IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPORTABLE: NO/YES

OF INTEREST TO OTHER JUDGES: NO/YES

REVISED.

SIGNATURE DATE 6/12/2019.

CASE NO: A213/18

WEAVIND & WEAVIND INCORPORATED **APPLICANT**

and

DAVID MANLEY N.O. **RESPONDENT**

JUDGMENT

N V KHUMALO J

Introduction

[1] This is an appeal against the whole judgment of the learned magistrate Khoele delivered on 22 March 2018 in the Magistrate Court for the district of Pretoria, granting the Respondent, Mr David Manley, a Summary Judgment against the Appellant for payment of an amount of R72 039, 31 together with interest thereon calculated at the rate of 10.25% per annum, payable with effect from 28 November 2017 plus costs.

[2] Mr David Manley ("Manley") was previously employed by the Appellant, Weavind and Weavind Incorporated, a firm of attorneys, as a partner and Director. On 20 August 2015 whilst still in the employment of the Appellant, Manley signed an acceptance of trust as an executor in the estate of the late Mr Orlando Simao Godinho ("the deceased estate") in which

he named the Appellant as the agent who was to assist him in the management of the deceased estate. Ms Annemarie van Schalkwyk ("Van Schalkwyk"), an employee of the Appellant assisted him to administer the estate on behalf of the Appellant.

[3] On 29 February 2016 Manley left the employment of the Appellant. At the time the administration of the estate was not yet finalised and he was yet to receive his letters of executorship. The letters of executorship were duly issued on 24 May 2016. Subsequent to receiving the letters of executorship, Manley signed a power of attorney on 10 June 2016 appointing Van Schalkwyk as his agent and attorney to continue on behalf of the Appellant, to assist him with the administration of the deceased estate.

[4] In the summons that Manley sued out of the Magistrate Court, Manley alleged inter alia, that:

> [4.1] On termination of his employment with the Appellant on 29 February 2016, it was expressly, alternatively impliedly, alternatively tacitly agreed with the Appellant that he would pay the Appellant its reasonably taxed or agreed fees for the services rendered by Van Schalkwyk upon the distribution of the deceased's estate, alternatively upon an earlier date as may be agreed upon by the parties.
>
> [4.2] No other person was appointed as executor of the deceased estate or acquired a right to the executor's remuneration as contemplated in s 5 (1) and (3) of the Administration of Estate Act 66 f 1965 except himself. The estate has not yet been finalised or distributed, therefore executor's remuneration not yet payable.
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> [4.3] on 10 March 2017, he commenced a discussion concerning an agreement in respect of the fees to be charged by the Appellant. On no response, he on 5 April 2017 made an offer of a fee sharing arrangement which Appellant rejected.
>
> [4.4] he, as a result on 2 October 2017, terminated the Appellant's instruction as his agent and requested that Appellant render an account for the work done for his consideration. Appellant instead on 11 October 2017 made a proposal in respect of the fees payable. Manley rejected it and made a counterproposal subject to a proviso that, failing a settlement on the fees, the Appellant should make arrangements for the taxation of its bill. The Appellant then withdrew its settlement proposal.
>
> [4.5] **With the parties unable to settle the fees payable, he demanded that Appellant tax its costs. The Appellants advised him by letter dated 27 November 2017 that it will not tax its costs but appropriate an amount of R72 039 as its fees and make the file content available to him, challenging him to institute an action for the recovery of the appropriated amount.**
>
> [4.6] The Appellant confirmed that there was no written mandate per 20 August 2015, however alleged that because Manley "left the firm" he cannot lay claim to a fee ex-post facto".
>
> [4.7] there is no agreement between the parties in respect of the fees to be charged.

[4.8] he denies that the amount appropriated by the Appellant constitute a fair and reasonable fee for the services rendered and **pleads that such amount has been retained and debited by the Defendant unlawfully.**

[5] Manley sought a Summary Judgment application only on the monetary claim as was granted in the court a quo. He had abandoned the rest of the prayers.

[6] On Opposing the Application, the Appellant, alleged in defence to the claim that:

[6.1] Manley appointed Van Schalkwyk on 25 August 2015 as per the annexed document (which is the letter of acceptance of executor) signed by Manley, in terms of which the Appellant was appointed as Manley's agent in the estate.

[6.2] The power of attorney does not refer to fees and was only a de *facto* confirmation of the appointment of Van Schalkwyk which had already taken place on 20 August 2015. Manley was supposed to pitch his claim to entitlement to fees he wishes to recover reliant on this document and failure to do so constitutes a failure to comply with Rule 6 (6).

[6.3] **Van Schalkwyk denied that a fee arrangement was agreed upon at the time but for an implied term that all work done by her would be done in terms of the prescribed tariff for the benefit of the Appellant. The fact that there was no fee agreement is self-evident from the fact that the instruction was given to Van Schalkwyk whilst Manley was in the employ of the Appellant and the only logical conclusion** (which was also a clear and unequivocal understanding with no other interpretation to be inferred or implied to Manley's instruction to Van Schalkwyk) being that **fees for the administration of the estate was to fall due to the Appellant,** which was not changed by the fact Manley left the employ of the Appellant.

[6.4] **There is no legal basis for its fees to be submitted for taxation, the services rendered being strictly according to the tariff. They were set out in the submitted liquidation and distribution account lodged at the Master's office on 27 March 2017 and approved by the Master on 27 March 2017.** The fee agreement or arrangement of the 29th February 2015 as alleged by Manley is denied which is an issue that must be referred to trial.

