29/9/17

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

29/9/17
DATE

SIGNATURE

Date of hearing: 11 September 2017 Date of judgment: 29 September 2017

Case number 41188/2017

In the matter between:

ISAAC PHUMLANI NGOBESE Applicant

versus

EHLERS FAKUDE INC Respondent

JUDGMENT

BRENNER, AJ:

1. In this opposed application for summary judgment, the applicant is advocate Isaac Phumlani Ngobese ("Ngobese"). The respondent is Ehlers Fakude Incorporated, ("Ehlers Fakude"), a professional corporation which carries on practise as attorneys.

2. Ncongwane claims payment of fees in the balance of R101 962,00, including Vat, for services rendered, at the behest of Ehlers Fakude, in motion proceedings involving the latter's client, Deborah Moosa ("Moosa"). The proceedings are cited as Deborah Moosa versus Ronny Moosa and three others under case number 48261/2013. The invoice dated 10 December 2015, initially for a total of R151 962,00, is attached to the summons and particulars of claim.

3. Counsel for Ehlers Fakude made an attempt to supplement its opposing affidavit by asking the Court to permit the introduction of a supplementary affidavit, to amplify its request for the taxation or assessment of the applicants' invoices. This was refused because any supplementation of its papers would offend the peremptory time constraint in Rule 32(3)(b), which prescribes that the opposing affidavit in summary judgment proceedings shall be delivered before noon on the court day but one preceding the day of the hearing of the application.

4. Indulgences of the nature sought by the parties in this application would militate against the purpose of summary judgment proceedings, which are designed to be heard summarily and expeditiously, via a curtailed process which calls for the exchange of one affidavit by each opposing party. For this reason, strict adherence to the requisites of rule 32 is desirable. Any relaxation of its clear requirements would result in the prolongation of the process, and would defeat the objective.

5. Counsel for Ehlers Fakude made an attempt to supplement its opposing affidavit by asking the Court to permit the introduction of a supplementary affidavit, to amplify its request for the taxation or assessment of Ngobese's invoice. This was refused because any supplementation of its

papers would offend the peremptory time constraint in Rule 32(3)(b), which prescribes that the opposing affidavit in summary judgment proceedings shall be delivered before noon on the court day but one preceding the day of the hearing of the application.

6. Indulgences of the nature sought by Ehlers Fakude would militate against the purpose of summary judgment proceedings, which are designed to be heard summarily and expeditiously, via a curtailed process which calls for the exchange of one affidavit by each opposing party. For this reason, strict adherence to the requisites of rule 32 is desirable. Any relaxation of its clear requirements would result in the prolongation of the process, and would defeat the objective of the rule.

7. Ngobese's claim is based on what is considered to be a liquidated amount in money.

8. The particulars of claim advert to an instruction given by Ehlers Fakude to Ngobese on 24 July 2015 to represent Moosa in the proceedings. To this end, he was mandated to consult with Moosa and/or any persons who were well versed with the issues, to draw an application in terms of rule 45A to stay an order by this Court, to draw an urgent interdict application, and to prepare for an appearance in court on 14 and 27 October 2015. It is alleged that it was an implied term of the instructions that Ngobese would be entitled to payment of a fair and reasonable fee for his services.

9. On 10 December 2015, Ngobese submitted his invoice to Ehlers Fakude. The invoice was required to be paid within 90 days of the date of receipt. On 30 December 2015, a part-payment was made to Ngobese, in the sum of R50 000,00. The payment was made by electronic funds transfer by Moosa into a bank account at First National Bank. This is a different bank account from the account reflected in Ngobese's invoice, the latter account being at Standard Bank. Nevertheless, Ngobese's particulars of claim admit that this payment was made in reduction of the claim.

10. When payment of the balance was not timeously made, a letter of demand was sent on 8 April 2016, to inform Ehlers Fakude that, failing payment within seven days, the applicants would report the default of Ehlers Fakude to "the Bar Council". On 3 May 2016, the Pretoria Society of Advocates ("the PTA") sent a written notice to Ehlers Fakude that it would be placed on the list of defaulters in the absence of payment within 10 days from the date of its letter.

11. Attached to the particulars of claim are two letters sent by Ehlers Fakude to Ngobese, on 8 August 2016, and on 4 May 2017, which his attorneys contend constitute admissions of liability for the debt owed to him. This is incorrect. These are letters addressed to advocate Ncongwane SC and Ngobese, in an unrelated case under number 80178/2014. This is not the case which is the subject-matter of Ngobese's claim in this case. These letters are not relevant.

12. Ehlers Fakude's opposing affidavit in the summary judgment proceedings is deposed to by Zithulele Emmanuel Fakude ("Fakude"), a director of Ehlers Fakude. The confirmatory affidavit of Moosa is attached to the opposing affidavit.

