

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO. 1097/20

In the matter between

M. S. DLAMINI LEGAL ATTORNEYS

PLAINTIFF

And

Qs SWAZILAND (PTY) LTD

FIRST DEFENDANT

IOANNIS CALAVITIS

SECOND DEFENDANT

Neutral Citation: *Ms Dlamini Legal Attorneys vs Qs Swaziland (Pty) Ltd
& Another 248 (24th January 2022)*

Coram: LANGWENYA J

Heard: 3 December 2021

Delivered: 24 January 2022

Summary: *Civil law and Procedure-application for summary judgment-
plaintiff entered into oral agreement with defendants to provide
legal services-plaintiff's bill disputed by defendants-defendants*

argue they paid some money into plaintiff's account for legal services and that amount not reflected in statement-defendants argue that the amount of time allegedly spent by plaintiff attending to their legal matters is less than what is reflected in statement-plaintiff states payment made by defendants related to different cases and not the present matter.

Civil law and Procedure-application for summary judgment-dispute concerning billing and quantum of fees charged-bill not taxed-an enquiry into nature and extent of the professional services rendered and reasonableness of the fees charged is called for by the defendants.

Civil law and Procedure-is attorney's bill liquidated in terms of Rule 32(2)(a) & (b) of the Rules of the High Court?-attorney's bill incapable of 'speedy and prompt ascertainment'-attorney's fees do not accord with requirements of a liquidated amount-amount involves an enquiry into the nature and extent of professional services rendered, the reasonableness of the fees charged-these are not matters of calculation but matters of taxation within the purview of the Registrar of the High Court.

JUDGMENT

- [1] This is an opposed application for summary judgment.
- [2] The plaintiff is described in the simple summons as a company duly incorporated under the laws of eSwatini and its place of business is Block 2

Plot 123 opposite Mandlenkhosi Building, Esser Street, Manzini. In the plaintiff's declaration, the plaintiff is described as a law firm with its practice situate in the location described in the simple summons.

- [3] The first defendant is Qs Swaziland (Pty) Ltd a company duly incorporated under the laws of eSwatini carrying on business at Matsapha Industrial sites and in Piggs Peak.
- [4] The second defendant is an adult male South African conducting business at Matsapha industrial sites on remainder of portion 180 in the district of Manzini. The second defendant is one of the directors of the first defendant.
- [5] By way of simple summons, the plaintiff instituted action against defendants for the payment of the sum of E87 368.00 (eighty seven thousand three hundred and sixty-eight Emalangeni) in respect of legal services rendered at the instance of defendants; interest thereon at the rate of 9% per annum *a tempore morae* from the date of service of summons to date of payment and costs of suit.
- [6] Plaintiff avers that on 8 February 2019, and at plaintiff's offices, the parties entered into an oral agreement in terms of which plaintiff would provide legal services to defendants. The plaintiff was represented by Mzwandile S. Dlamini. Defendants were represented by Ioannis Calavitis-the second defendant.
- [7] As a result of the agreement between the parties, plaintiff represented defendants in different matters before this court. In particular, plaintiff represented the defendants in matters which were pending already before

this court¹ as well as instituted proceedings on behalf of defendants at their special instance, request and instruction².

- [8] It is plaintiff's averment that it was part of the agreement that plaintiff would issue a combined statement for both defendants for work done. Accordingly, on 14 October 2019 plaintiff issued a statement to defendants for work done in the period of 29 March 2019 ending 15 October 2019. The statement was for the amount of E87 368.00. On receipt of the statement, the defendants as represented by the second defendant negotiated for a discount of the fees and to pay the amount claimed in instalments. The negotiations fell through.
- [9] Plaintiff states that a number of demands were made for the payment and despite the demands, defendants have refused, neglected and or ignored to pay the money that is now due and owing.
- [10] The defendants aver that they made certain payments to plaintiff. Defendants argue that despite making some payment for the services rendered by plaintiff, they were never given a statement reflecting the said payments. It is defendants' case that they made a total payment of E19 500.00 to plaintiff's account and to their dismay this amount was not reflected in the invoice given them by plaintiff.
- [11] On 24 July 2020 applicant moved an application for summary judgment against defendants. Plaintiff argued that defendants have no *bona fide* defence to plaintiff's claim; that they filed the notice to defend only for the purpose of delaying the inevitable. According to plaintiff, the second

¹ Reference is made to case number 280/2019 and case number 281/2019.

