is a client of an attorney, where no express or tacit agreement to this effect is alleged, entitled to refuse to pay a disbursement made by the attorney on the client's behalf, where the quantum or appropriateness of that disbursement is not in dispute, on the single basis that the client insists that the attorney's other invoices, all of which had been paid by the client without demur or protest, should first be taxed by the Taxing Master?

[16]The contending positions were these. For the appellant, it was argued that a client has an unqualified right in law to insist on taxation of the attorney's fees and disbursements, whether these have been paid or not; absent waiver, the fact of payment does not destroy that right. The exercise of that right has the effect of destroying the liquidity of the attorney's claim.

[17]For the respondent it was submitted that where, as here, the client makes no case of fraud or overreaching, or error, in the accounts, either proven or *prima facie*, payment by the client of the attorney's account without first insisting on taxation before payment involves a contractual election between two mutually exclusive positions: either to pay the invoice thereby accepting it, or to challenge the invoice and to insist on taxation before payment. If the election involves the former, the latter course is no longer available; the client is bound by its election.[6]

Discussion

[6] For the principles governing contractual election of disparate remedies, reference was had to Xenopoulos and Another v Standard Bank of SA Ltd and Another, 2001 (3) SA 498 (W).

[18] The parties' two opposing positions require that this court considers the nature and longevity of the client's right to insist on taxation of an attorney's account, and we do that below. But it does seem that there is an *a priori* issue: when an attorney makes a disbursement on the client's behalf, and no aspect of that disbursement is disputed, is it always a defence to say, as was submitted on behalf of the appellant, that payment of that disbursement is not due until taxation of the other items will have been finalised?

[19] Generally, a debt is due when the agreed date for its payment will have arrived, also known as *mora ex re*. If there is no agreed date, the creditor places the debtor *in mora*, and so fixes the date for payment; this is *mora ex persona*. In this matter the discharge by the attorney of its mandate occurred over slightly more than a year. The practice that was applied was that the attorney rendered invoices of fees and disbursements from time to time, and these were paid from time to time.[7] This is a frequent practice and perfectly understandable, since the attorney's cash flow would otherwise come under severe pressure.

[20] If that was then the practice, and it was followed without objection, as it was, then it is likely that the agreement between the parties, confirmed if not established by their conduct, was that payment was contractually due within a reasonable time after invoice, which is a not uncommon commercial arrangement. Put differently, each invoice invoked its own *mora* date, and the client was obliged to pay on that date.

[21] That being so, there does not seem to be a basis for contending that a particular invoice, that of 25 January 2013,[8] which was payable within a reasonable time after the end of January 2013, should be rendered no longer due and payable, because past invoices may or may not be disputed. There is of course the added dimension that the disbursement here was in respect of the client's direct liability to pay its counsel.[9]

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[7] Appellant's heads of argument, p10, para 4.7.

[8] Comprising the now undisputed disbursement to Adv. Beltramo, SC.

[9] See Minister of Finance and Another v Law Society, Transvaal, 1991 (4) SA 544 at 556 I; compare the heads of argument by Adv. RS Welsh, QC (with him AC Thompson) at 552 E to 553 E, quoted in Bertelsmann v Per, 1996 (2) SA 375 (TPD) at 380 D to 381 D.

[22]On this basis alone, there is no defence to the respondent's claim in convention for immediate payment of the disbursement. The question whether a client may insist on taxation of an attorney's other invoices after these had been paid, then lives on in this matter independently[10] of the claim in convention, by virtue of prayer 1 of the appellant's claim in reconvention.

[23]For the appellant's central proposition, that a client always has an unqualified right to demand taxation of fees, it relies on Blakes Maphanga Inc v Outsurance Co Ltd,[11] Muller v The Master and Others,[12]and Benson and Another v Walters and Others.[13]

[24]Blakes Maphanga was concerned with a case where the attorney had purported to set off untaxed, disputed, fees against trust moneys of the client. The question was whether the set-off was good. The Supreme Court of Appeal upheld a full court which upheld a single judge, who denied the set-off and directed the attorney to pay to the client the trust moneys concerned. The basis of the decisions was that until taxed, the attorney's accounts were not liquidated, and so could not sustain set-off.

[25]In para [17], the passage relied on by the appellant in the present matter, Malan, JA held:

[17] A client is entitled to taxation of his or her attorney's account. It follows that the amount of a disputed bill of costs is not liquidated. It is not capable of 'easy and speedy proof'. This was decided in so many words in Arie Kgosi v Kgosi Aaron Moshette and Others 12 where Wessels JP said:

'An untaxed bill of costs is not an absolute and present debt, for it is one the exact amount of which is still to be ascertained, as it depends on the arbitrarium of the Taxing Master. It cannot, therefore, be set off as against a liquidated debt.'

