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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date:25/07/2022

A Maier-Frawley

CASE NO: 2020/30563

In the matter between:

RAMSAY WEBBER INCORPORATED Plaintiff

and

PHILLIPA ANASTASSOPOULOS Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. The plaintiff seeks provisional sentence against the defendant for payment of an amount of R1,326 686.89 together with interest and costs, in respect of professional legal services rendered to the defendant and disbursements incurred by the plaintiff on behalf of the defendant during the subsistence of its mandate.

2. The claim is founded on a written mandate concluded between the parties as well as a taxed bill of costs containing the taxing master's allocatur. Both the mandate and taxing master's allocator are annexed to the summons. The

existence and authenticity of the written mandate and of the taxing master's allocator is not in dispute on the papers. *Ex facie* the summons, the plaintiff's claim is founded on a liquid document.

3. It is common cause that the defendant appointed the plaintiff as his attorneys for purposes of obtaining legal advice and legal representation in different legal matters. The attorney/client relationship commenced in June 2017 and ended at the end of March 2019 when the defendant terminated the plaintiff's mandate. It is further common cause that the plaintiff invoiced the defendant from time to time during the subsistence of the mandate for services rendered by it to the defendant and disbursements incurred by it on the latter's behalf. The defendant paid each invoice that was presented to him up to the 28th January 2019. On 29 March 2019, the plaintiff rendered its final statement of account (the 'last bill'), which statement reflected *inter alia* all the various payments made by the defendant during the subsistence of the mandate up to 28 January 2019 (in aggregate totalling the sum of R2, 269 304.90), whilst 6 additional invoices[1] rendered after that date (in aggregate totalling R730,423.50), remained due, owing and unpaid.

4. When confronted with the last bill reflecting an amount of R730,423.50 as outstanding, the defendant insisted upon the taxation of the final invoices so that the reasonableness of the charges levied as reflected therein could be assessed. According to the plaintiff, its managing director, Mr Shawn Van Heerden, informed the defendant in correspondence on 30 May 2019[2] that *'If the bill of costs in respect of our charges is to be taxed at your insistence, which I have no difficulty with, kindly be advised that I reserve Ramsay Webber's rights to collect the higher amount should, on taxation, the bill of*

[1] The additional invoices are also referred to as the 'final invoices' in the papers and contained *inter alia* charges for fees levied and disbursements incurred more than a year prior but which had not previously been billed.
[2] See par 3 of Annexure 'A3' at p001-120.

costs [be] *taxed for more than the amount still due by you as reflected in the statement of account.'* The plaintiff thereupon prepared a revised or amended bill of costs for taxation, raising charges for work performed and disbursements incurred since January 2018, which charges amounted, in aggregate total, to a sum exceeding R2 million.

5. Upon being granted a higher allocator in respect of its revised bill of costs, the plaintiff now claims the higher amount awarded in terms of the allocatur (R1,963 059.33) less amounts subsequently paid by the defendant (R636,372.44) for its claim for payment of the sum of R1,326 686.89 in these proceedings.

6. The defendant raised various defences in his opposing papers, however, at the hearing of the matter, only one main defence was pursued, which is that the plaintiff was not, as a matter of law and fact, entitled to redraw its bill of costs (and so replace its last bill) for purposes of taxation, there being no agreement between the parties allowing the plaintiff to increase its charges in an amended bill, and further, on the basis that the contents of the revised bill remained in dispute[3] for reasons given in the opposing papers where various anomalies in the revised bill were demonstrated.

7. The defendant thus contends that the central question arising for determination is whether a firm of attorneys can, after its mandate is terminated, redraw its bill of costs for purposes of taxation by the taxing master and charge its client an additional amount that is far in excess of the

[3] The dispute regarding the contents of the bill concerned the fact that the bill drawn for taxation purposes was *inter alia* not prepared in accordance with the terms of the written mandate that provided for work undertaken by the plaintiff to be charged as a time-based attendance as opposed to a tariff based folio basis, as was done. Such bill also did not reflect certain payments that had previously made by the defendant and as demonstrated in the answering papers did not correlate with the contents of the final invoices in certain respects. In short, various anomalies in the revised bill were pointed out in the defendant's opposing papers, such as to impugn the correctness of the amounts charged therein.

amount that had been charged and invoiced to its client at the time of termination of the plaintiff's mandate.

