

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2022-23261

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED YES/NO |

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SIGNATURE

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DATE

In the matter between

USHA DAYANAND-JUGROOP

Applicant

and

SIYAMCELA BONGANI NGENTO

Respondent

JUDGMENT

STRYDOM, J

[1] The applicant and the respondent in this matter are respectively an advocate and an attorney of the High Court of South Africa.

- [2] The applicant is suing the respondent for the payment of professional fees allegedly owing to her.
- [3] It is common cause that the respondent briefed the applicant to appear in several matters and that she delivered invoices. The applicant's case is that in terms of these invoices the aggregate amount of R 139 000-00 plus interest remains unpaid.
- [4] The respondent did not file an answering affidavit but filed a notice on points of law as provided for in Rule 6(5)(d)(iii) of the Rules of this Court.
- [5] Certain defences were raised as law points, which upon scrutiny, are not law points but rather factual allegations and defences which should have been contained in an answering affidavit.
- [6] The notice on points of law starts with an introduction where, *inter alia*, the following allegations are made:
- a) that the Respondent's defence is premised on the alleged items, time spent and overreaching as contained in the four invoices of Applicant.
 - b) it is stated that the Respondent has referred this matter to the Johannesburg Society of Advocates with jurisdiction over the applicant and is awaiting the outcome.
 - c) that pending the outcome of the complaint lodged with the Bar Council this matter should not have been enrolled before this Court, alternatively, that the hearing of this application should be stayed.

- d) that condonation should be granted for the late filing of the notice raising the points of law, to be the following:
- i. the *audi alteram partem* rule; the applicant intends to silence the respondent and/or to attain an order that may result in undue enrichment without a fair hearing; that the applicant's invoices are not absolute and/or agreed between the parties.
 - ii. A point of jurisdiction was raised on the basis that the fee dispute was pending before the Bar Council and that this Court has no jurisdiction pending the outcome of the fee dispute before the Bar Council.
 - iii. A point of jurisdiction was raised as the claim fell within the jurisdiction of the Magistrates' Court.
 - iv. A *lis pendens* plea was raised and that the applicant served a notice in terms of Rule 41A dated 30 June 2022 pertaining to mediation.
 - v. It is alleged that there exist a dispute of fact and should have proceeded by way of action.
 - vi. It is stated that the applicant is bound by the provisions of the Legal Practice Act 28 of 2014 and to the sections in the Act that deal with the reasonableness of fees. It was stated that the applicant failed to show her hourly rate on her invoices to the respondent.

vii. A punitive cost order was sought against the applicant.

- [7] When a party failed or elected not to file an answering affidavit the only evidence before a court is that contained in a founding affidavit. Any point of law can only be decided with reference to the evidence contained in the affidavits filed by the applicant.
- [8] Evidence cannot be inserted in a notice to argue law points, consequently, this matter can only be considered on the factual basis set by the applicant.
- [9] When the matter was heard the main defence of the respondent was stated to be the alleged unreasonableness of the fees charged by the applicant and how this should be determined.
- [10] If the uncontested evidence as referred to in the founding affidavit is considered it has been shown that the respondent failed to raise the reasonableness of the charges contained in the applicant's invoices upon delivery of these invoices, or shortly thereafter.
- [11] The Applicant was rather informed in correspondence that some of the invoices were paid in full or that the proverbial cheque was in the post.
- [12] In a detailed letter written by the respondent particularity was provided about the invoices of the applicant and the fees charged.
- [13] Specific allegations were made in relation to payment and the respondent concluded that only R18 000-00 was outstanding. The respondent provided no proof of payment as is expected from a person alleging payment, instead, the respondent decided to attack the reasonableness of the fees.

