REPORTABLE

CASE NO. I 1762/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRIEDRICH CHRISTIAN BRANDT t/a CHRIS BRANDT ATTORNEYS — **APPLICANT/PLAINTIFF**

and

WINDHOEK TRUCK & BAKKIE CC	**1st RESPONDENT/DEFENDANT**
JOHANNA ALETTA FERREIRA	**2nd RESPONDENT/DEFENDANT**
LEONARD FERREIRA	**3rd RESPONDENT/DEFENDANT**

CORAM: CORBETT, A.J

Heard on: **15 NOVEMBER 2011**

Delivered on: **5 APRIL 2012**

JUDGMENT

CORBETT, A.J: .

[1] This is an application for summary judgment in terms of Rule 32 of the Rules of the High Court brought against the defendants. In the summons, the plaintiff, a legal practitioner, claims an amount of N$86,509.00 in respect of an account rendered to the defendants in respect of fees and disbursements incurred in litigation conducted on behalf of the defendants against a third party.

AUTHORITY IN VERIFYING AFFIDAVIT

[2] In the opposing affidavit filed on behalf of the defendants, a preliminary point was taken that the deponent to the verifying affidavit had failed to allege that he was duly authorised to initiate the summary judgment application. In the second paragraph the deponent to the affidavit states that he is "*authorized to depose to the affidavit for and on behalf of the plaintiff*". Although the deponent fails to expressly state that he is authorised to bring the application for summary judgment on behalf of the plaintiff, it is evident from a reading of the whole verifying affidavit that authority is referred to in this context. I accordingly find that there is no foundation to this objection.

APPLICATION TO STRIKE OUT

[3] The defendants brought an application to strike out paragraph 3 of the verifying affidavit. In paragraph 3 the deponent states that he has "*at all relevant times been the legal practitioner of record so acting for and on behalf of the Respondents* [the respondents in these proceedings] *in legal proceedings so conducted against Wilhelm George Lucas as the plaintiff as is evident from the particulars of claim and the Special Powers of Attorney and Resolution so attached to the Particulars of Claim…*'. It was contended on behalf of the defendants by Mr Wylie that paragraph 3 should be struck on the basis that it constituted inadmissible and extrinsic evidence not permitted by Rule 32 (3) (b). Mr Mouton, who appeared for the plaintiff, submitted that the paragraph merely referred to the capacity in terms whereof the deponent deposed to the verifying affidavit and that the defendants were not prejudiced in their opposition to the summary judgment application by the inclusion of this paragraph in the verifying affidavit.

[4] An applicant for summary judgment must set out the cause of action and the amount claimed must be confirmed by someone who can swear positively to the facts. The deponent must further state that in his or her opinion there is no *bona fide* defence to the action and that the notice of intention to defend was delivered solely for the purposes of delaying the action. The deponent may not in the verifying affidavit refer to evidence in support of the plaintiff's action[1].

[1] Triplejay Equipment (SWA) (Pty) Ltd v Muller, 1962 (3) SA 115 (SWA), 116 C - D

[5] On a perusal of the summons, it is evident that neither the particulars nor the power of attorney and resolution state specifically that Helmut Stolze was the legal practitioner of record in the proceedings, but refer to him, alternatively the plaintiff, further alternatively the firm as being so authorised to act on behalf of the defendants in that litigation. The statement made in paragraph 3 of the verifying affidavit is accordingly an amplification of the summons in this matter. Summary judgment is an extra-ordinary and stringent remedy [2] and there is scant reason for extending its ambit by permitting any form of amplification of the cause of action as set out in the summons [3]. I accordingly find that the application for the striking-out of the whole of paragraph 3 of the verifying affidavit is well founded and I make an order to that effect. I pause to mention, however, that the verifying affidavit *sans* paragraph 3, meets the requirements of Rule 32 (2).

UNTAXED PROFESSIONAL FEES

[6] The plaintiff's cause of action is based upon the defendants' failure to pay his professional fees. It was contended on the plaintiff's behalf that the plaintiff had complied with the requirements of Rule 32 (1) (b) in that the claim was for a liquidated amount in money. This submission was contested on behalf of the defendants on the basis that professional fees, until taxed, do not constitute a liquidated amount in money as required by the sub-rule. Generally a liquidated

[2] Maharaj v Barclays National Bank Ltd, 1976 (1) SA 418 (A), 422 A - D
[3] Steeledale Reinforcing v H O HUP Corporation, 2010 (2) SA 580 (ECP), 585, para [15]

amount in money is an amount 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*" [4].

[7] In the opposing affidavit the defendants dispute that they are indebted to the plaintiff in the amount claimed. They deny that the professional fees and disbursements claimed are fair and reasonable. They set out in detail items which they consider to be unreasonable and unfair in the bill of costs. They further state that they are entitled to have the plaintiff's bill of costs taxed in order to determine whether the amounts claimed by him constitute fair and reasonable fees and disbursements for the services rendered. They state that at no stage has the plaintiff's bill of costs indeed been taxed.

