Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG.

CASE NO: 15792/2021

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

10 April 2024 .....
DATE

In the matter between:

BRIAN KAHN INC Applicant
(registration Number: 1995/002655/21)

and

MICHAEL ARTHUR STETTER Respondent
(Identity Number: […])

JUDGMENT

NOKO J

Introduction

[1] This in an application for an order directing the respondent to pay the applicant the amount due for legal services rendered at the instance and in favour of the respondent. The applicant's claim is for the sum of R1 607 048.10 plus interest at the rate 24% calculated from 1 January 2021 to date of final payment.

[2] The respondent opposes this application and is representing himself.

Background

[3] The parties entered into what in common parlance is referred to as a fee and mandate agreement (*engagement letter/fee/mandate agreement*) in 2017 in terms of which the respondent gave the applicant a mandate to provide him with legal services. To this end the parties signed an engagement letter which sets out, *inter alia*, the tariff in terms of which the fees will be levied.

[4] The facts underlying the services requested by the respondent started as follows. The respondent was a 30% holder of the member's interest in Synthecon Sutures Manufacturing SA cc (Registration No. 2006/004193/23) (*Synthecon*). The other members who held majority member's interest were Peter Karungu (*Mr Karungu*) (32.5%) and Joe Julius Githu (*Mr Githu*) (17.50%).[1]

[1] The applicant avers that the mandate must be broadly interpreted to include acquisition of 10% member's interest of Cybel Chabane and 2.5% member's interest held by Peter as nominee. See para 38 of the Applicant's Heads of Argument at 011-71.

[5] The respondent consulted and appointed the applicant to assist him to acquire the member's interest of both Messrs Karungu and Githu whom the respondent accused of having siphoned funds from the Synthecon to the tune of 16 million rand.

[6] The applicant alleges that service was accordingly provided and detailed invoices were rendered to the respondent over a period of time. That payment in respect of some invoices were settled by the respondent without demur. The fees in respect of the outstanding amounts were never disputed and in terms of the engagement letter those fees are deemed to have been accepted. They are therefore due and payable. The respondent failed and or refused to settle the outstanding balance hence the applicant launched these proceedings.

[7] The respondent's bases for the opposition of the application are, first, that the proceedings should be stayed pending the final adjudication of the complaint lodged with the Legal Practice Council (*LPC*) against the applicant. Secondly, that the fees claimed by the applicant are not due and owing as the applicant acted beyond the scope of the mandate or acted negligently. Thirdly, that the applicant's bills of costs must first be referred for taxation.

Issues

[8] The issues for determination are, first, whether the application should be stayed pending the adjudication of the dispute lodged with the LPC. Secondly, whether the bill must first be subjected to taxation. Thirdly, whether fees are due and payable. Fourthly, whether the applicant has breached the mandate agreement *inter se*. Lastly, whether the applicant has made out a case for the relief sought.

Contentions and submissions by the parties.

Condonation.

[9] The applicant brought an application for condonation in respect of late filing of the replying affidavit on the basis that the respondent has raised issues in the answering affidavit which were complex and were not anticipated. Also, that an employee in the applicant's firm who provided assistance has resigned and as such Brian Kahn (*Mr Kahn*) was therefore overwhelmed. There is no evidence that the respondent suffered any prejudice as a result of the delay. To this end the applicant ask for condonation for the late filing of the replying affidavit.

[10] The respondent argued that the replying affidavit was inordinately late and further that the application for condonation was not comprehensive. Such application should have addressed aspects which were identified in *Phasha*[2] judgment, namely, the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance, the importance of the case and the respondent's interest in the finality of the judgment, convenience of the court and the avoidance of the unnecessary delay.