In Tredoux v Kellerman 13 Griesel J dealt with an application for summary judgment for the amount of the fees of an attorney and counsel. He had to consider whether the amounts claimed were 'liquidated' as required by rule 32 of the Uniform Rules of Court. He said:

'A liquidated amount of money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or, put differently, where ascertainment of the amount in issue is "a mere matter of calculation". In my view the plaintiffs' claims in question

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[10] The appellant' case is that the right to insist on taxation of those invoices that have already been paid, establishes also a defence to payment of the invoice that is not disputed; see appellant's heads of argument, p5, para 2.2.

[11] 2010 (4) SA 232 (SCA) at para [17].

[12] 1992 (4) SA 277 (T) at 283 H – I.

[13] 1984 (1) SA 73 (A) at 83 A – G.

do not fall in this category: they involve an enquiry into the nature and extent of the professional services rendered, the reasonableness of fees charged, and so on. These are not mere matters of calculation; they are matters for taxation, which fall within the compass of duties of the taxing master. It is that official, and not the court, who must determine the reasonableness of professional fees charged by legal practitioners . . .

In any event, there is authority for the proposition that an untaxed bill of costs does not constitute a liquidated amount in money - at least in circumstances, as here, where the bill is being disputed . . . .

Even if I were to err in coming to this conclusion, and even if the plaintiff's claims were to be regarded as liquidated amounts, it has authoritatively been held that a party cannot recover his or her costs in the absence of prior agreement or taxation. . . .'"

[26]Blakes Maphanga therefore held that until taxed, the account is not a liquidated debt, capable of being paid by set-off against an opposing claim which is liquidated. Whether payment of an attorney's account by way of set-off has occurred, does not arise in the present matter. What does arise here is whether payment of a debt which is not liquidated, discharges the obligation. We return to this below.

[27]Muller was concerned with the question whether a Taxing Master was bound by an agreement between an attorney and client as to the scale that ought to apply to the taxation. A full bench held that the Taxing Master was so bound. The passage relied on by the appellant reads as follows:

"Counsel on both sides were ad idem that, even in the case of an attorney and own client bill based upon agreement, a Taxing Master was entitled to interfere. The dispute turned on the extent of such interference, of which the upper limit would be a total ignoring of the agreement and a resort to the prescribed tariff. I should add that counsel for the respondents did not address argument before us to support this drastic approach, nor was any argument directed to suggest that Kriegler J had countenanced it."

[28]This *dictum* goes to the power of the Taxing Master to interfere before payment in the arrangements between attorney and client. That is not an issue in this appeal.

[29]Benson is authority for the proposition that an attorney is entitled to sue for its fees and disbursements once the mandate is either terminated or completed, without having to wait for taxation. Further, it held that prescription begins to run then already, and not only later upon taxation. The passage relied on by the appellant reads thus:

"It is clear that the relationship of an attorney and his client is based on mandatum and that generally speaking, and in the absence of an agreement to the contrary, an attorney is not entitled to payment of fees (and disbursements) until he has performed his mandate or until the employment of his services has been terminated: Goodricke & Son v Auto Protection Insurance Co Ltd (in Liquidation) 1968 (1) SA 717 (A) at 722 - 3. If an attorney were to be treated as an ordinary mandatary, his client's obligation would therefore become due on execution or termination of the mandate. Counsel for Walters relied, however, on a number of Cape cases in support of his contention that an attorney cannot sue on an untaxed bill of costs. He relied especially on the decision in Clarke v Hemming and Hemming 1923 EDL 315, in which the other cases were collected and discussed. It appears that until 1908 there had been no express provision in the Cape Colony authorising the taxation of an attorney and client bill of costs. Nevertheless, it had become the practice of the taxing officer to tax such a bill of costs if it pertained to a litigious matter and in Walker v Syfret, Godlonton and Low 16 CTR 814 MAASDORP J said that, if an attorney refused to proceed to taxation and instituted action to recover the amount of his bill, the Court could order the bill to be taxed.

In 1908 Rule of Court 444 was promulgated. It empowered any taxing officer of a Superior Court

"to tax all bills of costs for work actually done by any attorney of the Supreme Court, in his capacity as such attorney, whether such work be connected with suits pending or not".