[6.5] **Manley failed within the invited 30 days period to either institute action for payment of the appropriated amount of R72 039.31 against the Appellant or initiate the taxation process which he has continually claimed he is entitled to do.**

[6.6] There is a plethora of disputes between the parties of which Manley was well aware but has persisted with the Summary Judgment Application as a result the Application must be dismissed.

Court a quo's finding on the Application

[7] The court a quo had to determine if the Appellant discloses a bona fide defence to Manley's claim that would constitute a defence to the action if proved at trial. It indicated a threshold that had to be crossed by the Appellant as the one set in the matter of *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at page 423 which is as follows:

[7.1] Whether the Respondent has disclosed the nature and grounds of his defence, and;

[7.2] Whether on the facts so disclosed, the Respondent appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.

[8] The court a quo, concluded that the relationship that subsisted between Manley and the Appellant as pleaded was that of an attorney and client, which mandate was accordingly terminated on 2 October 2017. Subsequent to termination of the mandate the Appellant debited certain monies from the estate account, to wit the R72 039.39 without any **authorisation** and **justification to such monies.** Manley **sought to recover the amount** by seeking in the summary judgment proceedings an order that Respondent restore the aforesaid amount to the deceased estate account.

[9] The fact that Appellant rendered certain services and was therefore entitled to legal fees in respect thereof was common cause. The learned magistrate however considered that the Appellant did not deny that Manley demanded that such fees be ascertained by taxation or agreement prior to the deceased's estate being debited. He therefore found that in the absence of the taxed bill of costs and there being no agreement between the parties of a fixed amount, the reasonableness of the fees levied by the Appellant was not established. Particularly as Manley had disputed the Appellant's claim to debit the deceased's estate account with its legal fees without his consent or having them taxed. He had pointed out that the Appellant is not an executor of the estate and consequently not entitled to executors' fees.

[10] The learned magistrate further took note of the contrary argument by the Appellant that placed on issue the terms as alleged in Manley's particulars of claim, specifically Appellant's assertion that there was no agreement that it was to be paid reasonable taxed or agreed fees but an implied term that the fees would fall due on a prescribed tariff, imploring the court to refer the matter to trial on that ground. The court indicated that reference by the Appellant to a prescribed tariff, is, nothing but an entitlement to reasonable fees in respect of work done, with the tariff being the determinable factor of what is reasonable and fair, as argued by Manley. Therefore, in the absence of an itemised statement of the Appellant's attendances, it cannot be said that any fee levied in conjunction therewith is reasonable. The learned magistrate found that Appellant's assertion of an implied term that a prescribed tariff is applicable, supports Manley's argument that the bill of costs bar an agreement, was to be taxed prior to the deceased estate being debited.

[11] He furthermore held that the executor is the only one responsible for payment of the liabilities of the deceased estate from the estate account. As a result authority having been terminated for Appellant to administer the estate, nothing entitles it to debit the estate account and any such action is unlawful or contrary to acceptable practices. Appellant's debiting and retention of the money without Mnaley's consent, after termination of his mandate was unlawful.

[12] The court therefore found that the Appellant has failed to either in whole or in part raise a defence which is bona fide and good in law against Manley's claim.

Appeal

[13] The Appellant's grounds of appeal, as amended, are that the court a quo misdirected itself when:

[13.1] **it found that the fees are due to Manley as a result of an agreement entered into on 29th February 2016** as pleaded in his particulars of claim when such is vague and embarrassing as it made no reference to where the agreement was concluded and who represented the parties, therefore excipiable.

[13.2] by finding that Manley was entitled to payment of the R72 039 which in effect disallows Appellant of any amount in respect of the administration of the deceased estate when Manley's particulars of claim clearly stated **that Appellant would be entitled to a reasonable or taxed fee, when Manley himself pleads that the full amount would not be payable to it.**

[13.3] **by incorrectly holding that the fee to which the Appellant would be entitled in terms of the Administration of Estates Act, constitutes a tariff or a price list in terms of which the Appellant had to set out and record its attendances against the aforesaid price list and its failure to do so therefore did not constitute a *bona fide* defence.**

[13.4] by finding that Rule 33 (8) finds application to the facts in *casu*, governing the position between the Appellant and Manley, therefore the Appellant **was under an obligation to supply Manley with an itemised account,** alternatively to apply an agreed tariff to an itemised billing that would then form the basis for a fair and reasonable fee payable to the Appellant and that in the absence of an itemised statement of Appellant's attendances, that it cannot be suggested that any fee levied in conjunction therewith is reasonable, **when in actual fact the position between the Appellant and Manley is governed by the provisions of the Administration of Deceased Act which does not require a fair and reasonable fee** but entitles the Appellant to a fee based on the gross value of the assets of an estate and the income accrued after the death of the deceased.

[13.5] By finding that the Appellant's affidavit does not to set out the nature and grounds of its defence without dealing with the nature and grounds of defences as advanced by the Appellant.

