



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 88431/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 12 MARCH 2021
SIGNATURE:

In the matter between:

BAKER & McKENZIE AMSTERDAM N.V.

Plaintiff

And

GENCORP INVESTMENTS (PTY) LTD

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The plaintiff, Baker & McKenzie Amsterdam N.V., a private company registered in the Kingdom of the Netherlands, claims payment in the amount of EUR 157 422, 00 from the defendant, GenCorp Investment (Pty) Ltd ("GenCorp"), a private company registered in South Africa for legal services rendered to it in terms of a written agreement between the parties.

[2] The written agreement was concluded on 27 February 2015 and provided that:

[2.1] the plaintiff will represent GenCorp in its dispute with KyotoCooling B.V. and its shareholder Mr Drossos;

[2.2] the plaintiff's fees for rendering the legal services would be based on time spent on the matter, computed at the plaintiff's hourly rates for the persons performing the services as well as a general 3% overhead surcharge and actual disbursements made in the course of the assignment;

[2.3] GenCorp will be invoiced monthly and payment will be due upon receipt of the invoice.

Issues common cause

[3] It is not in dispute that legal services were rendered by the plaintiff in terms of the agreement and that GenCorp was invoiced for such services, to wit:

[3.1] 10 April 2015	EUR 54 408, 72
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[3.2] 12 May 2015	EUR 35 394, 41
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[3.3] 10 July 2015	EUR 70 844, 98
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[3.4] 17 August 2015	EUR 36 329, 13
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[3.5] 7 September 2015	EUR 14 853, 71.
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- [4] It is, furthermore not in dispute that the first invoice was, albeit late, paid by GenCorp.

Issues in dispute

- [5] The liability of GenCorp to pay the remainder of the invoices issued to it in respect of the services rendered by the plaintiff is in dispute.

- [6] GenCorp pleaded that it is not liable to pay the outstanding invoices, because:

[6.1] Reinier Lehmann, who allegedly represented GenCorp in concluding the agreement was not authorised to do so; and

[6.2] the fees claimed by the plaintiff are not fair and reasonable and/or were not properly calculated at the hourly rates ordinarily charged by the plaintiff for the services.

Evidence

- [7] In order to place the evidence in perspective, it is apposite to identify the following role players:

[7.1] Itse Oosterhoff ("Oosterhoff"), the attorney representing the plaintiff at all relevant times;

[7.2] Reinier Lehmann ("Reinier"), who, according to the written agreement, represented GenCorp in his capacity as Chief Commercial Officer when the agreement was entered into; and

[7.3] Erwin Lehmann ("Erwin"), Reinier's uncle and chief executive officer and sole shareholder of GenCorp.

- [8] Oosterhoff testified on behalf of the plaintiff. He testified that he was a lawyer in the litigation department of the plaintiff and that his primary area of expertise is the settling of disputes in commercial and corporate matters.
- [9] Oosterhoff was contacted by Reinier in respect of a dispute that had arisen between the defendant and a certain Mr Drossos ("Drossos"), the shareholder of a Dutch firm, KyotoCooling B.V. ("Kyoto"). Reinier informed Oosterhoff that GenCorp wanted to acquire Drossos's shares in Kyoto, but that the negotiations were not progressing according to plan.
- [10] In the result, GenCorp sought legal advice in devising a scheme to put pressure on Drossos in the hope that mounting pressure might persuade Drossos to look more favourably at GenCorp's offer to acquire Drossos's shares in Kyoto.
- [11] Oosterhoff made a few suggestions, which included filing a bankruptcy application against Kyoto.
- [12] A consultation was arranged for 27 February 2015 at the offices of the plaintiff in Amsterdam to discuss the way forward. In the email confirming the consultation, Oosterhoff explained to Reinier that the plaintiff requests a EUR 10 000, 00 deposit from first-time clients. Significantly and on the day of the first consultation, Reinier addressed an email to Oosterhoff, informing Oosterhoff that he was "*on his way*" to the meeting, in which email Erwin was copied in. This was a trend followed in all

further communications from Reinier to Oosterhoff and other attorneys working in the plaintiff's offices.

[13] It is, therefore, quite clear that Erwin was, from the word go, fully appraised of the negotiations between Reinier on behalf of GenCorp and Oosterhoff on behalf of the plaintiff. The aim of the mandate to the plaintiff was in any event to strengthen GenCorp's hand in its negotiations with Drossos.

[14] Erwin represented GenCorp during the negotiations with Drossos and the work performed by the plaintiff was in the end result to place Erwin in a more favourable position during the negotiations.

