



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2039/2012

In the matter between:

GIGI A. REID ATTORNEYS

Appellant

and

SWAZILAND LAW SOCIETY DISCIPLINARY

TRIBUNAL

1st Respondent

LAW SOCIETY OF SWAZILAND

2nd Respondent

FAIZEL LATIFF

3rd Respondent

Neutral citation: *Gigi A. Reid Attorneys v Swaziland Law Society Disciplinary Tribunal & 2 Others (2039/2012) [2014] SZHC 21(7th March 2014)*

Coram: **M. Dlamini J.**

Heard: **6th March 2014**

Delivered: **7th March 2014**

Application for leave to appeal – prospects of success – applicant claiming both legal costs and collection commission – not permissible in law by reason that it would result in double charges –

where a collection agent incurs disbursement during collection, such are not be borne by principal.

Summary: By Notice of Motion, the appellant seeks leave to file its appeal against 1st and 2nd respondents' decision.

Chronology of events

[1] The appellant, an attorney of this court, received instructions from the 2nd respondent, a former director of a company under liquidation. At the end, the appellant served 3rd respondent with a statement of account. The 3rd respondent, dissatisfied with the bill of costs, approached 1st respondent for taxation. The 1st respondent, in taxing the bill, disallowed collection commission and reduced other items in the bill by the sum of E21 699.99. Whereas the initial bill was for the sum E135 000, after taxation by 1st respondent it reduced to E113 300.01.

[2] Following appellant's prayer, I ordered that appellant should establish prospect of success. The matter was so argued. The issue was therefore whether appellant could claim both costs for legal services rendered and collection commission from the appellant. I must hasten to point out that when the matter was first argued, appellant challenged both the sum reduced per item and the disallowance of the collection commission.

[4] During the submission, upon scrutiny of the record filed on behalf of 1st and 2nd respondents, it became clear that the methodology of reaching the sum of E113,300.01 was not clear. It was assumed by all the parties that the record filed was incomplete. By consent of all the parties, the matter was

postponed in order to allow the 1st and 2nd respondents to file a complete record.

- [5] On the return date, Mr. Fakudze demonstrated that nothing was missing from the record as by a close scrutiny of the taxed bill and on adding the amounts reflected, a total of E113,300.01 would be reached. On this information, Counsel for appellant abandoned pursuing the reduction on each item by 1st and 2nd respondents. This resulted in one point remaining viz. whether the 1st and 2nd respondents were correct in law to disallow collection commission?

Adjudication

- [6] The first enquiry is, “*What are legal costs?*” **A Cilliers** in “**Law of Costs**” **Service Issue 17** discussing pre-litigation at paragraph 4.02 cites:

“Attorney and client costs are costs that an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client and for the professional services rendered by him. These costs are payable by the client whatever the outcome of the matter in which he engaged the attorney’s services, and are not dependent upon any award of costs by the court. In the wide sense, it includes all the costs that the attorney is entitled to recover against his client on taxation of his bill of costs, but in the narrow and more technical sense the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party. The position set out above ordinarily applies. In special cases, however, the court may award a litigant costs against his adversary on an attorney-and-client basis. In that event, the successful litigant becomes entitled to recover from the unsuccessful party all the costs that on taxation are due by him to his attorney.”

- [7] Innes CJ in **D & D H Fraser v Waller 1916 A.D 494** was faced with a similar question on whether the appellants were “*entitled to claim the collection charges*” (see page 497). The learned judge further pointed out:

“if they were not, then the amount of £20.15s paid to them under protest was inadmittedly recoverable.”

- [8] Adjudicating on this issue, the learned judge stipulated on collection costs at page 499:

“And that meaning must be borne in mind throughout this enquiry. Collection costs are the costs due to an agent who collects; they are speaking generally, assessed on a percentage basis of the amount recovered, and they are only chargeable in respect of the process of collection. Where there has been no collection, there can be no collection costs.” (underlined, my emphasis)

- [9] At page 501 the honourable Chief Justice eloquently concludes:

*“If the debt has actually been collected without recourse to law, then assuming the percentage rate to be a reasonable one, the full commission would be due. If only portion of the debt has been so collected, then the commission would be calculated upon that portion. **But there may be cases in which expense has been actually incurred in unsuccessful attempts to collect. If so, every expense for which the creditor is so liable to his agent would be recoverable from the debtor:** ... But the point is that the costs recoverable must be costs of collection. Collection in the sense in which the word is used in this clause is a different process from recovery by action. ... The attorney who conducts the case recovers the money at law, and is remunerated by the costs awarded him. He cannot claim against his principal a commission upon the amount of the judgment; nor can the agent; for neither, of them has collected the debt. It would make no difference should the capacities of collecting agent and attorney happen to be united in the same individual. If it were otherwise, there*

would be a double charge – costs plus commission – upon the debtor in every case in which an instrument of debt containing a collection clause was sued upon.” (underlined and bold my emphasis)

[10] I now apply the above principle to the case at hand. Appellant submitted an eighteen page bill to the 3rd respondent. Admittedly, this bill from its readings was for legal services rendered, together with disbursements, inclusive of collection services. In its grounds of appeal, the appellant states:

“(a) *The appellant was instructed by the third respondent to assist him in the liquidation of his company called Mzala’s Carriers (Pty) Ltd and collect on his behalf all monies to be realised from the liquidation. The appellant collected the sum of E1 287 915.79 on behalf of the third respondent prior to judgment and was therefore entitled to charge collection in terms of article 17 (2) of the Law Society of Swaziland Bye Laws of 1992. The first respondent erred in failing to apply the correct applicable principles of law relating to charging a client collection commission and came to a wrong decision.*

(b) *In particular, there were no allegations and/or primary facts that the appellant collected the amounts due to the third respondent through a judgment of court in order not to be entitled to collection commission. The third respondent admitted that the amount recovered was through the services of the appellant and the first respondent erred in then disallowing collection commission.”*

[11] It is correct that the appellant did not recover the money on behalf of 3rd respondent as a result of a court action. However, that as it may, analyses of the principle as propounded by **CJ Innes** *supra*, is that one cannot claim costs together with collection commission.

Applying the law as enunciated above *strict sensu*, appellant is entitled to collection commission only as it avers that “*appellant collected the sum of E1,287,916.79*” and from the itemized bill no where does one find that appellant approached the court for litigation on behalf of 3rd respondent. Fair enough, appellant incurred disbursement in the process of collection. However, in law, these are not to be borne by the creditor or the principal who is 3rd respondent *in casu*. However, as 3rd respondent was contesting collection commission, I do not wish to disturb 1st and 2nd respondents’ award.

[12] I note that 1st and 2nd respondents declined collection commission on the basis that the liquidator had already charged for collection commission. I find no legal support for this rationale. If 3rd respondent decided to solicit for an agent to collect besides the one appointed by the court or Master of the High Court as the case may be, he was legally bound to pay collection commission upon collection by the agent of his choice. If he was later double charged in the sense that his appointed agent and that of the court or Master demanded collection commission, he had himself to blame because he put himself in that situation. The view by the appellant that she is entitled to collection commission is therefore correct. However, appellant’s case falls on the ground that she has claimed also for legal services rendered.

[13] In the result, the appellant having been awarded legal services’ costs and this court not inclined to disturb the decision of 1st and 2nd respondents, is not entitled to collection commission. Appellant should choose one and certainly not both in order to avoid “*double charges*” as per Innes CJ *supra*. In the above, there are no prospects of success in appellant’s application.

[14] Turning to the question of costs, it is my considered view that the record filed on behalf of 1st and 2nd respondents was not clear. This was evident during the hearing where all parties, including respondents, conceded that the record was insufficient to inform the court of how the decision that applicant was entitled to E113,300.01 was reached. The matter had to be postponed in order to allow respondents to file a clear record. I appreciate that on the return date, respondents did not file a record but Counsel representing respondent did go back to his client for clarity on the issue. This postponement was occasioned by the failure of respondents to file a concise clear record. This was so despite the request by appellant to give reasons for its ruling on the matter. In other words, when appellant requested for reasons for the ruling, this was an opportunity for 1st and 2nd respondents to revisit the record. They did not do so and this necessitated the postponement by court. In my view this was unnecessary in the light of appellant's prior request. In the circumstances, I am not inclined to exercise my discretion in favour of respondents on costs of this application.

[15] In the result, I enter the following orders:

1. Appellant's application is dismissed;
2. Each party to bear its own costs.

**M. DLAMINI
JUDGE**

For Applicant : **M. Nkomonde**
For 1st and 2nd Respondents : **N. Fakudze**
For 3rd Respondent : **T. Ndlovu**