IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No A 459/08

In the matter between:

JASPER COETZEE TREDOUX Appellant

and

NICKLAUS WOLFGANG KELLERMAN Respondent

JUDGMENT DELIVERED: 3 FEBRUARY 2009

GRIESEL J:

Introduction

[1] The appellant (as second plaintiff) issued summons against the respondent (as defendant), claiming payment of R139 308, together with interest and costs. The claim arises from professional services rendered to the respondent in his divorce action by the appellant, a practising advocate at the Cape Bar, duly instructed thereto by the first plaintiff, a local attorney. (The first plaintiff instituted a separate claim for the same amount, being disbursements allegedly incurred by him on behalf of the respondent. In addition, the first plaintiff also claims payment of some R45 000 in respect of his own fees. His claim, however, is not relevant for purposes of this appeal. I shall refer to the appellant and the first plaintiff individually as such and collectively as 'the plaintiffs'.)

[2] After the respondent gave notice of his intention to defend the action, the plaintiffs applied for summary judgment. The respondent filed an affidavit opposing the application, raising a number of defences. The matter came before Joubert AJ, who dismissed the application for summary judgment, ordering the plaintiffs to pay the costs of the application. Both plaintiffs thereupon applied for leave to appeal against the costs order, but this was refused by the court a quo. Subsequently, however, the necessary leave to appeal to this court was granted to the appellant by the Supreme Court of Appeal.

Approach on appeal

[3] The main grounds of appeal advanced on behalf of the appellant are that the judge a quo erred in the exercise of his discretion in failing to apply 'the established principles pertaining to costs in summary judgment applications'; that such failure resulted in the decision being 'capricious, untoward and with no foundation'; and that there were no circumstances present to warrant or justify a departure from 'the established principles pertaining to costs in these type of matters'.

[4] The difficulty in evaluating the appellant's argument is that, save for stating that he was satisfied that the affidavit opposing summary judgment 'sets out enough of a defence to enable me to grant the defendant / respondent leave to defend', Joubert AJ did not furnish any reasons for the order granted by him. The application for leave to appeal was likewise dismissed without reasons being furnished. This omission

by the learned judge is unfortunate and has undoubtedly complicated our task on appeal.[1]

[5] Be that as it may, the well-established principle of our common law is that, in awarding costs, a court of first instance exercises a judicial discretion and a court of appeal will therefore not readily interfere with the exercise of that discretion:

> The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order.[2]

[6] Counsel for the appellant has been unable to persuade us that the decision of the court a quo is vitiated by any misdirection or irregularity. The present appeal therefore turns on the question whether or not there are grounds on which a court, acting reasonably, could have made the costs order in question. I accordingly turn to consider this question against the following factual background.

Factual background

[7] It is common cause that, in terms of an oral agreement concluded in January 2006, the respondent appointed the first plaintiff as his attorney to represent him in the divorce action instituted against him by

---

[1] With regard to the general duty resting on judicial officers to furnish reasons for their decisions, see *inter alia Botes & Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H–28F; *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) paras 31–32. See also M M Corbett, 'Writing a Judgment' in (1998) 115 *South African Law Journal* 116 at 117–118.

[2] *Attorney-General, Eastern Cape v Blom & Others* 1988 (4) SA 645 (A) at 670D–F; *Premier, Mpumalanga & Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 53.

his wife. According to the particulars of claim, it was expressly agreed that the first plaintiff would engage the services of counsel to represent the respondent in the abovementioned matters. With regard to fees, it was agreed that the respondent would pay a deposit to the first plaintiff and would make further payments to him on presentation of an invoice or statement of account depicting the reasonable fees for services rendered. In addition, he would recompense the first plaintiff for all reasonable and necessary disbursements made by the first plaintiff in acting for the respondent, which would include counsel's fees.

[8] Pursuant to the agreement, the first plaintiff engaged the professional services of the appellant to act as the respondent's counsel in the divorce proceedings instituted as well as any ancillary matters. The plaintiffs duly acted as the respondent's legal representatives in the aforesaid proceedings up to 18 December 2006, when the respondent informed the plaintiffs to stay all services as he was in the process of attempting a reconciliation with his wife.

[9] Certain interim payments had been made by the respondent up to that stage, the last such payment being made on 6 November 2006, covering the plaintiffs' fees and disbursements up to 3 October 2006. According to the plaintiffs, their fees due for services rendered during the period from 4 October 2006 to 18 December 2006 amount to some R45 000 (in the case of the first plaintiff) and some R139 000, in the case of the appellant. These amounts appear from an account, dated 27 March 2007, submitted by the first plaintiff to the respondent.

[10] Upon receipt of the account, the respondent replied by letter addressed to the first plaintiff, stating *inter alia*:

This account is by no means full and detailed with the attorneys and advocates [sic] costs, and I strongly dispute the costs reflected in this account.
This invoice does not correspond with discussions held between the attorney and [the respondent].

[11] The plaintiffs thereupon proceeded to issue summons on 7 June 2007 and, in due course, applied for summary judgment.

