

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 16884/2008

DATE: 3 DECEMBER 2008

5 In the matter between:

BORMAN AND HAYWARD INC APPLICANT

versus

MERIDIAN BAY RESTAURANT

(PTY) LIMITED RESPONDENT

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JUDGMENT

(Application for Leave to Appeal)

15 DAVIS, J:

This is an application for leave to appeal against a judgment of this Court which granted summary judgment in favour of plaintiff (respondent in these proceedings).

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I do not intend to traverse the details of the case which are set out in the principal judgment. Suffice it to say, the essence of the dispute turns on whether the defendant (appellant) in these proceedings) has raised, on affidavit, a statement of material facts which would be sufficient to persuade a Court that, if

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proved *afra* at trial, this would constitute a defence to plaintiff's claim. See the classic statement of this approach in Breitenbach v Fiat (S.A.) (Edms.) Bpk, 1976(2) SA226 (T). In this case the defence, to the extent that one is put up in the affidavit by defendant, is that, highlighted by Mr Van Reenen, who represented the defendant (appellant in these proceedings), namely that the:-

10 "Defendant never signed a fee mandate with the plaintiff in terms whereof a fee structure was determined. Under the circumstances, I am of the opinion that applicant is entitled to a reasonable costs, which costs is (sic) to be taxed in accordance with the rules of the High Court and
15 also based on the tariffs determined by the rules of the High Court."

It is correct that summary judgment is a fairly drastic measure and that, as Mr Van Reenen submitted, court's do not parse through the affidavit of a defendant such as in this case with the kind of scrutiny that they would in dealing with matters of an application. But the test is clear.

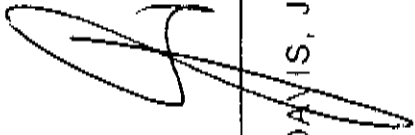
As I noted in the principle judgment, there is no dispute, if all the papers are read as a whole. The defendant engaged the

services of the plaintiff, significant costs were incurred, pursuant to such engagement, and plaintiff is entitled to be so paid.

5 Clearly there was a dispute as to the quantum that then necessitated recourse to the taxing master. It is correct, as Mr Van Reenen submits, that a taxing master cannot determine whether the attorney acted with or without a mandate. These are matters clearly which fall beyond the competence of a
10 taxing master. See Berman and Fialkov v Lumb, 2003(2) SA 674 (C) at para 22.

But this is not a case in which there is a dispute about an engagement of services. This is a dispute as to the quantum
15 flowing from the engagement of an attorney. The defendant, having requested the taxing master to become involved, now makes the further averment that the taxing master was obliged to tax at the High Court tariff. There is no basis in the affidavit to even sustain that averment, or even to suggest that
20 this averment has any basis in reality. Once this issue is disposed of, there is nothing left to analyse so as to justify the basis of a defence, sufficient to ensure that summary judgment should be refused. In my view, there is no basis by which
another Court would come to a conclusion different to that of
25 this Court and accordingly the application for leave to appeal

is DISMISSED WITH COSTS.



DAVIS, J