In Layton v Oehley 1909 EDC 101 an attorney instituted action in a magistrate's court on a bill of costs pertaining to the prosecution of a criminal appeal. The client's exception to the effect that the bill had not been taxed was upheld by the magistrate. Subsequently the attorney's appeal was dismissed on the ground that the client was entitled to refuse to pay until the bill had been taxed. It was pointed out that although Rule 444 did not compel an attorney to have his bill of costs (as between attorney and client) taxed, a court could order this to be done, and that a client was entitled to insist on taxation. The Court went on to say (at 104):

"When the plaintiff in the court below ascertained what the defence was, it was open to him... to have applied for a postponement to enable him to have the bill taxed. No such application having been made, the judgment in the court below was, in my opinion, substantially correct..."

This passage explains why in an earlier part of its judgment the Court remarked:

"It certainly would have been better... if the defence had been raised in the form of a special plea rather than by an exception..."

[30]This passage stresses the entitlement of a client to raise the taxation of the attorney's bill, ultimately with delaying effect only. But that is still far cry from saying that the right to insist on taxation may be invoked after voluntary election to pay the account without then raising fraud, overreach or error.

[31]These authorities relied on by the appellant accordingly do not support the proposition that it advances. It seems more in accordance with principle and logic to approach the issue in this appeal in the following way.

[32]First, contractual obligations are discharged by performance in accordance with what the parties had agreed. If the obligation is to pay, then that obligation is discharged by payment. The then Appellate Division articulated this first principle as follows in Harrismith Board of Executors v Odendaal:[14]

"Payment is the delivery of what is owed by a person competent to deliver to a person competent to receive. And when made it operates to discharge the obligation of the debtor (Grotius 3.39.7; Voet 46.3.1)."

[33]The discharge of the obligation does not exclude further, subsequent causes of action by the debtor against the creditor arising, such as where it is discovered there had been fraud, misrepresentation, or error. Each of those causes of action has its own requirements for sustainability, and may give rise to claims by the debtor against the creditor.

[34]Also, it must not be thought that the question whether the debt is liquidated affects its being due in a contractual sense. As Benson affirms, prescription begins to run against the creditor attorney immediately upon termination of the mandate, and for prescription to commence running, the debt must be "due".[15] Benson put it thus (emphasis supplied):[16]

"Section 12 (1) of the Prescription Act 68 of 1969 provides that "prescription shall commence to run as soon as the debt is due". It is clear that the date on which a debt becomes due does not always coincide with the date on which it arises. In List v Jungers 1979 (3) SA 106 (A) at 121, DIEMONT JA remarked that the difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. And in The Master v I L Back and Co Ltd and Others 1983 (1) SA 986 (A) at 1004 the following was said:

"The words 'debt is due' in the section (ie s 12 (1)) must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately."

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[14] 1923 AD 530 at 539.
[15] S.12(1) of the Prescription Act 68 of 1969. Compare also Benson at p83.
[16] At p82.

In parenthesis it may be pointed out that, if it was intended to formulate a principle of general application, the words "liquidated" and "money" were clearly used per incuriam, since there is no doubt that prescription runs in regard to unliquidated claims for damages and also claims not sounding in money. It should be borne in mind, however, that in Back's case the relevant obligation was indeed one to pay a liquidated amount of money, and that the only question was whether that amount was "presently claimable"."

[35]Applied to the present matter, the appellant had therefore discharged its obligations to the respondent to pay it for the fees and disbursements raised by it from time to time. Barring the (admitted) disbursement in respect of Adv. Beltramo, SC, the appellant no longer owes the respondent any fees or disbursements, and the contractual bonds between the parties had become extinguished. No obligation was owed by either to the other any longer. This feature already distinguishes the present matter from the cases in which the entitlement of the client to insist on prior taxation was affirmed.

[36]Second, one should distinguish, in the case of a contract consisting of an attorney's mandate, between the common law practice of intercession of the Taxing Master, on the one hand, and the contractual entitlement of the client to pay no more than what is a fair and reasonable fee, on the other. The effect of the common law practice of intercession of the Taxing Master is, according to the authorities to which we have been referred, to serve as a dilatory effect on the entitlement of the attorney to exact payment of its fees and disbursements: before the attorney can get judgment for its fees and disbursements, the Taxing Master has to tax the account, if the client so insists.[17]

[37]But the notion that, according to the practice that has so developed, the client's insistence on taxation delays the litigation until taxation will have taken place, has the necessary corollary that absent such insistence, judgment may be granted for the amount claimed, barring of course any other defences. And so, in Kruger v Resnik[18] the then Appellate Division held that there was no obstacle in law to the client voluntarily paying an untaxed bill of costs and, relying on Merula, Manier van Procederen 4, 102, 1; 4, 103, 1; van Alphen,

[17] Benson at p83 in fin; p84.
[18] 1955 (3) SA 378 (A) at p383.

