IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

NOT REPORTABLE

Case No: 1825/2016

In the matter between:

SR NAIDOO & COMPANY **Applicant**

and

JYOTHI MAHARAJ NO **1st Respondent**

MASTER OF THE HIGH COURT **2nd Respondent**

Coram: Gorven J

Heard: 25 October 2016

Delivered: 1 November 2016

ORDER

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1. The application is dismissed.
2. The first respondent is directed to pay the costs incurred up to 17 May 2016.
3. The applicant is directed to pay the balance of the costs.

JUDGMENT

Gorven J:

[1] The applicant is a firm of attorneys which was engaged to litigate on behalf of the deceased estate of which the first respondent is now executrix (the estate). The dispute concerns the fees and disbursements payable by the estate to the applicant. At the time the applicant was engaged, the executor of the estate was Mr Dass. A written Client Mandate and Fee Agreement (the agreement) was concluded between the applicant and the estate. There is no dispute as to the essential terms of the agreement. The estate was to pay the applicant's fees, on an attorney and own client scale, calculated on the basis of a tariff of fees plus 25% plus VAT. In addition, the estate would be liable for reasonably incurred disbursements.

[2] The way payments would take place was set out in paragraph 4 where the estate agreed that:

'4.1 the attorney is entitled to render to the estate interim accounts in respect of disbursements and that at the conclusion of the matter he will render me a final account for his fees and disbursements.

4.2 all disbursements reflected in the account will, so far as possible, be accompanied by supporting documentation, and that in respect of fees, the attorney will set out a short cryptic description of the work done by him together with the total time spent in the execution thereof, where applicable.

4.3 should I require the attorney to furnish the estate with a detailed specified account in respect of services rendered by him the estate shall be responsible and liable for the additional costs of drawing such itemised account and/or attending to the taxation or assessment thereof

as provided for in the tariff as prescribed from time to time by the Rules Board for Courts of Law aforesaid to which 25% is to be added plus VAT

4.4 if I do not object in writing to the account, or request a specified detailed account, within 30 (thirty) days of receipt of the account from the attorney, I will be deemed to have waived any right which I may have in respect thereof and that I will also then be deemed to have accepted the attorney's account as fair and reasonable.'

[3] It is therefore clear that, when payment was sought, the applicant was obliged to render an account. The account was to include fees and disbursements. A short description of the work done was to support the fees claimed. Supporting documents for the disbursements would, where possible, accompany the account. A final account would be rendered for fees and disbursements. The final account would then include fees and disbursements and reflect as deductions any payments already made by the estate.

[4] Once the account was rendered, three possible courses of action were open to the estate. First, it could accept the account and pay. Secondly, it could request a detailed specified account in respect of the services rendered by the applicant. In this case, the estate would be liable for the additional costs of drawing this itemised account and/or attending to its taxation or assessment. If this option was exercised, once the itemised account was drawn the estate could pay without requiring taxation. If not, a taxation or assessment would take place. Thirdly, the estate could do nothing in which case, after a period of 30 days, the estate would be construed as having accepted the account.

[5] Pursuant to the agreement, the applicant rendered services to the estate. This involved litigation to protect the property of the estate. This began in November 2012. Mr Dass was removed as executor on 10 December 2013. The first respondent was appointed as executrix on 23 December 2013. After the first respondent was so appointed, she terminated the mandate of the applicant to act

on behalf of the estate. This was prior to the finalisation of the litigation. The litigation was finalised by the present attorneys of record of the estate on 28 May 2014. One Bramdeo was ordered to pay the costs of the estate on a scale as between attorney and client.

[6] A number of disputes arose between the applicant and the estate relating to the fees claimed by the applicant. Much correspondence was exchanged. It is fair to say that this correspondence generated more heat than light. It is common cause on the papers that, at some stage, the estate paid R36 308.68 to the applicant. This appears from a letter dated 25 March 2014 along with which the applicant submitted two bills of costs to the estate. One of these related to the above-mentioned litigation and the other apparently related to instructions given to counsel by the applicant at some stage.

[7] When disputes arose concerning the claims of the applicant, it set down the bill of costs relating to the litigation. It is not clear what transpired to the second bill of costs. The taxing master of the high court refused to tax the bill and invited the applicant to approach the court if so advised. This resulted in the present application. The founding papers assert that the estate denied liability for the payment of any of the applicant's fees. It is clear that at least certain of the estate's responses in the correspondence can be construed in that light. I shall deal with this later. However, in the answering affidavit, the estate conceded that it was liable to pay pursuant to the agreement.