[11] The respondent further submitted that the court should convey its displeasure at the applicant's conduct especially since the applicant kept on reminding the respondent to serve its answering affidavit on time but it failed to heed and respect the same imperative. Importantly, so the respondent argued, the request for condonation is not there just for asking and should be clearly articulated. This was in retort to the applicant's contention that the condonation applications are ordinarily and invariably

[2] *Phasha v Morudi N.O. and Others* (3046/2018) [2019] ZALMPPHC (7 May 20190.

granted. In the premises the respondent submits that condonation should not be granted and the replying affidavit should be struck out.

[12] It is noted that granting condonation is within the discretion of the court. The factors which I considered in the adjudication over the application for condonation are as follows. The applicant has informed the respondent that the replying affidavit would be served out of time and requested that the late service be condoned which request was rejected. There is also no evidence or factors presented by the respondent to substantiate that the respondent has suffered any prejudice which cannot be assuaged by an order of costs. The issue of condonation was also not argued, if any, with requisite vigour during the hearing of the argument by the parties. The need for finality is also a factor I took into account.

[13] In the premises the condonation should be granted and awarding the costs of opposition would not be justifiable more particularly as the applicant had also put pressure on the respondent to serve the answering affidavit on time but failed to observe same. In any event the applicant is the party asking for an indulgence.

Merits

[14] The specific clauses which are implicated in this *lis* include, the indication in the agreement that the tariff would apply to the specific instructions given and shall also apply to any other instructions given by the respondent at a later stage; that the bills must be settled at the end of the month following that on which the bill was provided; that the bills/ statements may be disputed by the respondent before the expiry of the due date for the payment failing which it would be assumed that the bill/statement has been

accepted and therefore payable and also that even if the bill is disputed and referred for taxation/ assessment the respondent would still be expected to pay and be refunded after taxation.

Taxation of the bill

[15] The applicant submitted that the bills were never disputed by the respondent at all or within the time stipulated in the engagement agreement and as such they have been accepted. They are further due and payable.

[16] The respondent referred to *Chapman Dyer Miles*[3] judgment where the court held that where there is acknowledgement of debt coupled with undertaking to pay the debt there is an obligation raised and plea for taxation would not be available to the defendant. In this case serving before me the respondent contends that there is no acknowledgement of debt and the fees are excessive to justify the court holding that the agreement is unenforceable.

[17] The respondent further referred to the SCA judgment in *Blakes Maphanga*[4] where the court held that the right of taxation is enshrined and cannot readily be waived despite a fee agreement between the parties. In addition, the respondent referred to *Ngobese*[5] judgment where the court was confirmed that despite it being entered into between the parties *'… the binding nature of agreement is not absolute and is not definitive of the fairness of the bill raised.'*[6]

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[3] *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings* 1998 (3) SA 608.
[4] *Blakes Maphanga v Outsurance Insurance* 2010 (4) SA 232 SCA. This judgment was also referred to by the Full Court in this division in *Praxley Corporate Solutions (Pty) Ltd Praxley Corporate Solutions (Pty) Ltd* 2017 JDR 0482 (GJ).
[5] *Ngobese v Erlers Fakude* 2017 ZAGPH 295 (29 September 2017).
[6] Ibid at para 27.

[18] Further that this division held in *Coetzee*[7] judgment that '*Payment by a client to the client's own attorney is not aimed a full indemnity, but rather is aimed at payment of a reasonable recompense for service rendered.*' This was mentioned in support of the argument that even where the bill/ invoices was settled there is no bar to refer such a bill for taxation.

[19] The applicant contends that the demand for the bill to be taxed is unsustainable as it was held in *Chapman Dyer Miles* judgement[8] that where the fees were agreed upon between the parties then the plea that the bill must first be taxed is not available to the respondent. In any event, so applicant continued, there were also communication between the parties where the respondent requested the applicant to give him more time to settle the outstanding amount.

Staying of proceedings

[20] The respondent argues that the LPC has jurisdiction over the applicant on the services they have provided and the outcome of the investigation would assist the court in coming to a fair conclusion of the matter. Regrettably, so the argument proceeded, the LPC appear to be unable to proceed if the court is seized with this matter.