13. Three issues are raised. They are traversed ad seriatim.

14. The first issue is that Ngobese had agreed to discount his fee. The operative paragraphs are quoted below:

> *"I am advised by my client that shortly after the delivery of the applicant's invoice to my client, my client and the applicant had a direct telephonic communication regarding the said invoice. I am further advised by my client that it was discussed between the applicant and my client that the applicant shall factor or deliver a revised/discounted invoice either directly to my client and/or to myself as an attorney of record.*
>
> *I am further advised that it was also agreed that my client shall, in the interim, make a direct deposit/payment apparently into the applicant's wife's FNB account, which payment of R50 000.00 was duly made by my client's bookkeeper on 30th December 2015 as confirmed by the attached annexure "EFI2". I also confirm that as at date hereof the applicant has not delivered, either to myself or*

directly to my client, the revised/discounted invoice as earlier promised. This notwithstanding the applicant's promise to do so. Instead the applicant has proceeded and issued summons against the respondent for the "outstanding balance."

15. The second issue constitutes a dilatory defence which relates to a claim for taxation of the invoices. It is set out in the following paragraph of the opposing affidavit:

"I also submit that in the event that this Honourable Court find that the applicant's invoice, as delivered is due, same should first be referred to the Taxing Master of this Honourable Court for the necessary taxation and/or settlement. I further submit that the applicant's invoice as it currently stands is not a liquid document as the applicant has always known that his invoice is disputed by my client, hence the undertaking by the applicant to my client to deliver a revised/discounted invoice."

16. The third issue is procedural in nature, namely, that Moosa should have been joined as a second defendant owing to her *"direct and substantial interest in these proceedings"*, the view being expressed that the outcome of the application would have a *"direct and huge effect on her."*

17. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses fully the nature and grounds of the defence and the material facts relied upon therefor. A holistic approach constitutes the logical starting point in the overall enquiry concerning whether a bona fide defence has been advanced. In **Erasmus Supreme Court Practice, second edition, Van Loggerenberg Volume 2, at D1-388**, the author stated:

"In the exercise of its discretion under the wider test, the court must not look only at the summons in order to decide whether a claim is for a liquidated amount of money, the defence as disclosed in the defendant's opposing affidavit must also be taken into account."

18. In the case of **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)**, the Court held as follows:

"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the

defendant to satisfy the Court of the bona fides of his defence. It will suffice.....if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

19. A further inciteful case is that of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA),** at paragraph 31, my emphasis included:

"The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court."

20. The suggestion by Ehlers Fakude that Ngobese agreed to discount his fee is uncorroborated by any correspondence on the subject, but it is substantiated by the confirmatory affidavit of Moosa. It is unnecessary at this juncture, however, to make any findings on the alleged agreement directly between Ngobese and Moosa in the light of my finding concerning the demand for taxation.

21. Concerning the issue of the non-joinder of Moosa, Ehlers Fakude's affidavit does not suggest that Ngobese concluded an agreement which included a term that Moosa would be directly liable to him for payment of his fees. Absent an express agreement between Counsel and the instructing attorney, it can never be implied that Counsel are obliged to look to the client directly for payment. Vide **Serrurier and another v Korzia and another 2010(3) SA 166 WLD**. The defence based on the non-joinder of Moosa is inherently implausible and lacking in foundation, and must fail.

22. The remaining defence pertains to the fairness of the fees charged, and this is germane to the determination of whether the claim is liquidated, to warrant the granting of summary judgment. An untaxed bill has been found to constitute a liquidated claim. It is not a condition precedent to the launch of an action for a bill of costs to be taxed. However, it is left to the discretion of the Court to determine whether, on the facts of a

particular case, the claim for legal fees is liquidated. In casu, various considerations were taken into account.

23. There is no pre-litigation correspondence from Ehlers Fakude to request taxation, and the part-payment is arguably tantamount to an admission of liability, at least pro tanto. The demand for Ngobese to refer his bill for taxation (I presume it means assessment by the relevant governing body) came at a very late stage, and only after the summons had been served. Nevertheless, in its opposing affidavit, Ehlers Fakude calls for the taxation of Ngobese's invoice, as it is *"disputed"*. The dissatisfaction with the quantum charged by Ngobese is implicit in this statement and, arguably, if the assertions of Moosa are correct, by her request to Ngobese circa December 2015 for a discounted fee.

24. In the enquiry as to whether a genuine, bona fide defence was raised concerning the fairness of the invoice, Ehlers Fakude's supine stance in failing to assail the fairness of the fees directly with Ngobese, and its knowledge of the part-payment made by Moosa may be tantamount to admissions of liability. But they are not dispositive of the matter. The Court cannot without further ado disabuse its mind of the call for taxation in the opposing affidavit. All facts of relevance need to be addressed to determine whether, in the face of the contra-indications, Ehlers Fakude was bona fide, genuine and convincing in calling for the assessment of the invoice, and whether this gives rise to a triable issue, and imposes an obligation on Ngobese to have his invoice assessed before pursuing his claim.

25. A consideration of Ngobese's invoice indicates that his engagement entailed time spent of about 7 days in the aggregate.