[14] In its heads of argument the Appellant proceeded to raise as grounds of appeal the following new issues *in limine*, that were not mentioned in the affidavit resisting summary judgement:

[14.1] Manley's affidavit in terms of Rule 14 does not constitute an Affidavit as contemplated in the subrule in that it has not been properly commissioned as required in terms of s 32 (2). It therefore does not constitute an affidavit for the purposes of a Summary Judgement as it makes no mention of the fact whether the person who administered the oath made the necessary enquiries and the Deponent had any objection to taking the prescribed oath. In addition, the Commissioner of oath does not indicate her designation or the area for which she holds her appointment or her office if she has been appointed ex officio.

[14.2] The amount claimed by Manley does not constitute a liquidated amount as contemplated in Rule 14.

[14.3] The particulars of claim are vague and embarrassing as they refer to the agreement on 29 February 2016 and that of 10 June 2016 without indicating if the one of the 10 June 2016 was the continuance of the agreement of 29 February 2016. The particulars also pleads another separate agreement dated 10 June 2016 without indicating if the first agreement still endures.

[14.4] a bona fide defence has been disclosed

New issues raised on appeal

[15] The Appellant argued that in so far as it has raised these new issues for the first time in its heads of argument, it is justified to do so without having mentioned them in its affidavit resisting summary judgment, referring to *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592E-H. Mr Boot, Appellant's Counsel has failed to indicate the relevance of this case to this argument.

[16] Nevertheless, the raising of complaints for the first time *in limine,* as points of law during the hearing of the Application would normally be allowed even if they were not pleaded or raised in the Answering Affidavit; see *Arends v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 © when Corbett, J, as he then was, held that a Defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the Plaintiff's application merely because he has not referred to these issues in his opposing affidavit. The learned Judge at 314B C observed as follows:

> "Where the attack is upon the ground that the Plaintiff's particulars of claim do not substantiate a valid cause of action, then, in my view, this is strictly a defence and it does not fall within the ambit of rule 32 (3) (b) regarding the Defendant's obligation to fully disclose his defence. It raises rather the question as to whether the Plaintiff has complied with rule 32 (1) and (2) relating to the requirements of an application for summary judgment."

[17] The same approach was followed in *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T) at 107 *C E and Transvaal Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W). According to Herbstein and Van Winsen in the Practice of the High Courts of South Africa 5th edition Volume 1 at P537, a Defendant can raise a defence that the summons issued at the instance of a Plaintiff's is defective or open to exception, which defence according to the authors does not need to be canvassed in the Defendant's affidavit resisting summary judgment.

[18] In *casu* not only were the new issues *in limine* not raised in the affidavit resisting summary judgment but it was also neither raised during the hearing of the Application in the court a quo nor by way of a Notice to Appeal. It was only raised in the Appellant's written heads of argument in the Appeal. However for the reason that an inherently defective summons or particulars of claim cannot sustain a summary judgment or be corrected of its defectiveness by overlooking or disregarding the defect, I am not persuaded that there is justification for not allowing the raising of these *limine* issues for the first time on appeal and for them to be considered. They have been adequately responded to by the Respondent. Any

prejudice that may be suffered by the Respondent if the *in limine* complaints are upheld may be compensated by an appropriate order for costs; see *Borman en De Vos NNO v Potgietersrusse Tabbakkorporasie Bpk* 1976 (3) SA 488 (A) at 157C-G. In that case the validity of the issues raised *in limine* have to be determined first since if upheld, they have the effect of reversing the court a quo's decision on the merits.

Legal framework

Manley's Affidavit's non-compliance with Rule 14 of the Uniform Rules of Court

[19] The Regulations Governing the Administering of an Oath or Affirmation, GN R3619, 21 July 1972 (the regulations) promulgated in terms of s 10 of the Justices of the Peace and Commissioners Of Oaths Act 16 of 1963 are merely directory and not peremptory; see *Absa Bank v Botha NO* 2013 (5) SA 563 (GNP); *S v Msibi* 1974 (4) SA 821 (T) at 830. The court has got a discretion to refuse an affidavit which does not comply with the Regulations subject to whether or not there has been substantial compliance with the Regulations.

[20] Appellant's contention that Manley's affidavit does not constitute an Affidavit as contemplated in terms of Rule 14 of the Uniform Rules of Court and required in terms of Rule 32 (2) of the Magistrate Court Rules for the purposes of a Summary Judgement, is based on the fact that the affidavit makes no mention of whether the person who administered the oath made the enquiry if the deponent knew and understood the contents of the declaration; has any objection to taking the prescribed oath and if he considers the prescribed oath to be binding on his conscience. Furthermore the Commissioner of oath did not indicate her designation or the area for which she holds her appointment or her office if she has been appointed *ex officio*. The Appellant therefore argues that the Affidavit fails to meet the requirements of Rule 14 which is a *sine qua non* to an application for summary judgment and constitutes nothing more than a statement.

[21] The factual position is that the Commissioner of Oaths has indeed confirmed that the deponent swore and acknowledged to him that he knows and understood the contents of the affidavit that they were true and correct and that he considers the oath to be binding on his conscience. The assertion substantially covers the enquiry on the deponent's attitude towards taking an oath. The stamp of the Commissioner of Oaths that appears next to the signature constitutes of the Commissioner's full names and address that indicate her area of designation. The only aspect left out is her official designation.

[22] In my view, having regard to the fact that the regulations are merely directory not preremptory, there has been substantial compliance with the regulations. I exercise my discretion in favour of acceptance of the Affidavit.