8. According to the plaintiff, the defendant did not raise the notion that it was precluded from reserving its right to demand payment of whatever the process of taxation would indicate. The defendant's version is that the plaintiff was not entitled to have claimed more than he was entitled to claim under the written mandate[4] or to draw up a different bill for purposes of taxation in order to recover more than that which was originally billed. In this regard, the defendant avers that *'the plaintiff had not, in either the agreement* [written mandate] *or the* [final] *invoices, established and/or reserved for itself the right to charge a higher amount than it had invoiced (or any higher amount) in the event of* [the respondent] *terminating its mandate and/or insisting upon taxation'* and that *'such taxation of the bill as may have taken place pertained to only the fees reflected therein, and not to the presence or absence of underlying contractual (or other) liability to make payment of the fees contained therein and, as such, the bill is not determinative of my liability towards the plaintiff.'*[5]

9. The plaintiff relies on *Hathorn*[6] as authority for its contention that it was permissible for it to have prepared a revised bill for taxation as the defendant had been informed that a different bill would be prepared for taxation and the defendant had not at the time (or subsequently at taxation)

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[4] In terms of the written mandate, the parties agreed that the plaintiff's agreed rates would increase on an annual basis subject to notice. The mandate further contains a no variation clause prohibiting changes thereto in the absence of written agreement by the parties. As no written variation agreement was concluded, no increased rates could be billed.

[5] See paras 29.3 and 29.5 of the opposing affidavit. See too para 32 of the answering affidavit, where the defendant alleges that "*The plaintiff's espoused version is that it offered discounts during the matter (evidenced by, inter alia, the plaintiff's correspondence of 30 May 2019, a copy of which is annexure "A3" hereto). To the extent that such discounts were offered, it was never a term thereof (or of the agreement) that they were liable to be, or capable of being, reversed on either the termination of the plaintiff's mandate or my requiring that the bill be taxed and I certainly never agreed thereto.*"

[6] *Hathorn v Barton* (1922) 43 NPD 504

raised any objection to the bill in its amended form, which exceeded the amount at which it was originally rendered.

10. *Hathorn* upheld the principle established in *Hershensohnn*[7] namely, that an attorney is bound by his first bill delivered, however, the court recognised an exception thereto in circumstances where the client was informed that the bill which was being rendered was in effect a tentative bill that would be superseded by a bill prepared for the purpose of taxation, if taxation was required, and where the client did not object to the bill in its amended form, once received.

11. Counsel for the defendant argued at the hearing of the matter that the facts in *Hathorn* are distinguishable from the facts *in casu.* In *Hathorn*, the attorney had delivered a bill of costs to his client, the respondent, which consisted of fees and disbursements, and had informed the respondent that he was prepared to reduce to the sum of 33 guineas, the items shown on the bill as being due for fees, but that if the respondent desired to avail himself of his right to have the bill taxed it would have to be redrawn for that purpose and must be returned. The respondent returned the bill with a request for taxation.

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[7] *Hershensohnn v Martens* 1915 NPD. In this case the court considered whether an attorney is entitled to substitute a bill prepared for taxation for an account not prepared with a view to taxation, and whether such substituted bill is the bill which should be taxed.