[21] The applicant contended that the jurisdiction of the court is not excluded by a referral of a complaint to LPC and case for the stay of the proceedings has not been properly pleaded. To this end the request for the stay should not be granted the respondent having refused to heed a rule 35(12) notice requesting copy of the complaint.

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[7] *Coetzee v Taxing Master* 2012 ZAGPJHC 2013 (1) SA 74 (GSJ).
[8] See para 17 of the Applicant's Heads of Argument at 011-60.

Breach of the mandate

[22] The respondent contends that the amount which the applicant is claiming is not due and payable as the applicant failed to act in accordance with mandate given alternatively failed to obtain a new mandate in respect of the action the applicant has now advised to be embarked upon, being to ask the court that the antagonists acquire the respondent's member's interest. This was predicated on the argument that the specific instruction given to the applicant was to assist with the acquisition of the member's interest of both Messrs Katungu and Githu. Instead, the attempt to proceed to sue for the said antagonists to acquire the respondent's member's interest was a new mandate which should have been preceded by a new fee agreement being signed.

[23] The respondent further contended that the applicant's conduct fell short of what is expected of a reasonable and professional legal service provider. This argument was predicated on the contention that the advice to provide assistance to acquire the member's interest of the two antagonists and prospects of success were not properly investigated. The advocate provided an opinion in October 2018 in which the advocate opined that in accordance with *Bayly*[9] judgment the court would never grant an order directing the majority shareholder/s to sell their shares to the minority shareholder/s. Had the applicant conducted a proper research the applicant would have known the correct legal position and would have provided the respondent with proper legal advice timeously without incurring unnecessary legal costs. The discovery of the *Bayly* judgment precipitated the change of course of action as set out above.

[24] The respondent also contended that the applicant sought to duplicate the services by opening the second file which was labelled labour dispute. This was unnecessary

[9] *Bayly v Knowles* 2010 (4) SA 548 (SCA)

since the issues arose from the same entity and are between the same parties. In reply applicant contended that services relate to the two distinct issues, namely, member dispute being between the members *inter se* whereas the labour matter is between Synthecon and the respondent.

[25] The applicant in retort stated that launching of the application induced the antagonists to opt to propose a round table discussion which according to the applicant was itself a success. At this meeting it became clear that the financials of the Synthecon were in tatters. The Synthecon contravened SARS related prescripts, breached exchange controls and transfer pricing regulations. These factors made the initial strategy to acquire the members' interest of the antagonists to be what would be construed a proverbial suicide.

[26] It also transpired, as per advice by the expert appointed at the instance of the respondent, that it would have been risky for the respondent to retain Synthecon as it may be indebted to the SARS in the sum of approximately 20 million rand. That notwithstanding, the respondent would not have afforded to buy the majority members' interest. Pursuant to the above factors both the respondent and the applicant thought it prudent that the best way out would be to sell the member's interest to the antagonists rather than becoming a majority holder of member's interest of the entity whose status was precarious and perilous.

[27] In addition, the fee agreement further clearly indicated that the nature of service to be provided should not be interpreted restrictively and the respondent was at all material times on board with the suggested change in the direction and strategy.

[28] Importantly, the applicant contended, that the *Bayly* judgment referred to above also highlighted that there may be instances where the majority shareholder/s may be ordered to sell their shares to the minority shareholder/s. As such it would not be correct to state that in all instances the court would always be compelled to order that sale of shares be from the minority shareholder/s to the majority shareholder/s. To this end the argument that the advice to proceed on the basis that the respondent as a minority shareholder should approach court for the acquisition of the majority shareholder was *ipso facto* incorrect is unsustainable.