[12] In his affidavit filed in opposition to the application, the respondent alleged that the first plaintiff had undertaken to keep him (the respondent) informed in respect of costs at all times, and it was agreed that both plaintiffs would furnish the respondent with regular accounts. Notwithstanding this agreement, the respondent did not receive any statements of account from the plaintiffs, save for the final statement referred to above, which was only received in May 2007.

[13] During the period February to October 2006, the respondent made various interim payments to the first plaintiff, amounting to R161 572,50 in total. The last payment, in the sum of R80 000, was made on 10 October 2006. It was the respondent's understanding that this payment was a deposit for the costs of the trial which was to commence towards the end of October. This understanding was corroborated by the first plaintiff's statement mid-way through the trial that the respondent's funds 'were starting to run short'. It is apparent from the statement relied upon by the plaintiffs, however, that the R80 000 payment was not credited to the invoice for attendances from 6 October 2006.

[14] In his opposing affidavit, the respondent further stated:

It is impossible for me to assess whether the amount supposedly owing in terms of the 2007 Statement is fair and accurate in the absence of a statement detailing the attendances from the inception of the matter until 6 October 2006.

I believe that there should have been a substantial credit in my favour in the 2007 statement. However, I am not in a position to comment categorically until I see some indication of how my various payments were spent.

In the light of the first plaintiff's admitted problems with his book-keeping, I am concerned that there may have been some mistake in the first plaintiff's calculations.

In the circumstances I submit that there should be a statement and debatement of account. I am entitled to claim this relief in as much as I had a contractual right to receive accounts from the plaintiffs, and they failed to render any accounts save for the 2007 Statement. I any event, as my agents the plaintiffs were obliged to account for everything in good faith. This they failed to do.

Discussion

[15] The cornerstone of the appellant's argument was that the 'established principles' pertaining to costs in summary judgment applications required the court a quo to reserve the costs of the opposed summary judgment application for later determination. Although this may be regarded as the 'normal costs order' where summary judgment is refused and leave to defend is granted,[3] this is by no means an inflexible rule. In terms of Uniform rule 32(9), the court has a wide discretion to 'make such order as to costs as to it may seem just'. In the exercise of such discretion, the court may make a punitive costs order against an

---

[3] See eg *Ebrahim & Others v Khan & Others* 1979 (2) SA 498 (D) at 505B–C; Erasmus *Superior Court Practice* (1994 with loose-leaf updates, Service 24) at B1-232 at footnote 8; S J van Niekerk, H F Geyer & A R G Mundell *Summary Judgment – A Practical Guide* (Lexis Nexis loose-leaf guide, Service Issue 7) para 12.2.

unsuccessful plaintiff 'where the case is not within the terms of subrule (1)',[4] or 'where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend'.[5]

[16] In support of the judgment of the court a quo, counsel for the respondent submitted that both these grounds were present in this case: first, the case does not fall within the ambit of subrule (1), because the plaintiffs' claims are not 'for a liquidated amount in money'; and second, the plaintiffs knew that the respondent relied on contentions which would entitle him to leave to defend.

[17] It is a vexed question whether a practising advocate such as the appellant is legally entitled to sue his or her lay client directly for professional fees. We have not been referred to any authority in support of such a claim, while there is authority directly *against* the proposition.[6] In the view that I take of the remaining defences raised on behalf of the respondent, however, it is not necessary for purposes of this appeal to make any finding regarding this issue.

---

[4] See Rule 32(9)(a). Subrule 32(1) reads as follows:
'Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-
(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment;
together with any claim for interest and costs.'

[5] Rule 32(9)(a). See also Van Niekerk *et al, op cit,* para 12.3 and the cases referred to therein.

[6] See the unreported judgment of Jordaan AJ (as he then was) in *Serrurier & Another v Korzia & Another*, WLD Case No 2000/26570, 12 March 2002 (unreported) at pp 22–28. Cf also *Bertelsmann v Per* 1996 (2) SA 361 (T). For the position in England, see *Halsbury's Laws of England* Vol 3(1) 4ed (2005) Reissue §681.

[18] Assuming (without deciding) in favour of the appellant that he is indeed legally entitled to sue, the next question is whether each of the plaintiffs' claims, being for professional fees, is for 'a liquidated amount in money', as required by subrule (1). A liquidated amount of money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or, put differently, where ascertainment of the amount in issue is 'a mere matter of calculation'.[7] In my view, the plaintiffs' claims in question do not fall into this category: they involve an enquiry into the nature and extent of the professional services rendered; the reasonableness of fees charged and so on. These are not mere matters of calculation; they are matters for taxation, which fall within the compass of duties of the taxing master. It is that official, and *not* the court, who must determine the reasonableness of professional fees charged by legal practitioners.[8]

[19] Furthermore, it has been held that the court is entitled to have regard to the defence raised by a defendant in opposition to a claim for summary judgment in deciding whether or not the claim is liquidated:

> If from the defence as disclosed, it appears to the Judge that proof of the claim may be protracted and difficult rather than prompt, then it seems to me that that is a matter which he may take into account in deciding whether or not the claim is liquidated.[9]

[20] From the defences raised by the respondent in the present matter, it appears that proof of the plaintiffs' claims will entail an enquiry, covering not only the period dealt with in the 2007 account, but also the

---

[7] See eg Erasmus *op cit* at B1-210 and the cases cited in footnote 2.