Dove Wilson JP held that "*To hold that where a solicitor has delivered his bill, he may, as a matter of course, when he is met with a demand for taxation, withdraw that bill and substitute another, would be, I think, to open the door to abuse. The rule must be that he is bound by his bill as delivered. It may be that in special circumstances the rule may be departed from and amendment allowed. What these special circumstances may be and what procedure they may entail are matters which do not arise in this application.*"
In a concurring judgment, Broome J held that "*The case of Baker & Laughton v Bond (7 NLR 206) is at any rate authority for this, that when a later and larger bill has been substituted for an earlier and smaller bill for taxation as against a client, the amount to be allowed in the result is to be no more than that originally claimed and sued for. Upon the ground suggested by the JUDGE PRESIDENT I agree that it would be dangerous to hold that a bill of costs can be withdrawn and another and a larger bill submitted for taxation as claimed in this application.*" (emphasis added)

12. The facts in the present matter reveal that on 29 March 2019 the plaintiff rendered its last bill reflecting an amount owing in terms of its final invoices raised during January 2019, February 2019 and March 2019, without any qualification or any reservation of its right to amend the bill should taxation be required, having accompanied the last bill. Thereafter, on 30 May 2019 the plaintiff *ex post facto* reserved its right to *'charge the higher amount should its bill of costs be taxed at a higher amount.'*[8]

13. I agree with counsel for the defendant that the facts *in casu* are not aligned with the facts in *Hathorn*. The plaintiff's reservation of rights as recorded in its letter of 30 May 2019, contains no express intimation that a different bill would be prepared for taxation (based on different rates than those permitted in terms of the written mandate)[9] nor was the last bill (presented on 29 March 2019) stated to be a tentative bill which would be amended and increased should the respondent insist on taxation. Rather, the implicit intimation *ex post facto* was that a different bill would be prepared *because* the respondent had insisted on taxation. As a matter of fact and law therefore, the exceptional circumstance recognised in *Hathorn* do not find application on the facts of this matter. In my view, the probability of success in the principal case on the respondent's central defence (relating to the plaintiff's entitlement to present a revised bill for taxation and the defendant's concomitant liability to pay for increased charges levied therein, as taxed) has been shown to be against the plaintiff.[10] This conclusion is fortified by facts demonstrated both during argument and in the opposing

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[8] See par 19 of the replying affidavit.

[9] In terms of the written mandate, the parties agreed that the plaintiff's agreed rates set out therein would increase on an annual basis subject to notice being given to the client. The mandate further contains a non-variation clause that prohibits variations in the absence of written agreement between the parties. The papers are silent about whether any notice of increased rates was given to the respondent, and no written variation to the mandate was produced in these proceedings. The plaintiff was not thus entitled to raise charges at rates other than those reflected in the mandate in its bill of costs.

[10] See *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a the Land Bank and Another* 2011 (3) SA 1 (CC) at par 21.

papers to the effect that, contrary to the plaintiff's allegation that the revised bill had been prepared based on the contents of the final invoices, the revised bill did not accord with the contents of the final invoices in all respects.

14. It was argued on behalf of the plaintiff at the hearing of the matter that by virtue of the failure by the defendant's cost consultant to raise any objections to the revised bill or its contents at the taxation, the amount of which had been settled by agreement between the parties' respective cost consultants, the defendant should be taken to have acquiesced, by silence, to the basis upon which the revised bill had been drawn and the agreed amount as endorsed on taxation. [11] In *riposte*, counsel for the defendant argued that no case had been made out in the papers for a finding that the defendant had agreed to assume the risk of paying a higher amount on taxation by way of acquiescence by silence. I am inclined to agree. All the plaintiff had pleaded in its replying affidavit was that the defendant did not raise the notion that it was precluded from 'reserving its right to demand payment of whatever the process of taxation would indicate.' That is a far cry from pleading (or establishing) that the defendant had failed to object to the plaintiff redrawing its last bill on an agreed basis which included (i) a redrawing of the bill without limitation to the entries appearing on the final invoices and (ii) on the basis that the original bill rendered was merely