26. Ehlers Fakude mentions the possibility of Moosa suffering prejudice if summary judgment were granted. While Moosa was not a necessary party to the action, I am obliged to take account of the potential consequential impact of an adverse summary judgment against Ehlers Fakude, based on the unassessed invoices of Counsel. The possibility, if not probability,

remains extant that Moosa may be sued by Ehlers Fakude for the same amount claimed in this action by the applicants. The argument may well be advanced against Moosa, potentially to her detriment, that the costs of Counsel were found to be liquidated, and therefore fair and reasonable, because summary judgment was granted in Ngobese's favour. Cognisance needs to be taken of the fact that Moosa may call upon Ehlers Fakude to tax an attorney and own client bill of costs in due course, and this bill would have to include the fees of Counsel.

27. A Court should be reluctant to arrogate to itself the functions of a taxing master or a fee assessor, both of whom are suitably equipped with the expertise to examine the details of, and justification for, the work done, including, inter alia, the magnitude and complexity of the case, the time spent, and the results achieved. As a general principle, it is not within the province of this Court, as a Court of first instance, to pronounce upon the fairness of Counsel's fees, where this is disputed. This function falls squarely within the jurisdiction of the relevant fee assessment committee of Counsel. In casu, this appears to be the PSA. Even where an attorney and his client have agreed to a specified hourly rate, the binding nature of the agreement is not absolute, and is not definitive of the fairness of the bill raised. The following cases have endorsed this approach.

28. In **Tredoux v Kellerman 2010(1) SA 160 CPD**, an advocate and his instructing attorney sued for payment of their legal fees, which were rendered for the defendant in a divorce action. The defendant disputed the reasonableness of the fees in a summary judgment application brought against him. The full bench of the Western Cape High Court held that such claims were not liquidated where they involved an enquiry into the nature and extent of the services, and their reasonableness. These matters were considered by the Court as *"not mere matters of calculation"* but fell instead within the purview of the taxing master.

29. The case of **Malcolm Lyons and Munro v Abro and another 1991(3) SA 464 WLD,** involved an unsuccessful application for the judicial review of a decision taken by the Taxing Master to tax off certain amounts from

an attorney and own client bill of costs. The Court found that the Taxing Master is not bound by an agreement in which the hourly rate was specified, where he considered certain work to have been unnecessary and therefore not reasonable. At page 699, the Court stated:

"All in all, therefore, the Taxing Master in my opinion rightly did not regard the client nor, of course, himself, to be bound by an agreement to the effect that the attorneys would be entitled to payment at the rate of R220 per hour for all the work they did in connection with the action, necessary or unnecessary, prudent or prodigal."

30. A relationship between a former attorney and client came to the fore in **Blakes Maphanga v Outsurance Insurance 2010(4) SA 232 SCA.** The attorneys sought to set off monies collected for their former client against untaxed fees and disbursements, on termination of their mandate. The client had called for its former attorneys to tax their fees and disbursements. The SCA held that, flowing from a client's right to taxation of an attorney and own client bill, the amount of an untaxed disputed bill of costs was not a liquidated debt, but one yet to be ascertained by the taxing master. The SCA held, at paragraph 18E (page 241) to 18A (page 242), my emphasis:

"The duties of a taxing master include the duty to determine whether costs have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses. It is his duty to decide whether the services have been performed and he should not close his eyes and ears to evidence which may be readily available to show that any work alleged to have been done was in fact not done. Even where an agreement exists between an attorney and client a taxing master is empowered to satisfy him- or herself that fees related to work done and authorised were reasonable. There are sound reasons for a client's right to insist on taxation and to regard the amount of a bill of costs that has not been taxed as not liquidated. The question whether a debt may be capable of speedy ascertainment is a matter left for determination to the individual discretion of the Judge. In the case of a disputed bill of costs in litigious matters, however, the reasonableness is to be determined by the taxing master and not by the court."

31. While her non-joinder is not a defect in the pending action, on a practical level, Moosa has a residual interest in the outcome. There are sound reasons why an independent body with comparable powers to those of a

taxing master should assess the fees of the applicants. This would serve the interests of litigating parties, who should be able to approach access to justice with the confidence and trust that there are mechanisms in place for the independent oversight of legal fees. Ultimately, it is Moosa who may eventually foot the entire bill for the services rendered to her. The call for the taxation/assessment occurred at a late juncture, in the summary judgment application. However, on Moosa's version, she queried the fee shortly after she received the invoice. Ehlers Fakude should not be deprived of exercising this defence, albeit that it is one which impacts on verification of the quantum of the claim.

32. Based on the relevant facts, taken cumulatively, Ehlers Fakude was genuinely convincing in proving a bona fide, prima facie, triable defence on the merits. Its opposing affidavit contained enough substance to fortify a defence that the quantum of the claim was disputed, and therefore liable to be assessed, and that the claim was not liquidated, as required by Rule 32. Leave to defend in regard to Ngobese's claim should be granted, with the usual costs order, namely that the costs of the application should be costs in the cause of the main action.

33. The following order is granted, namely:

a. the application for summary judgment against the respondent is refused;

b. the respondent is granted leave to defend in the main action;

c. costs shall be costs in the cause of the main action.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG, 29 September 2017

Appearances

Counsel for the Applicant:	Advocate G Bofilatos SC
Instructed by:	Bekker Attorneys
Counsel for the Respondent:	Advocate ASL van Wyk
Instructed by:	Ehlers Fakude Inc Attorneys