Vague and embarrassing particulars of claim

[23] In terms of s 23 of the Uniform Rules of Court, an exception is a legal objection to the opponent's whole pleading that it is inherently defective. An exception that it is vague and embarrassing is therefore not directed at a particular paragraph within a cause of action, which must be demonstrated to be vague and embarrassing but strikes at the formulation of the whole cause of action and not only its legal validity; see Erasmus Superior Court Practice Pb1 154. Therefore where a pleading is found to be excipiable summary judgment cannot be granted.

[24] It therefore goes without saying that in order to ensure that a Summons is not excipiable on the ground that it does not disclose a cause of action, the Respondent must set out all material facts with sufficient particularity in order to justify the legal conclusion in relation to the relief sought.

[25] In addition, causes of action as also indicated by the Appellant, are not in the first instance dependent on the questions of law. They require the application of the legal principle to a particular factual matrix. The test on exception being whether on the readings of the facts no cause of action is made out; see *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O'Farrell NO and Others* [2013] 4 All SA 598 (KZD).

[26] Appellant's contention is that the court a quo found that the fees are due to Manley as a result of an agreement entered into on 29th February 2016 as pleaded in his particulars of claim when such is vague and embarrassing as they make no reference to where the agreement was concluded and who represented the parties, therefore excipiable. He also pleads in his particulars another separate agreement dated 10 June 2016 without indicating if the first agreement still endures.

[27] In addition, the Appellant argues that Manley after that pleads that there was no agreement concluded which is contrary to the allegation that an agreement was entered into on 29 February 2016.

[28] The court a quo found with reference to Manley's whole formulation of the cause of action (factual matrix) that the relationship between the appellant and Manley as pleaded by Manley was that of attorney and client. It arose from Appellant's mandate prior thereto on 29 February 2016. It was then extended by the power of attorney that Manley signed on 10 June 2016 in his capacity as the appointed executor, the purpose of which was to facilitate Appellant's continuance acting as Manley's attorney or agent, since he was no longer a partner/director of the Appellant at that time. He had also left the employ of the Appellant before the administration of the deceased estate and his appointment was finalised. The power of attorney is attached to the particulars and self- explanatory. It indicates by who, when and where it was signed and for whom it was intended. Therefore there is no ambiguity or vagueness.

[29] Manley has specifically alleged that it was agreed between the parties expressly, alternatively impliedly or tacitly that the Respondent would pay the Appellant its reasonable fee or agreed fees for the services rendered by the Appellant. The negotiations for an agreed fee subsequently failed and the mandate was terminated as set out in his particulars. As a result there was no agreement on the fees to be paid hence, as pleaded on paragraph 9, Manley demanded taxation. The termination and demand was prior to Appellant's appropriation of the judgment amount. It is the basis of Manley's recovery claim. There is therefore no vagueness or ambiguity in Manley's pleading of the cause of action.

[30] The Appellant's entitlement to reasonable fees in respect of work done is logically as pleaded by Manley, that, since the parties could not agree on a fixed amount, and there being a demand for taxation, the tariff would be a determinable factor of what is reasonable and

fair. Therefore for the establishment of the reasonableness of Appellant's fees the Appellant has to render an itemised bill to be taxed, from which the fairness and reasonableness of the fees would be determined. In the absence of an itemised statement of the Appellant's attendances it cannot be said that any fee levied in conjunction therewith is reasonable.

[31] An attorney's cause of action for fees and disbursement accrues when his mandate has been performed and not when his bill of costs has been taxed; taxation being not a prerequisite to a client's liability *Benson v Walters* 1981 (40 SA 42 © at 49 C –D and *Benson v Walters* 1984 (1) SA 73 (A) at 86C. In Superior Courts practice taxation is therefore not a prerequisite for the institution of an action on a bill of costs as between attorney and client, **but if a client insists on taxation**, the action cannot proceed until the bill has been taxed; see *Benson* at 85C –D. Appropriation of funds from the deceased estate account without the consent of the executor when there is a dispute would therefore be unlawful.

[32] Taxation is merely a method whereby the reasonableness of the fees charged by one of the officers of the court is prima facie determined by another, where this is put in issue by the client; see *Benson* 1981 (4) at 49C. In terms of this s 80 (4) the same applies in magistrate's court practice. If an attorney sues his own client upon an untaxed costs, the Defendant can apply under this section for a stay of proceedings until they are taxed; see *Scheepers v Krog* 1925 CPD 9 at 11 -12.

[33] According to Appellant, Van Schalkwyk denies that a fee arrangement was agreed upon at the time, pointing out that there was an implied term that all work would be done in terms of the prescribed tariff for the benefit of the Appellant. It argues that the fact that there was no fee agreement is self-evident from the fact that the instruction was given to Van Schalkwyk whilst Manley was in the employ of the Appellant. According to it the only logical conclusion is that fees for the administration of the estate was to fall due to the Appellant, which did not change when Manley left the employ of the Appellant. This argument is in line with what is pleaded by Manley in any case that his claim is not based on any contract as none was agreed upon.

[34] There was therefore no misdirection by the court a quo to have found that Manley's cause of action was properly pleaded and competent for the court to have granted the Summary Judgment.