[11] It is not in dispute that the parties' respective cost consultants had agreed on the amounts depicted in the bill after making certain deductions therefrom, however there is a dispute between them as to whether or not the defendant's cost consultant (Gertzen) had been misinformed and misled by a misrepresentation made by the plaintiff's cost consultant (Van Dyke) as to the extent of the charges raised in the final invoices and thus the extent of the defendant's liability for the amount depicted in the revised bill, which, as is common cause, was about three times more than the amount depicted as owing by the defendant in the final invoices. According to Gertzen, notwithstanding that he had pointed out that the bill was inconsistent with the written mandate, Ms Van Dyk (his counterpart) represented to him that the bill hac nevertheless been drafted for an amount that was substantially less than that which was purportedly still due and owing by the defendant. Moreover, on Gertzen's version, he was not permitted by Ms van Dyk, to peruse the plaintiff's files. Needless to say, Gertzen's version of the events is disputed by the plaintiff.Ultimately, the trial court in the principal matter will have to determine this dispute by considering the credibility of these witnesses. It also appears that Gertzen and his counterpart may have been unaware that the legal basis for the revised bill was questionable.

tentative. On the plaintiff's own version, it had mandated its cost consultant to draw a bill of cost based on the scale as between attorney and own client *'limited to the entries that appeared on the final invoices,'* however, as the defendant demonstrated in his opposing papers, the revised bill as drawn did not in fact correlate with the entries appearing on the invoices.

15. There is no dispute between the parties that the taxing master's function is to determine the amount of the liability, *assuming* that liability exists.[12] It is not the function of the taxing master to decide whether a party is liable to another party, whether in terms of a written mandate or in in terms of the common law. I have already found that the facts peculiar to this matter do not appear to me to support a finding that the plaintiff was entitled to redraw its bill reflecting increased charges and to present such bill for taxation. In terms of the relevant authorities, this carries the consequence that the defendant could legally and factually resist liability for the increased aggregate total amount appearing therein, notwithstanding taxation thereof. The papers do not suggest that either the parties' respective cost consultants or the taxing master considered the question of the legality of the revised bill but rather assumed the existence of the defendant's liability in relation thereto.

16. Accordingly, it follows that provisional sentence must be refused and the defendant must be allowed to enter the principal case to pursue its defences untrammelled by having to pay the amount claimed upfront. The general rule is that costs on the party and party scale would ordinarily follow the result. The defendant seeks a punitive costs order on the basis that the plaintiff employed abusive tactics in its flagrant pursuit of an untenable claim. I do not agree. Although it is true that the court *Hershensohnn* cautioned against allowing an attorney as a matter of course, when he is met

[12] See *Martens v Rand share and Broking Finance Corporation (Pty) Ltd* 1939 WLD 159 at 165.

with a demand for taxation, to withdraw his original bill and substitute another, stating that this would open the door to abuse. The court however went on to say that '*It may be that in special circumstances the rule may be departed from and amendment allowed. What these special circumstances may be and what procedure they may entail are matters which do not arise in this application.*' In my view, the plaintiff pursued an argument for the grant of provisional sentence based on a genuine belief that the facts of this matter were such as to warrant a departure from the general rule enunciated in *Hershensohnn,* precisely because it considered the facts of this matter to be similar to the facts that were found in *Hathorn* to constitute such a special circumstance. I cannot lose sight of the fact that the plaintiff was put to the expense of having to counter various additional defences raised by the defendant in his opposing papers, but which were not pursued at the hearing of this matter. In these circumstances, I do not think it would be fair or just to impose a punitive order for costs.

17. Accordingly, the following order is granted:

ORDER:

1. Provisional sentence is refused with costs.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	10 May 2022
Judgment delivered	25 July 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 25 July 2022.

APPEARANCES:

Counsel for Plaintiff:	Adv HM Viljoen
Attorneys for Plaintiff:	Ramsay Webber Inc Attorneys
Counsel for defendant	Adv HP Van Nieuwenhuizen (Heads of argument prepared by Adv DS Dodge)
Attorneys for defendant	Steve Merchak Attorneys