² Reference is made to case number 808/2019; 280/2019; 281/2019

defendant acknowledged defendants' indebtedness to plaintiff for legal services rendered.

[12] In their affidavit resisting summary judgment, the defendants denied that they do not have a *bona fide* defence to plaintiff's claim and that the notice to defend has been filed for purposes of delay the proceedings against defendants. Defendants reiterated averments made in their plea-namely that some payment was made to plaintiff but was never reflected in the statement and or in the invoice issued by the plaintiff. Defendant further disputed that plaintiff spent the amount of time reflected in the invoice.

[13] Plaintiff admits that defendants made payment in respect of other matters and not the present matter. What is clear however is that the 'other matters' are the cases plaintiff refers to in its declaration. This is case number 280/2019 and case number 281/2019. The interim statement of 16 May 2019³ reflects a total of E18 122.00 and yet defendants aver they paid E19 500.00 to plaintiff. Except to state that defendants settled the amount reflected in the interim statement in full, Plaintiff does not explain what became of the difference of E1 378.00.

[14] As a parting shot, plaintiff avers that second defendant's affidavit resisting summary judgment is inappropriate in as much as it purports to have been signed by the deponent in Mbabane on 6 August 2020 when in fact the deponent was not in Mbabane on that day.

Applicable legal principles in regard to summary judgment

[15] The applicable principles in regard to summary judgment are trite and I will not restate them here. I will however keep in mind a reminder that during the

³ See 'SM2' at page 68-70 of the book of pleadings.

current enquiry the court must determine firstly, that the plaintiff has established his claim clearly on the papers; secondly whether the defendants have fully disclosed the nature and grounds of the defence raised in the action and the material facts upon which it is founded on the facts disclosed in the affidavit and whether the defendants appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law. If satisfied, the court must refuse summary judgment either wholly or in part as the case may be.

[16] An application for summary judgment is applicable to claims based on a liquid document or for a liquidated amount of money⁴. Plaintiff's case is a claim for the payment of attorney's fees. The question is whether an attorney's fees are liquidated as required by Rule 32(2)(a) and (b) of the Rules of the High Court. The quantum of a monetary claim is regarded as liquidated if, firstly, the amount thereof has, prior to the application for summary judgment been agreed upon by the parties. Secondly, if the amount thereof can be readily ascertained by way of simple mathematical calculation or thirdly, if the amount thereof has been determined by a court of law⁵.

[17] Griesel J in *Tredoux v Kellerman* dealt with an application for summary judgment for the amount of the fees of an attorney and Counsel. He had to consider whether the amounts claimed were liquidated as required by rule 32 of the Uniform Rules of Court. He said the following:

'A liquidated amount of money is an amount which is either agreed upon or ascertainment of the amount in issue is a 'mere matter of calculation.' In my view the plaintiff's claims in question do not fall in this category: they involve

⁴ Rule 32(2)(a) & (b)

⁵ Van Nierkerk Summary Judgment, A Practical Guide, Service Issue 14, 2015 pp 3-7

an enquiry into the nature and extent of the professional services rendered, the reasonableness of the fees charged, and so on. These are not mere matters of calculation; they are matters of 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..

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 disputed⁶. Even if I were to err in coming to this conclusion, even if the plaintiff's 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 to taxation...'

[19] In *Arie v Kgosi* Mason J stated at page 526 that:

'[As] soon as the client says I am not ready to pay, the attorney must have his bill taxed; and as soon as the question of taxation arises, the amount depends in nearly every instance on the discretion of the taxing officer.'