[35] In respect of the argument that the prayer as granted was not justified as Manley agrees that the Appellant would have been entitled to its reasonable taxed or agreed fees as agreed on 29 February 2019. The Appellant has refused taxation after the parties could not agree on a fee. What is meant is that authorised payment of Appellant's attorney fees could only be by consent of the executor and entitlement to payment thereof only arises after taxation or an agreement on the amount. In addition, the Appellant is not entitled to an executor's commission even if the amount thereof was approved by the Master in accordance to the tariff applicable in the Administration of Estates. Only Manley would be entitled to an executor's commission which is so even where the work is performed by another and the executor has agreed with such party to receive a share of the other's fees, or where the work is performed by a firm of which the executor is a partner; see *Niewoudt v Estate Van der Merwe* 1928 CPD 486.

[36] The Appellant's argument that Annexures H to M attached to the Respondent's particulars of claim constitute *facta probantia,* are irrelevant, vexatious and discloses a defence insofar as the final Liquidation and Distribution Account was already lodged with the Master of the High Court and not objected to by Manley, make it incompetent for the Court to grant Summary Judgment, is ill-advised. The attorney and client fees as between Manley as the executor and the Appellant are to be determined by taxation. It is clear from Manley's particulars that the correspondence was attached for the purposes of illustrating that there being consensus that the Appellant earned the fees, the mandate to act as agent terminated, the negotiations that followed to try and agree on a fee having failed and a demand for taxation made, rendered the appropriation of the amount from the estate account, without authorisation, unlawful.

Claim not founded on a liquidated Amount.

[37] Under Rule 14 of the Magistrate Court Rules of Court, Summary Judgment may be granted upon claims for a 'debt' or 'liquidated demand.' In High Court practice summary judgment may also be granted upon a claim for a liquidated amount in money, as per provisions of Rule 32 (1) (b) of the Uniform Rules of the High Court, basically being an amount which is either agreed upon or is capable of speedy and prompt ascertainment. Corbett J in *Botha v Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (C) put the test as follows:

> '[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation'.

Consequently the decisions of the Superior Courts upon applications for Summary Judgement are a guide to the Magistrate Court.

[38] The decision as to whether an amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case: see *Fatties Engineering Co (Pty) Ltd v Vendic Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738; *Whelan v Oosthuisen* 1937 TPD 304 at 311. Although Sutherland J in *Standard Bank of South Africa v Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) at 911 -94B was critical of the fact that the question of liquidity was left to the discretion of the court, opining that liquidity should be a hard fact, he however acquiesced to the binding effect of the weight of authorities to that effect.

[39] Manley's claim is for payment of the exact or specific sum of money that was unlawfully appropriated by the Appellant clearly known to both parties to be the amount of R72 039.31. Appellant is obligated to pay the money back as its appropriation was established to be unauthorised and unlawful. The amount is easily ascertainable as Appellant is not entitled to any payment until the amount has been agreed upon or taxed, especially in an instance where the fees are disputed and a taxation has been demanded. The Appellant refers to a bill of costs that does not exist, arguing that the amount to which Appellant is entitled in terms thereof should be subtracted from the appropriated amount, which then makes Manley's claim unliquidated. There is no bill of costs by the Appellant that was tendered for taxation or otherwise. The allegation is therefore incongruous and has no merit.

[40] Taking into consideration the particulars of claim, the defence as disclosed in the Appellant's Answering Affidavit, Manley's claim is clearly for a liquidated amount in money, and not affected by Manley conceding that the Appellant has earned legal fees in the matter.

Bona Fide Defence

[41] In determination of a *bona fide* defence the test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by the court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment; see *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423G.

[42] The court has an overriding unfettered discretion whether on the facts averred by a plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial, such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met; see *Mahomed Essop (Pty) Ltd v Sekhukhulu and sons* 1967 (3) SA 728[22]. Referring to the extraordinary and drastic nature of the summary judgment remedy in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A), Corbett JA reasoned as follows:

> "The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law."

[43] The Appellant contends to have disclosed a *bona fide* defence in its denial that Manley's claim is founded in contract concluded on 29 January 2016 or 10 June 2016 in terms of which he alleges to have instructed the Appellant to assist it with the administration of the deceased estate, and that such services was to be rendered by it at a reasonable taxed or agreed fee. It points out that Manley is not entitled to rely on any of these agreements by virtue of the fact that a preceding agreement was concluded between the parties on 20 August 2015, and the signing of the power of attorney was merely a confirmation of that agreement. Appellant denies that any agreement was concluded either on 29 February or 10 June 2016, and argue that the terms alleged by Manley actually came into existence on 20 August 2015 and governs the position between the parties in so far as a payment for services was concerned, which is the implied terms that all work done by the Appellant was to be done on the terms of the prescribed tariff as referred to in the administration of Estate Act 1965 and therefore that Appellant would be entitled to charge a fee based on the prescribed tariff.

[44] The issue raised by the Appellant has already been dealt with in the preceding paragraphs that deal with the alleged excipiability of Manley's particulars of claim. It should however be pointed out that the document signed by Manley on 20 August 2015 is a letter in Acceptance of Trust as Executor, that is completed on application for appointment as an Executor. He in the application named the Appellant, his firm at the time, to be his agent. Van Schalkwyk is not mentioned in the document. Manley's *de facto* appointment as executor only happened on 24 May 2016 when he was issued with letters of executorship, which is after he had left the Appellant's employment and Van Schalkwyk no longer under his

authority. It is however common cause that Van Schalkwyk assisted Manley with the administration of the estate. Manley therefore issued a power of attorney for Van Schalkwyk as an employee of the Appellant, to continue to assist him as the executor/ client of the firm. The mandate was cancelled on 2 October 2017.