[8] I note that the defendants, when dealing in detail with the plaintiff's bill of costs in their affidavit, do not refer to each item as being unreasonable and unfair, but highlight only certain specific instances. This does not amount to an admission that the remaining fees and disbursements are fair and reasonable since the defendants rely on a general denial. In any event, as was stated by Corbett J (as he then was) in the matter of *Botha v Swanson & Co (Pty) Ltd* [5]:

> "*nor am I persuaded that the claim in the summons which is not liquidated is rendered liquidated by the defendant admitting liability for the lesser amount*" [6].

[4] Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co., 1966(4) SA 427 (C), 430A

[5] 1968 (2) PHF 85 (C)

[6] Quoted with approval in Neves Builders and Decorators v De La Cour, 1985 (1) 540 (CPD), 546 F - G

[9] Generally in a claim based on a contract, whether it be for the sale of goods or the rendering of services, and no express agreement has been reached as to the price or fee to be charged, it is an implied term of the contract that reasonable remuneration will be paid in terms of such contract. By reference to existing trades and professions, what is the usual and current market price for articles sold and reasonable remuneration for services rendered, is something that can be ascertained speedily and promptly [7].

[10] This principle does not apply to legal practitioners' professional fees. In the matter of *Blakes Maphanga v Outsurance Insurance* Malan JA distinguished these considerations from the approach to be taken in relation to attorneys' fees in stating [8]:

> "The relationship between an attorney and client is based on an agreement of *mandatum* entitling the attorney, in the absence of an agreement to the contrary, to payment of fees on performance of the mandate or termination of the relationship. In *Benson* the court said:
>
> > 'But what is clear is that by the end of the last century it had become an established practice that the Court did not undertake the task of *inter alia* quantifying the reasonableness of attorneys' fees and that taxation of such a bill of costs was left to the taxing officer. This did not entail, however, that an attorney

[7] Fatti's Engineering Co. (Pty) Ltd v Vendick Spares (Pty) Ltd, 1962 (1) SA 736 (T), 739 B - F
[8] 2010 (4) SA 232 (SCA), 239, para [16]

> could not sue or obtain judgment on an untaxed bill. Although … the Court assumed a discretion to order a bill to be taxed, and although a Court would not allow an action to proceed if the client insisted on taxation, there was no reason why judgment could not be given for an attorney if the client was satisfied with the *quantum* of the bill but defended the action on some other ground.' "[9]

[11] I am of the view that the plaintiff's claim does not fall into the category of a liquidated amount of money in the sense that it can be ascertained promptly or that the amount in issue is a mere matter of calculation. In order to determine the reasonableness of the plaintiff's professional fees and disbursements, there has to be an enquiry into the nature and extent of the services undertaken by the plaintiff on behalf of the defendants, and in respect of any such attendances the reasonableness of the fees charged and a consideration of the justification for the disbursements and charges levied in respect of the work done[10].

[12] In terms of Rule 70 of the High Court Rules the duties of a taxing master include determining whether – "*costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party..*" and whether any such costs "*…have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses*".

---

[9] The reference to Benson: Benson & Another v Walters and Others, 1984 (1) SA 73 (A), 85B -D
[10] Tredoux v Kellerman, 2010 (1) SA 160 (CPD), 166, para [18]

Even where an agreement exists between a legal practitioner and a client as to the fees to be charged, a taxing master is empowered to satisfy him- or herself that the fees indeed related to work done and so authorized, and that they were still reasonable [11].

[13] Malan JA concluded in the *Blakes Maphanga* matter[12]:

> "There are sound reasons for a client's right to insist on taxation and to regard the amount of a bill of costs that has not been taxed as not liquidated. The question whether a debt may be capable of speedy ascertainment is 'a matter left for determination to the individual discretion of the Judge'. In the case of a disputed bill of costs in litigious matters, however, the reasonableness is to be determined by the taxing master and not by the court."

I respectfully adopt this reasoning of Malan JA in determining this application. The issues to be considered in a taxation of a bill of costs are not matters of mere calculation. They are matters for taxation which fall within the authority and competency of the taxing master. It is for the taxing master to determine the reasonableness of professional fees charged by legal practitioners. In my view, the plaintiff was ill-advised to rush into litigation prior to having the bill of costs taxed.

---

[11] Malcolm Lyons and Munro v Abro, 1991 (3) SA 464 (W), 469 E – F, quoted with approval in Blakes Mphanga *supra*, 241, para [18]

[12] Blakes Mphanga *supra,* 241 – 242, para [18]

[14] In the circumstances, it is unnecessary to deal with the further arguments raised by counsel at the hearing of this matter. I accordingly find that the plaintiff, having failed to bring his claim within the ambit of Rule 32 (1), is not entitled to summary judgment.

[15] In the circumstances, I make the following order:

1. Summary judgment is refused and the defendants are granted leave to defend the action.

2. The costs of this application are to stand over for determination at the trial of this matter.

____

CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

Adv. C Mouton

Instructed by Conradie & Damaseb

ON BEHALF OF THE DEFENDANTS:

Adv. T Wylie

Instructed by Neves Legal Practitioners