Legal principles and analysis

Taxation

[29] The applicant contended that the facts of this case are on all fours with the decision in *Chapman* judgment that where a party has made an acknowledgement to pay such a party may resile from it if he can demonstrate that there was fraud, error, undue influence, or force/duress or even overreaching. The court in that case further held that defendant had an opportunity to discover and inspect the file to determine if the fees were indeed excessive so as to persuade the court not to give effect to the agreement entered into.[10]

[30] In this case the respondent sought to contend that there was no agreement on the bills by the parties. This is not correct as the agreement clearly afford the respondent an opportunity to dispute the bills within a specific period failing which it will be assumed that same has been agreed to and payable. Such a clause in a fee agreement is not unusual or unconscionable. The contrary would mean that resolution of disputes would

[10] See Para [30] and [39] of Chapman's judgment.

be delayed unreasonably if the period within which to dispute the bill is for a longer period. In any event the respondent has already settled some of the statements and by requesting an extension to pay would not be a conduct consistent with a party refusing or objecting to be liable for the bills.

[31] It was held in *Werksmans Incorporated,*[11] per Makume J, that a client cannot just demand taxation of the bills especially without demonstrating in what respect s/he believes the statement to be unreasonable.

[32] *Blakes Maphanga* judgement seem to be definitive that the client retains the right to demand that bill of costs should be taxed before payment could be made even where there is a fee agreement. The amount in the bill remains unliquidated until the taxing master has made a determination. The SCA held that:

> *'The duties of a taxing master include the duty to determine whether 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. It is his duty to decide whether the services have been performed and he should not close his eyes and ears to evidence which may be readily available to show that any work alleged to have been done. Even where an agreement exists between an attorney and client a taxing master is empowered to satisfy him or herself that the fees related to work done and authorised were reasonable. 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 or liquidated. The question whether a debt may be capable of speedy ascertainment is a matter left for the determination to the individual discretion of the judge. In the case of a disputed bill of costs in*

[11] *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd* (05741/14) [2015] ZAHCJHB (8 September 2015). The appeal against this judgment was dismissed by the Full Court, in *Praxley Corporate Solutions (Pty) Ltd v Werksmans Incorporated* (A5074/15) [2017] ZAHCJHB (28 February 2017)

litigious matters, however, the reasonableness is to be determined by the taxing master and not the court.' (underlining added).

[33] The above SCA judgment has not been reversed and is therefore binding. The reasonableness of the charges would relate to the whether time as allocated by the attorneys was properly accounted for and was not excessive, also whether certain work is considered to have been '*necessary or unnecessary, prudent or prodigal'*.[12] The court would ordinarily not have the luxury of time to traverse and trawl through each item on the bill and make a determination whether a fee note is clearly allocated or not. A court would however not shy away from that responsibility when it comes through a review process of the rulings made by a taxing master.

[34] The Full Court of this division in *Werksmans* judgment considered whether the right to demand taxation, can without more, apply to instances where the bill has been settled. This was not a specific issue dealt with by the SCA in *Blakes Maphanga* judgment. The Full Court held that where payment has been effected the client would ordinarily not be entitled to demand the taxation of the bill unless it can be demonstrated that there has been fraud, misrepresentation or en error. To this end the decision is *Coetzee*[13] judgment referred to by the respondent that bills may still be assessed by the taxing master even after payment is at odds with the decision of the Full Court. I find myself constrained to defer to the decision of the Full Court in accordance with principle of *stare decisis*[14] and therefore find that the review and or assessment of the bill by the taxing master may not include bills which have already been settled.

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[12] See *Malcolm Lyons and Munro v Abro and Another* 1991 (3) SA 464 WLD at 699.
[13] Ibid at note 7.
[14] The Constitutional Court stated in *Camps Bay Ratepayers Association AO v Harrison AO* CCT 18/10 [2010] ZACC 19 that '*[S]tare decisis is not simply a matter of respect for other courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our constitution. To deviate from this rule will invite chaos.'*

[35] The reference to the decision in *Ngobese* judgment by the respondent that the agreement on a specified rate is not binding is also at odds with the decision of the Full Court in *Muller*[15] where the court held that the taxing master is bound by the agreement between the parties with regard to the scale or tariff which would apply. It must be noted that taxation is not intended to undo the agreement with regard to the tariff agreed upon between the parties.