[45] The existence of the Acceptance of Trust does not answer to whether or not the appropriation or holding over of the money by the Appellant from the deceased estate account without the consent of the executor was justified and lawful as Manley's claim was not based on that letter. The Appellant has failed to proffer a reply indicating on what basis it appropriated the money after its mandate was terminated and it has refused to tax its legal fees.

[46] The court a quo was therefore not misdirected in its finding that the Appellant's Affidavit resisting Summary Judgement fails to raise a defence either in whole or part that is *bona fide* and good in law, against Manley's claim for repayment of the money to the deceased estate account. The entering of Summary Judgment was therefore justified.

It is therefore ordered;

1. The Appeal is dismissed with costs.

SECOND JUDGEMENT

[47] I have read the judgment that Mokose J ("second judgment") prepared. In comparison, whilst the main judgment deals in detail with all the issues raised and the whole evidence (including documentary) to reach its conclusion, the second judgment approaches the issues raised selectively and the evidence in a generalised manner. It also misreads the implication of certain legal documents.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

MOKOSE J

[1] I have read the Judgment prepared by my sister, Khumalo J. I cannot agree with the reasoning in the judgment but do concur in the conclusion.

[1] This is an appeal against the entire judgment handed down by the Magistrate for the district of Pretoria on 22 March 2018 in which summary judgment was granted ordering the appellant to pay to the respondent the sum of R72 039,31 together with interest calculated at the rate of 10.25% per annum with effect from 28 November 2017 to date of payment and costs of the application on a scale as between party and party.

[2] The facts of the matter briefly are the following:

The respondent had been appointed as an executor in the estate of the late Orlando Simao Godinho whilst he was employed as a director of the appellant. He concluded an agreement with Annemarie van Schalkwyk ("van Schalkwyk") to assist him in the winding up of the estate. He subsequently resigned as a director of the appellant.

Whilst in the employ of the appellant van Schalkwyk assisted the respondent with the administration of the estate. It is alleged by the respondent that the agreement was that the appellant would be paid its reasonable taxed or agreed costs for the services rendered by van Schalkwyk upon distribution of the estate, alternatively, upon an earlier date as may be agreed by the parties.

On 2 October 2017 the respondent terminated the mandate to assist in the winding up of the estate effectively terminating the mandate of the appellant. Upon such termination, the respondent requested a statement of account from the appellant in respect of the work done. The appellant informed the respondent that that it would not present its account for taxation but that it would debit the estate's account with an amount of R72 039,31 inclusive of VAT as its fees.

[2] This is an appeal against the entire judgment handed down by the Magistrate for the district of Pretoria on 22 March 2018 in which summary judgment was granted ordering the appellant to pay to the respondent the sum of R72 039,31 together with interest calculated at the rate of 10.25% per annum with effect from 28 November 2017 to date of payment and costs of the application on a scale as between party and party.

[3] The facts of the matter briefly are the following:

The respondent, who had been employed as a director of the appellant, had been appointed as an executor in the estate of the late Orlando Simao Godinho. He concluded an agreement with Annemarie van Schalkwyk ("van Schalkwyk") to assist him in the winding up of the estate on or about 29 February 2016, alternatively, 10 June 2016. The respondent alleged that the appellant breached its mandate by unlawfully debiting fees in the sum of R72 309,31 inclusive of VAT in respect of fees that had not been taxed nor agreed upon. The respondent subsequently resigned as a director of the appellant.

Van Schalkwyk, who was in the employ of the appellant, assisted the respondent with the administration of the estate. It is alleged by the respondent that the agreement was that the appellant would be paid its reasonable taxed or agreed costs for the services rendered by van Schalkwyk upon distribution of the estate, alternatively, upon an earlier date as may be agreed by the parties.

On 2 October 2017 the respondent terminated the mandate to assist in the winding up of the estate effectively terminating the mandate of the appellant. Upon such termination, the respondent requested a statement of account from the appellant in respect of the work done. The appellant informed the respondent that that it would not present its account for taxation but that it would debit the estate's account with an amount of R72 039,31 inclusive of VAT as its fees.

The respondent was of the view that there had been no agreement in respect of the fees to be charged and denies that the amount debited from the estate account was fair and reasonable for the services rendered. It maintained that the appellant had unlawfully appropriated the said amount as the fee to be charged had been in dispute for a while and that the amount was appropriated in circumstances where the appellant was no longer the respondent's agent and therefore had no right or justification to appropriate such amount.

The appellant's defence was that the original mandate given by the respondent was given on the basis that the fees would be charged in accordance with the prescribed tariff as laid down in the Administration of Estates Act 66 of 1965.

After service of summons, the respondent applied for summary judgment and was granted it by the court *a quo*.

[4] The issue in the court *a quo* was whether the appellant could legally have appropriated the sum of R72 039,31 as and when it did. In the summary judgment application, the court ordered the appellant to pay the amount as stated therein as well as the costs on a scale as between party and party.