[8] Cf Cilliers *Law of Costs* (1997 with loose-leaf updates, Service 12) para 13.19.

[9] *Neves Builders & Decorators v De La Cour* 1985 (1) SA 540 (C) at 544G.

whole period preceding it. In addition, the terms of the oral agreement entered into between the parties are also in dispute. All these issues will first have to be resolved by the court before the amount of the plaintiffs' claims can be finally determined, which process may well be 'protracted and difficult rather than prompt'.

[21] In any event, there is authority for the proposition that an untaxed bill of costs does not constitute a liquidated amount in money – at least in circumstances, as here, where the bill is being disputed.[10] It is significant, in this context, to note the distinction drawn by Diemont J in *S Dreyer and Sons Transport v General Services*[11] between a claim for professional fees, on the one hand, 'where there may be uncertainty as to the fee which an auditor or an advocate should charge', and a claim based on a commercial contract entered into between two business firms, on the other hand. The latter type of claim is generally regarded as liquidated, whereas the former is not.

[22] For these reasons, I hold that the plaintiffs' claims in this instance are not for liquidated amounts of money, with the result that such claims do not fall within the ambit of rule 32(1).

[23] Even if I were to err in coming to this conclusion, and even if the plaintiffs' claims were to be regarded as liquidated amounts, it has authoritatively been held that a party cannot recover his or her costs in the absence of prior agreement or taxation:

---

[10] See eg Erasmus *op cit* at B1-213 and the cases cited in footnote 4.

[11] 1976 (4) SA 922 (C) at 923D–E.

Any summons claiming payment of costs not agreed upon or not taxed would have been met by a successful exception.[12]

In my view, this principle applies with equal force to counsel's fees, as much as it does to attorneys' fees.[13]

[24] In the present case, the respondent, upon receipt of the plaintiffs' account, immediately disputed the reasonableness of the fees and disbursements charged by the plaintiffs, stating quite emphatically that he 'strongly dispute[s] the costs reflected in this account'.[14]

[25] Thus it is apparent that the respondent's attitude was known to the plaintiffs even before action was instituted. In these circumstances, both plaintiffs were, in my view, ill-advised to rush into litigation, instead of first having their respective accounts taxed. It follows *a fortiori* that they were equally ill-advised to persist with the application for summary judgment upon receipt of the respondent's affidavit opposing summary judgment. In such affidavit, the respondent repeatedly insisted on a 'statement of account and debatement thereof'. It is clear that this must be read as insistence upon taxation of the plaintiffs' accounts – something to which the respondent is entitled. In these circumstances, the plaintiffs could not have thought that they had 'an unanswerable case',[15] which is an essential prerequisite for summary

---

[12] *Santam v Ethwar* 1999 (2) SA 244 (SCA) at 253D. See also *Benson & Another v Walters & Others* 1984 (1) SA 73 (A) at 84A–B and F–H; Cilliers *op cit* (Service 17) para 13.39.

[13] Cf Cilliers *op cit* para 13.19.

[14] Para [10] above.

[15] *Gilinsky v Superb Launderers and Dry Cleaners*1978 (3) SA 807 (C) at 811C–H.

judgment. In the result, the plaintiffs' application for summary judgment was doomed to failure.

[26] In a final attempt to persuade us to set aside the costs order granted by the court a quo, counsel for the appellant referred to the fact that the respondent, in his opposing affidavit, conceded that 'some amount' was owing to the plaintiffs. However, this does not assist the appellant as the respondent qualified his concession by stating that 'the precise amount owing can only be calculated once there has been a full accounting, and debatement if necessary'.[16] Furthermore, as pointed out in *Neves Builders & Decorators, supra*,[17] a claim in a summons which is not liquidated is not rendered liquidated by the defendant admitting liability for a lesser amount.

Conclusion

[27] It follows that the court a quo had sufficient grounds to award costs against the unsuccessful plaintiffs in the summary judgment application. In the result, there are no grounds for interference on appeal with the order made by the court a quo. The appeal is accordingly DISMISSED with costs.

B M GRIESEL
Judge

---

[16] Para [14] above.

[17] At 546C–H. See also *International Shipping Co (Pty) Ltd v FC Bonnet (Pty) Ltd* 1975 (1) SA 853 (D) at 854H–855B; *Mercantile Bank Ltd v Star Power CC & Another* 2003 (3) SA 309 (T) paras 8–9.

MOTALA J: I agree.

A M MOTALA
Judge

ZONDI J: I agree.

D H ZONDI
Judge