Papegay, Bk. 1, Chapter 3; van der Linden, Judiciële Practijk, 2, 8, 2, said that this was the position also at common law.[19]

[38]Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC,[20] referred to by the respondent, supports the case against the appellant in this regard. There the attorney sought to recover from the client the balance of fees owing. The client executed a written acknowledge of debt to pay the very amount. When the attorney sued, the client pleaded its insistence that the balance of the fees owing first be taxed. There was no allegation by the client of fraud, error or undue influence.

[39]The court dismissed the dilatory plea, and held:[21]

"The defendants have not in their plea claimed to have been overreached. Neither have they pleaded that the agreement or acknowledgment as to the balance due was induced by force, error, fraud, or undue influence. They are entitled to discovery and inspection of documents in terms of the Rules of Court. In the result they are in a position to present evidence that the fees were indeed excessive to an extent that the Court should not give effect to the agreement as to the balance due."

[40] This passage leads to the third proposition, which is that whereas our common law supports the proposition that a client can, before payment, insist on taxation (with dilatory effect), it does not afford any authority for the proposition now advanced by the appellant, which is that after payment the attorney can be compelled to have its accounts taxed, merely because the client would like it, without an assertion of fraud, overreach or error, and just to see whether the client might have an enrichment action for overpayment.

[41]The extent of the common law practice has been to have permitted the intercession of the Taxing Master prior to the client being compelled to pay in the face of the latter's challenge to the quantum of the bill, but no further. And it is understandable that it should have been so. The judicial oversight over the fees and disbursements of attorneys, and the invocation of the State machinery in aid of the oversight, is apt when an attorney is seeking a judgment

[19] As to the position in the Transvaal, which was held to be no different, despite local legislation there, see Incorporated Law Society v Lakofski 1939 TPD 289.
[20] 1998 (3) SA 608 (D).
[21] At p613.

from the court for the amount of fees claimed. When however the fees have already been paid without demur, and the client wishes *ex post facto* to investigate whether or not there should have been demur in the first place, that is a matter for the civil law of contract and the remedies that avail there.

[42]*Non constat* that a client who has paid its accounts is disentitled later from, prescription considerations aside, sending its paid bills to a private taxing consultant, who might or might not advise that there has been overpayment measured against the fair and reasonable yardstick, and then suing the attorney for recovery on the basis of a *condictio indebiti*.[22] There may of course be obstacles to success along the way, because without a mistake or compulsion, no *condictio indebiti* lies in our law.[23]

[43]But that is different from saying that the client is entitled, after payment without protest,[24] to insist that the attorney initiates and procures a taxation of the invoices it had submitted, and which the client had voluntarily paid, just so that the client can decide whether or not it has a cause of action in enrichment against the attorney. It follows that the appeal cannot succeed.

[44]There remains the question of the costs of the aborted liquidation proceedings. The appellant accepted that the outcome of the main point will also determine this issue, and it is suggested rightly so. Liquidation proceedings may legitimately be embarked upon to enforce payment of a debt.

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[22] In Chapman, in the passage quoted above, the court expressly envisaged that there was scope for a challenge to the quantum of fees without the client being entitled to insist on prior intercession by the Taxing Master.

[23] Wille's Principles of South African Law, 9th ed, p1063. Relying on ABSA Bank Ltd v Leech NNO, 2001 (3) SA 132 (SCA) they say that no *condictio indebiti* lies absent an error. This latter case held that an error as to the *reason* why an amount owed, is completely irrelevant, and will not constitute an error for the purpose of the *condictio indebiti*. This is not an issue that this court has to decide now.

[24] Payment under protest would also potentially have safeguarded the appellant's right to recover; compare CIR v First National Industrial Bank Ltd, 1990 (3) SA 641 (AD).

[45]It follows that both the main application and the counter-application were rightly dismissed, and that the appeal must accordingly be dismissed. The respondent asked for a special costs order but this was not pressed in argument.

[46]In the result I propose the following order:

(a) The appeal is dismissed with costs, including the costs of senior counsel.

WHG van der Linde
Judge, High Court
Johannesburg

I agree

WL Wepener
Judge, High Court
Johannesburg

I agree, and it is so ordered.

DSS Moshidi
Judge, High Court
Johannesburg

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