[36] The applicant contended that the sentiments in the SCA judgment were previously echoed in *Benson's case*[16] where it was stated that where a client insist on taxation the matter cannot proceed until such the bill of costs has been taxed.

[37] Having referred to the above judgments the following factors militates against the finding in favour of the respondent. First, the question in *Blakes Maphanga* judgment 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. This is not an issue in this case and is therefore distinguishable. Secondly, the letter of engagement clearly gives the respondent an opportunity to challenge the bill within a specified time and further states that if no challenge is mounted then the respondent is assumed to have accepted the amount and he is therefore liable to pay. This is the case where quiescence is to be construed as acquiescence.

[38] Thirdly, the respondent received other statements and made payments without demur. He had also asked for time to settle the balance as his benefactor was no longer available to assist in proving funding for the legal services.

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[15] *Muller v The Master and Others* 1992 (4) SA 277 (T).
[16] *Benson and Another v Walters and Others* 1984 (1) SA 73 (A).

[39] Fourthly, the letter of engagement provides that even if there is a dispute on the bill which must be referred for arbitration the respondent would settle the bill with interest pending the adjudication. The said amount with interest will be refunded if the arbitration is decided in his favour.

[40] Fifth, the fee agreement is not being challenged by the respondent and remains binding. There is no allegation of unfairness or unconscionability of the agreement.

[41] In the premises the request for taxation is being raised as a ploy or subterfuge to delay finalisation of the matter. The court should be loath to be seen as countenancing stratagem to frustrate parties to agreements (or pervert with the principle of sanctity of contracts), in this case, the first agreement being on the mandate and fees and the second agreement being to pay the bills which were received by the respondent.

[42] The respondent is not being denied justice as he may still persist and set down the bills for taxation even after payment provided, he meets the requirements set out in *Werksmans* judgment which includes evidence of fraud, error or even overreaching.

[43] That being said one feel behoved to raise, though in passing, some aspects which arose from the judgments and arguments raised by the parties. The arguments raised some competing interests which needs some interrogation. First, for the client. A client who is desperate may find himself in a position not to bargain with an attorney for fees. Such a client may at least benefit from the involvement of a taxing master to assess the fairness of the fees/costs incurred. If the client is entitled to request taxation of the bills at the end of every month or as an when he receives the bill this may be found to be a sign of mistrust by the attorney and possibly as a sign of confrontation. The client may

then be forced to oblige and accepts to pay bills without taxation so that his matter should proceed. Alternatively, the client will have to terminate one attorney and appoint another one who may also be offended by intermittent request for taxation of bills before payment. This leaves client in an invidious position.

[44] On the other hand, the rules of court prescribes times within which exchange of pleadings must be affected. This is intended to have the proceedings being conducted in an orderly fashion and at the same time ensuring that litigation process progresses and reaches finality. There may be no room for intermittent proverbial ‘stop and go’.

[45] The legal practitioner may also prefer to provide services in instances where he is comfortable that he would be paid when an invoice is rendered. The continuous demand for taxation may become a rude interruption is the running of the legal practice. Taking huge deposit by the attorney whilst it may dissuade client who are poor, it would not excuse the legal practitioner from still being obliged to tax the bills before paying himself.

[46] In the end it appears that the only time when the client may comfortably demand to exercise the right to demand taxation is when the matter has been finalised. This may be late. One may construe this to be a right that never was. The resolution of these competing interests need to interrogated and dealt with at the time when appropriate facts present themselves and until then the proverbial jury is out.

Stay of proceedings

[47] The argument advanced by the respondent to stay the proceedings pending the investigation and findings by the LPC could not supported by any authority. No proper case has been made for this relief. There should be nothing which should stop the LPC for considering whether the applicant breached any of the ethical codes.