[5] The appellant relies on several grounds of appeal in appealing the judgment of the court *a quo, inter alia*:

(i) that the Magistrate had erred in finding that the affidavit deposed to by Sean van der Merwe in support of the summary judgment application does not disclose a *bona fide* defence;

(ii) that by incorrectly finding that the respondent is entitled to payment in the sum of R72 039,31 being fees due to him as a result of an agreement entered into on 29

February 2016 as pleaded in the particulars of claim is vague and embarrassing, thus rendering the particulars of claim excipiable;

(iii) that by finding the respondent entitled to payment of the sum of R72 039,31 in effect disallowed the appellant any amount in respect of fees for work done in the winding up of the estate when the particulars of claim clearly stated that the appellant would be entitled to a reasonable or taxed fee;

(iv) by incorrectly finding that the appellant was under an obligation to provide the respondent with an itemised statement, alternatively, apply an agreed tariff which would form the basis of a fair and reasonable fee payable to the appellant;

(v) by incorrectly finding that in the absence of an itemised statement of the appellant's attendances it cannot be suggested that any fee levied in respect thereof is reasonable; and

(vi) finding that the appellant's affidavit resisting summary judgment does not set out its grounds of defence.

[6] It is noted that on 7 January 2019 the appellant filed an amended Notice of Appeal in which the following further grounds of appeal were included, that:

(i) the affidavit filed in support of the summary judgment application and deposed to by David Ralph Manley does not constitute an affidavit as contemplated in Rule 14 of the Uniform Rules of Court;

(ii) the particulars of claim are excipiable on the basis that they lack the necessary averments to sustain a cause of action, alternatively, are vague and embarrassing and as such, were not competent for the court *a quo* to grant summary judgment;

(iii) the amount claimed was not a liquidated amount as contemplated in Rule 14 of the Uniform Rules of Court; and

(iv) the appellant had disclosed a *bona fide* defence to the respondent's alleged claim.

[7] The appellant failed to adopt the procedure provided for in the Magistrate's Court Rules with respect to the filing of an amended notice of appeal. A number of the grounds were raised for the first time in the said amended Notice of Appeal without an application being made for the court to allow such amendment. Accordingly and in the absence of an amendment to his grounds of appeal, the appellant is precluded from relying on the additional grounds of appeal and is confined to those grounds noted in the Notice of Appeal.[1]

[8] The respondent was of the view that the appellant seems to have misconstrued the respondent's claim and sought to assign it an incorrect character. In argument, it brought to the court's attention that the claim was not contractual in nature and was in fact for the repayment of monies which had been appropriated unlawfully by the appellant. It was also of the view that the only order that can follow is that the appellant must repay the amount and as such, the appeal should be dismissed.

The affidavit filed by the respondent not an 'affidavit' in terms of Rule 14

[9] An application for summary judgment must be accompanied by an affidavit in support thereof which affidavit must meet the requirements of Rule 14 of the Uniform Rules of Court. A commissioner of oaths is required to ascertain from the deponent that he understands the

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[1] Jones & Buckle, *The Civil Practice of the Magistrates' Court in South Africa* Vol 2 p51-12

contents of the document, whether he has any objection to taking the prescribed oath or affirmation and whether he considers the said prescribed oath to be binding on his conscious. The commissioner of oaths will then sign the declaration and insert his full names and designation and the area for which he holds such appointment.

[10] The appellant is of the view that the requirements of an affidavit in terms of Rule 14 is a *sine qua non* to a summary judgment application and no room should be left for speculation whether such document in support of a summary judgment application is an affidavit or not.

[11] The respondent, on the other hand, is of the view that it does not follow that an affidavit which is properly and legally commissioned be regarded as worthless simply because the commissioner of oaths neglected to set out all the steps which were followed during and after the commissioning process. In support of such view, he brought to the court's attention the matter of **Blieden and another v Reichenberg**[2]in which it had been averred that the affidavit was defective for reasons similar to those in the matter on hand. The approach adopted by our courts is a recognition that the regulations are not peremptory and non-compliance does not *per se* invalidate the affidavit.

[12] Although it is accepted that a properly sworn affidavit is a *sine qua non* for a summary judgment application, it does not follow that an affidavit which is properly and legally commissioned be regarded as worthless simply because the commissioner neglected to set out all the steps which were followed during and after commissioning the said document. The

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[2] [1996] 1 All SA 620 (W) at 630

question that should be asked is whether there has been substantial compliance with the prescripts of the regulation.

[13] The affidavit in support of the summary judgment indicates the commissioner's full names, and address. It however fails to mention the designation of the commissioner of oaths, her designation and the area for which she holds her appointment. I am of the view that there has been substantial compliance with the prescripts of the regulation and as such, this ground of appeal fails.

Summons excipiable

[14] The appellant's second ground of appeal is that the particulars of claim of the respondent are excipiable on the basis that it lacks the necessary averments to sustain a cause of action, alternatively, that it is vague and embarrassing. As such, it was not competent for the court *a quo* to have granted summary judgment. The appellant's contention is that the particulars of claim are silent on whether the agreement of 10 June 2016 endured despite the conclusion of the latter and in particular, that the appellant had failed to plead the agreements' full terms.

[15] The respondent denies that the particulars of claim are silent in this regard and brings to the court's attention paragraph 7 which states the following:

"Ms van Schalkwyk would continue to assist with the administration of the deceased's estate as contemplated in Annexure B"

The respondent is of the view that there can be no doubt that the appointment of Ms van Schalkwyk is set out in Annexure B and would remain operative albeit with the additional term referred to in paragraph 7.1 of the particulars of claim.