[20] In *Blakes Maphanga Inc v Outsurance*⁷ Malan JA stated as follows:

[17] 'A client is entitled to taxation of his or her attorney's account. It follows that the amount of a disputed bill of costs is not liquidated. It is not capable of 'easy and speedy proof.' This was decided in so many words in *Arie Kgosi v Kgosi Aaron Moshette & Others* where Wessels JP said

'An untaxed bill of costs is not an absolute and present debt, for it is one the exact amount of which is still to be ascertained, as it depends on the arbitranium of the Taxing Master. It cannot therefore, be set off as against a liquidated debt.'

[21] In *MB De Klerk & Associates v Eggerschweiller and Another* Damaseb JP stated as follows:

'[64] It is settled that a client is entitled to have an account of a legal practitioner taxed before payment. Malan JA in *Blake Maphanga Inc. v Outsurance Co Ltd* at 239 held that the purpose of such taxation is to determine the extent of the indebtedness as an untaxed bill of costs does not constitute a liquid amount in money where the bill is being disputed. Although it has also been held that an attorney may sue on an untaxed bill of the client is satisfied with the quantum, it is an established practice that the

⁶ *Tredoux v Kellerman* 2010 (1) SA 160 (c) at para 18-23; see also *Santam Ltd v Ethwar* 1999(2) SA 244 (SCA) at 253B-D.

⁷ (144/09) [2010] ZASCA 19 (19 March 2010)

courts assume discretion to order a bill to be taxed. In such circumstances, the taxing master must determine whether the costs have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee.

[65] The court also held that the taxing master's duty to tax is not ousted by an agreement between an attorney and a client and that even in such circumstances the taxing master must satisfy himself or herself that the fees charged are justified by the work done and are reasonable. I see no reason either in principle or logic why an instrument acknowledging personal indebtedness to the plaintiff by directors of a company who would not otherwise be but for such acknowledgment of debt would deny them the right that the legal practitioner justifies how that amount was made up. In my view the situation is no different from a client agreeing to an agreed fee, which must still be reasonable and borne out by the work actually performed.'

[22] In this matter, the plaintiff states that he charged defendants on a scale of a junior attorney even though he is a senior attorney and that this was done in the spirit of fairness and reasonableness⁸. That this fact is raised late, in plaintiff's replying affidavit to defendants' affidavit resisting summary judgment is unmeritorious. This issue is not pleaded in the summons and in the application for summary judgment. Defendants deny that plaintiff ever disclosed to them its hourly rate charge. Defendants deny further that plaintiff spent as much time as he says he did working on defendants' cases.

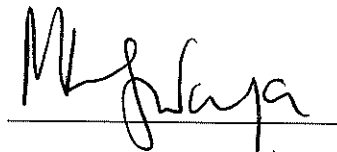
[23] Rule 63(3) of the High Court Rules states that:

'It shall be competent for any Taxing Master to tax all bills of costs for services actually rendered by an attorney in his capacity as such, whether in connection with litigation or not.' (my emphasis)

[24] Rule 63(2) is couched in peremptory language. The Taxing Master has to satisfy himself or herself that the amount charged is justified by the work done; such a duty cannot be ousted by an agreement between an attorney and a client.

⁸ Applicant's Replying affidavit, para 4 Book of pleadings at page 63.

- [25] This case is, in my respectful view distinguishable from *Mphetseni Co-operative Society Limited v L.R. Mamba & Associates* where the court observed that the appellants failed to set out fully its alleged defence to respondent's claim and by so doing show it had a *bona fide* defence and thereby raise a triable issue. In the current case, defendants have raised a triable issue regarding plaintiff's bill which, according to defendants does not reflect payments made and a reduction of the bill accordingly.
- [26] Having considered the papers and arguments advanced by the respective counsel, it is clear to me that the court is presented with a dispute as to the billing and quantum of the fees charged in the absence of taxation. An enquiry into the nature and extent of the professional services rendered and the reasonableness of the fees charged is called for by the defendants.
- [27] I am not convinced that the plaintiff's claim is capable of speedy ascertainment. Therefore the plaintiff's claim does not fall within the ambit of Rule 32(2)(a) and (b) of the Rules of the High Court and as a result, the plaintiff is not entitled to summary judgment.
- [28] Accordingly, application for summary judgment is refused.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For Applicant: Mr M. S. Dlamini

For Defendants: Mr S. Mabuza