[48] I note that both arguments to refer the matter for taxation and the application to stay the application pending adjudication by the LPC were not launched as counter applications by the respondent. I have opted to entertain the merits thereof despite the failure comply with the rules as no objection was raised. It is also to ensure that finality is reached without being derailed by technical issues.

Breach of the mandate.

[49] The respondent took umbrage with the fact that the applicant opened two files in the matters which allegedly relate to the same issues. The issues identified by the applicant are distinct and different principles apply to them and *fora* before which adjudication over them has to take place would be different. It was therefore proper that two separate files should be opened. The contention by the respondent would have been sustainable had he been able to indicate that there was duplication of hours charged, for example, where consultation for both matters took place at the same time over a period of one hour and the applicant stating in the bills for both files that one hour is billable respectively. In such an instance time spent should be prorated to each file. To the extent that respondent could not demonstrate prejudice for having two files the complaint is unsustainable and applicant’s conduct is this regard is not found wanting.

[50] The crux of the respondent's contention that change of approach/tactics or strategy should have been preceded by a new mandate is also unsustainable. The respondent has never raised the objection during consultations that new mandate should be obtained. If anything, the respondent was eager to have the new notice of motion crafted in accordance with the new strategy to be issued. The applicant has correctly contended that the directions of the cases do change especially after obtaining the version from the opponent which may have not been articulated clearly or correctly at the initial consultation.

[51] I must hasten to state that it cannot be correct for the applicant to contend that '… *in launching Stettler application – the intention was to use it as a platform to reach a settlement and not to proceed and win.'*[17] It is always the case that commencing litigation must be preceded by assessment of the prospects of success and to proceed with the objective to win on behalf of the client and not for settlement purposes. Settlement negotiations can be commenced through, *inter alia*, a letter of demand.

[52] That notwithstanding, even if this was a new mandate the letter of engagement provided that the terms and conditions of the agreement would regulate even future relations and instructions between the parties. In any event it is not a requirement that fee mandate should always be in writing.

[53] The factors which underpinned the change of the strategy as set out by the applicant, included the risk of being exposed to a liability for approximately 20 million rand due to several infractions committed by or on behalf of Synthecon, was based on a sound legal advice. Besides it also became apparent that the respondent would not be able to afford to buy out the majority shareholders and the condition including, agreeing

[17] See para 57.3.1. of the Applicant's Replying Affidavit at 005-92.

to restraint of trade was not acceptable to the respondent. At the same time, it appeared that holders of the majority member's interest would not have acquired the respondent's interest on terms acceptable to the respondent.

[54] The respondent's further argument that the applicant should not be paid as they were negligent on the basis of *Bayley* judgment fails to appreciate the fact that the court in that judgment stated that the court retains the discretion to compel either minority or majority shareholder/s to sell to the other shareholder/s. The court is therefore not restricted to always order the minority shareholder/s to sell to the majority shareholder/s. Based on the aforegoing it is therefore not correct that the advice that the respondent could acquire the member's interest of the antagonists was *ipso facto* incorrect.

Conclusion

[55] I find the respondent's contentions unsustainable. I conclude that the applicant has made out a proper case and is entitled to the relief sought.

Costs

[56] The general principle is that costs should follow the result. Nothing has been said or raised in this case to induce me to upset the said principle.

[57] In the premises I make the following order:

1. The respondent is to pay to the applicant R1 607 048.10.

2. The respondent is to pay the interest on the amount of R1 607 408.10 calculated at the rate of 24% per annum from 1 January 2021to date of final payment.

3. The respondent is to pay applicant's legal costs.

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Noko MV

Judge of the High Court

Delivered: This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 April 2024.

Date of hearing:	8 November 2023
Date of Judgment:	10 April 2024

Appearances.

Counsel for the Applicant	Adv B Brummer
Instructed by:	Brian Kahn Inc Attorneys
For the Respondent	*in Person*