[16] It is trite law that for the purposes of adjudicating an exception, the facts as alleged in the challenged pleadings must be accepted as correct. In respect of an exception based on the failure of the plaintiff to sustain a valid cause of action, the allegations contained in the particulars of claim are deemed to be accurate. The excipient has to prove that even if all the allegations in the pleadings are genuine, they do not amount to the founding of a valid cause of action on any conceivable interpretation that could reasonably be attached to the pleadings.[3]

[17] Pleadings are deemed to be vague and embarrassing if when read as a whole, the pleadings are so unclear and ambiguous that the opposing party is uncertain of the case he is required to meet and, materially prejudiced if he is required to plead in answer thereto. To successfully establish an exception based on pleadings being vague and embarrassing, the excipient must satisfy the court of the following, that:

(i) the allegation of vagueness and embarrassment must not relate to or be directed to particular and isolated paragraphs. They must relate to the whole cause of action;

(ii) it requires the excipient to satisfy the court that the pleadings are so unclear and ambiguous that the reader thereof would be unable to determine a clear and single meaning from the statement; and

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[3] Amalgamated Footwear and Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C) at 893

(iii) the court must be satisfied that on any conceivable interpretation of the pleading, the excipient could not plead thereto without being embarrassed.

[18] Paragraph 7 of the particulars of claim read as follows:

"Upon Plaintiff leaving the defendant's employ, on 29 February 2016 the administration of the deceased's estate had not been finalized and it was expressly, alternatively impliedly, alternatively tacitly, agreed by the Plaintiff and the Defendant that:

7.1.1 Ms Anne-Marie van Schalkwyk would continue to assist with the administration of the deceased's estate as contemplated in Annexure "B" hereto; and

7.1.2 The plaintiff would pay to the defendant its reasonable taxed or agreed fees for the services rendered by Ms Anne-Marie van Schalkwyk to Plaintiff upon the distribution of the deceased's estate, alternatively, upon an earlier date as may be agreed between the parties."

[19] Paragraphs 8 to 19 of the particulars of claim set out in detail the attempts which were made to agree the appellant's fees. Paragraph 20 pleads that no agreement could be reached. The appellant avers that these paragraphs are contradicted by Paragraph 7 which alleges that the respondent would pay the appellant's reasonable taxed or agreed fees.

[20] There is no ambiguity in the summons. I am of the view that the respondent has pleaded with sufficient particularity as to inform the appellant of the case he has to meet. Furthermore, it is indicated in the particulars of claim the attempts made to agree the appellant's fees which attempts were all unsuccessful. I am also satisfied that the claim was

not based on contract. It was premised on the fact that the appellant had no authority to appropriate the proceeds in lieu of fees. This ground of appeal also fails.

Claim not for liquidated amount

[21] The appellant is of the view that the Magistrate erred in finding that the respondent was entitled to the repayment of the sum of R72 309,39 whereas it should only have been entitled to repayment of the difference between the fees charged in excess of any agreed or taxed fees and the amount debited or that the sum of R72 309,39 constitutes such difference or constitutes a liquid amount.

[22] The respondent is however of the view that its claim was for the repayment of an amount which has been appropriated unlawfully and without justification.

[23] Rule 14 of the Uniform Rules of Court states that summary judgment may be granted upon claims for a debt or liquidated demand. A liquidated amount in money is an amount which is either agreed upon or is capable of speedy and prompt ascertainment or put differently, or where the ascertainment of the amount in issue is a matter of mere calculation. In **Botha v W Swanson & Company (Pty) Ltd**[4] Corbett J described the test as follows:

"[A] claim cannot be regarded as one for 'a liquidated amount in money' unless it is based on an obligation to pay an agreed sum or money or is so expressed that the ascertainment of the amount is a mere matter of calculation."

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[4] 1968 (2) PH F85 (C)

[24] The respondent can claim no other amount than the amount appropriated by the appellant. Accordingly, I am of the view that this ground of appeals fails.

***Bona Fide* defence**

[25] A party who wishes to avoid summary judgment being granted against it is obliged to satisfy the court that it has a *bona fide* defence. The facts must be set out in an affidavit which, if proved at the trial, would constitute an answer to the opponent's claim.

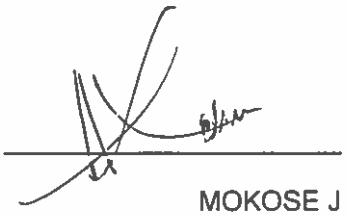
[26] The appellant submits that it has disclosed a *bona fide* defence to the respondent's claim for several reasons including the fact that the respondent's claim is founded in contract which governs the position between the parties insofar as payment for services rendered were concerned. The appellant however avers that the terms of the agreement and the dispute related thereto are not relevant for the purposes of determining the present matter.

[27] The respondent is of the view that this ground of appeal is also based on the erroneous contention that its claim is contractual in nature. I agree with the respondent's view. The claim is based on the misappropriation of the sum of R72 309,39 at a time when the appellant's mandate had been terminated. It therefore had no legal right, entitlement or justification to act in relation to the deceased estate and appropriate the said sum. It was appropriated at a time when it was aware of a dispute between the parties.

[28] I am therefore of the view that there was therefore no misdirection on the part of the Magistrate in the court *a quo*.

[29] Accordingly, the following order is granted:

The appeal is dismissed with costs.



MOKOSE J

Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

For the Appellant:

Adv B Boot instructed by

Alant Gell & Martin Attorneys

Pretoria

For the Respondent:

Adv NG Louw instructed by

Manley Inc

Pretoria

Date of hearing: 29 January 2019

Date of judgement: December 2019