[8] The relief sought by the applicant is:

'1. That the Estate of the late SEWNARAIN NARAYAN MAHARAJH: No.3236/1994(PMB) is ordered to pay the attorney and client costs incurred by the Applicant and Mason Inc. in the matter of ANOOPKUMAR SEWNARAIN DASS N.O. –VS- NADIRA BRAMDEO & 4 Others: Case No. 11569/12 instituted in this Court, as taxed plus mora

interest thereon at the rate of 15.5% per annum from 11 April 2014 to date of payment both days inclusive;

2. The taxing master of this Court is directed to tax the costs referred to in paragraph 1. above;

3. The Estate and the First Respondent shall bear the Applicant's costs of this application, jointly and severally, the one paying the other to be absolved.'

Shortly before the hearing of the application, the applicant brought an application to amend the relief sought which, if granted, would amend paragraph 1 of the notice of motion to read:

'1. That the Estate of the late SEWNARAIN NARAYAN MAHARAJH: No.3236/1994(PMB) is ordered to pay the attorney and client costs incurred by the Applicant and Mason Inc. in the matter of ANOOPKUMAR SEWNARAIN DASS N.O. –VS- NADIRA BRAMDEO & 4 Others: Case No. 11569/12 instituted in this Court in terms of the Client Mandate and Fee Agreement (Annexure "SRN 5" of the Applicant's Founding Affidavit), as taxed plus mora interest thereon at the rate of 15.5% per annum from 11 April 2014 to date of payment both days inclusive;'

[9] The application to amend was opposed. The applicant submitted that there could be no prejudice to the estate if the application were to be granted. This submission is correct. All that would be achieved by the amendment is a reference to the agreement. The founding papers clearly rely on the agreement even without the notice of motion specifically referring to it. The amendment is accordingly granted.

[10] The application is one for specific performance of the agreement. It is brought on the basis that the applicant has performed its obligations and that the estate refuses to perform its obligations. The crisp issue for decision is whether, on the papers, the applicant is entitled to payment and, if so, to the specific relief which it claims. The payment claimed is of 'costs incurred by the Applicant' in the litigation referred to above. It seeks to direct the taxing master to tax the bill of costs which had been set down previously.

[11] It is, of course, so that the applicant did not incur costs in that litigation. The costs were incurred by the estate. However, what is clearly meant is the items included in the bill of costs included in the application papers. This runs to some 62 pages and covers the period between 22 November 2012 and 27 March 2014.

[12] I have set out above what, apart from the work, is required to be done by the applicant before it can demand payment. The applicant is obliged to render an account. Where, as in the present matter, a payment has been made, the account must deal with three aspects. First, what the applicant claims it is entitled to for fees. Secondly the disbursements reasonably incurred. Thirdly, it must bring into account in reduction of the indebtedness of the estate any payments which were made.

[13] When the applicant was asked in argument whether the papers made out a case that any account had been rendered which included the payment of R36 308.68, it was unable to point to any. The bill of costs on which the applicant relies certainly does not do so. At the very least, therefore, one aspect required to be dealt with in an account is missing from the bill. To claim, in those circumstances, that the applicant is entitled to payment at all lacks a legal basis. The obligation of the applicant to render such an account is antecedent to the obligation of the estate to pay. It certainly cannot be argued by the applicant, therefore, that the estate has failed to perform its obligations. This is so even if assertions were made by the estate that it was not liable to pay anything at all.

[14] Put simply, accordingly, the applicant has not pleaded and proved that it has performed its antecedent obligation of rendering an account. That being so, no relief by way of specific performance can be granted. This applies even more clearly to the specific relief sought by the applicant which requires payment after

the taxation of the bill of costs. The relief sought by the applicant is not competent on the papers.

[15] The applicant therefore cannot succeed in the application. This then gives rise to the issue of costs. There is some merit in the argument of the applicant that, until the answering affidavit of the estate was put up, it appeared that the estate was contesting liability to pay any of the fees and disbursements of the applicant. In addition, it is clear from the correspondence that the estate claimed that its liability was limited to what it could recover by way of the costs order granted against Bramdeo. It also claimed that it was only liable to pay any balance outstanding once the costs order had been executed. These were entirely incorrect assertions and, in my view, misled the applicant into approaching the court. Regardless of the fact that the relief sought is not competent, it is my view that the applicant should not bear the costs of the application up to the delivery of the answering affidavit. This took place on 17 May 2016. The applicant submits that, if it is entitled to costs, the estate should not be depleted and the executrix should be ordered to pay personally. I disagree. There is no indication that the executrix was doing anything other than act on legal advice in good faith.

In the result, the following order issues:

1 The application is dismissed.
2 The first respondent is directed to pay the costs incurred up to 17 May 2016.
3 The applicant is directed to pay the balance of the costs.

GORVEN J

DATE OF HEARING:	25 October 2016.
DATE OF JUDGMENT:	1 November 2016.
FOR THE APPLICANT:	ES Law instructed by SR Naidoo & Company
FOR THE 1ST RESPONDENT:	BL Skinner SC instructed by Gounder & Associates.