- [14] Only at a much later stage, when these misrepresentations could no longer delay payment to the applicant, the respondent engaged in a new line of defence challenging the reasonableness of the amounts charged. A complaint of overreaching was laid at the Johannesburg Bar, the professional body to which the applicant belongs too.
- [15] This raises a question over the *bona fides* of the respondent in this matter who previously stated that, except for R18 000, the invoices of applicant were paid.
- [16] The relationship between the applicant and the respondent is contractual and is further regulated in terms of the Legal Practice Act 28 of 2014, read with the Code of Conduct for Legal Practitioners. Section 18.18 of the Code of Conduct provides that an attorney must pay timeously in accordance with any contractual terms the reasonable charges of an advocate.
- [17] This would mean that the reasonableness of an advocate's charges could be challenged but it should be done timeously and following the correct procedures. The provisions of the Code of Conduct has hardened the obligation of an attorney to pay the fees of an advocate into a rule of law. (See: *Solomon and Another v Junkeeparsad* 2022(3) SA 526 (GJ)).
- [18] The applicant avers that an agreement was reached between her and the respondent that she would provide professional services at the rate of R2000-00 per hour. She rendered the services and charged accordingly. The invoices reflect the hourly rate and time spent. There is nothing to counter say this.
- [19] Her first invoice presented to the respondent was partly paid after delivery, without a challenge based on the reasonableness of charges.

[20] It should be noted that in a supplementary affidavit filed by the applicant allegations were made that provide a final blow to the respondent's allegations that applicant was overreaching. It is stated in the affidavit that on 13 December 2022 the Professional and Fees Committee of the Johannesburg Bar Council dismissed the complaint of unprofessional conduct with reference to overcharging by the applicant.

[21] After the outcome of the fee dispute the respondent was placed on terms to file an answering affidavit but still failed to do this.

[22] Unsurprisingly, after the dismissal of the complaint, the respondent placed no further reliance on the *lis pendens* and other related defences, as contained in the notice to raise legal points.

[23] The focus of the defence in relation to the excessive legal fees now shifted to an argument that the taxing master should first tax the applicant's invoices before payment becomes due.

[24] This new defence was not raised as a point of law in the notice filed by the respondent.

[25] When an attorney challenges the reasonableness of fees a complaint should be laid with the professional body under which professional rules an advocate practises. This is what happened in this matter. The reasonableness of an advocate's invoice delivered to an instructing attorney for payment does not concern the taxing master.

[26] The respondent's reliance on the matter of *Blakes Maphanga Inc v Outsurance Co. Ltd* 2010 (4) SA 232 (SCA), and other matters, for his contention that the

applicant's fees should be taxed before it can be claimed is misplaced. In that matter the question was whether an attorney's untaxed bill constituted a liquidated claim which could be set-off against money collected by the firm from a creditor of Outsurance. The dispute in *Blakes Maphanga* was a dispute regarding fees charged by the attorney to its client and not between attorney and an advocate. A client, failing an agreement to suggest otherwise, can insist on a taxation of the attorney's bill of costs. The respondent, *in casu*, is not a client of applicant.

[27] In the applicant's case we are not dealing with a set-off but with invoices delivered to the respondent.

[28] In any event, this issue was not properly raised before this Court and should not further be entertained.

[29] The jurisdiction point that this claim should have been instituted in the lower courts is also without merit. The Constitutional Court in the matter of *South African Human Rights v Standard Bank of South Africa and Others 2023 (3) SA 36 (CC)* upheld the Supreme Court of Appeal in its finding that "our courts are not entitled to decline to hear cases properly brought before them in exercise of their jurisdiction".

[30] With reference to respondent's argument that there exist a dispute of fact concerning the reasonableness of the fees charged, as previously stated, there can never be a dispute of fact in this matter as the respondent failed to file an answering affidavit. Furthermore, the respondent's reply to the applicant's letter of demand constituted an admission of liability without a challenge to the reasonableness of fees.

[31] In my view, the applicant has made out a case for the relief she was seeking in the notice of motion and judgment should be granted in favour of the applicant in terms of prayers 1.1, 1.2, 1.3 and prayer 2 of the notice of motion.

[32] The applicant handed a draft order to court and the following order is made:

1. An order is made in terms of the draft order which is marked with an "X".

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 18 March 2024

Delivered on: 20 March 2024

Appearances:

For the Applicant: Adv. W. Pye SC
with: Adv. C. Rowji

Instructed by: Seanego Attorneys

For the Respondent: Adv. M. Tonyela

Instructed by: Moganelwa Attorneys