[15] At the consultation on 27 February 2015, it became evident that the work to be done will be more complex and time-consuming. Oosterhoff explained that Kyoto had various creditors who supported GenCorp's bid to gain control of Kyoto and who would be willing to participate in a strategy that would place pressure on Kyoto and ultimately Drossos.

[16] Oosterhoff appraised Reinier of the above in an email dated 4 March 2015 as follows:

"In the course of our discussion on the previous Friday at our office, we made a preliminary estimation of the costs.

We estimated that the costs for an elementary/ (simple) application for bankruptcy [insolvency] on EURO 5000. The extent of the file / (docket) (whereby in the first place we think about the large number of e-mails with a large number of documents that were

attached and the entities involved) and the different strategies that had to be discussed, require significantly more time. Although GenCorp realises this fact I would like to point this out at this stage.

This means that the costs with regard to the advising of GenCorp will be more than the estimation of the number of hours with regard to a simple application for bankruptcy."

[17] Thereafter Oosterhoff sets out the strategy as follows:

"As we have discussed earlier we have to include a summary proceeding in which we ask that KyotoCooling BV establishes liens to the possibilities. With the establishment of a lien the control remains with the creditors in contrast to a bankruptcy procedure where GenCorp will be dependent on the cooperation of the curator."

[18] The email concluded with a proposal that a telephonic conference be arranged for 5 March 2015 to discuss the other stakeholders as well as the scope of Baker & McKenzie's mandate. When asked whether he recalled the telephonic conversation of the 5th of March 2015, Oosterhoff responded that there were, especially in the initial stages of the process, various calls per day with Reinier,

[19] Oosterhoff explained that the process of obtaining pledges was a difficult and complex task due to the multiple creditors that were involved and who had different rights in terms of ranking. The priority ranking had to be determined which was a huge task involving a lot of work and hours spent.

[20] This email was followed by an email of 11 March 2015 in which Oosterhoff advised Reinier as follows:

"Hi Reinier

This [information] also for you so that you will stay informed [/to keep your finger on the pulse].

The number of hours that we spent on this matter is considerable, but this will be of no surprise to you. In my experience it is mainly during the first period that the complete docket [/file] (that is extensive in this case) have to be studied, the first discussions have to be entered into and the strategy has to be planned for which a lot of time is necessary. Up to and including the weekend the counter stands on about EURO 17 000 with regard to fees (exclusive of VAT and standard storage ["standaardopslag"]). A large portion thereof is with regard to the bankruptcy account. The same is valid for the preparatory work for the interim proceedings.

If you are in agreement, I will send an update to you in two weeks' time. In the first week of April we will send you our first invoice.

You are welcome to phone me if you have any queries,..."

[21] Reinier did not seek any clarification in respect of the amount of time that had been spent up until then, nor did he raise any complaints in respect of the fairness and reasonableness of the fees. To the contrary, Reinier, responded to the email as follows:

"Hi Itze,

Thank you it is clear. The money to pay costs is available if the outcome is good, but in this regard I have all the confidence. I am looking forward to the overview and the invoice.

How is the progress with the bankruptcy application and the preparation for the interim proceedings. If it is at all possible I wish that the application for bankruptcy could be completed by today so that it can (perhaps) be used as an extra motivation (/pressure), so that they then could establish the awarding of the right pledge [/lien] without the intervention

of judge. I assume that we don't have to be worried that in the case of an interim proceeding that the right of pledge will not be awarded..?"

[22] On 25 March 2015 Oosterhoff in an e-mail to Reinier, informed Reinier that a further EUR 22 000's work has been done since 11 March 2015. Mr Cross, counsel for the plaintiff, remarked that it seems to be a lot of money, to which Oosterhoff answered that the amount is nothing out of the ordinary and summary proceedings could easily cost between 100 and 200 thousand euro depending on the complexity of the matter.

[23] As proof that the bankruptcy and summary applications were having the desired effect, Oosterhoff was referred to an email exchange between Erwin and Drossos on 27 March 2015, in which Drossos expressed his wish to engage in settlement discussions on the condition that all legal actions be suspended for 45 days. Oosterhoff explained that he received all the email correspondence between Erwin and Drossos in order to discuss the strategy going forward. At that stage, GenCorp did not want to suspend the legal proceedings because it was of the view that its negotiation position would benefit from applying constant pressure on Kyoto.

[24] Oosterhoff's attention was directed to the first invoice issued to GenCorp dated 10 April 2015. The invoice pertained to professional services rendered and disbursement incurred for the period ending 31 March 2015 in a total of EUR 54 408, 72. Oosterhoff was referred to a further document that set out in detail

which person performed the work, a detailed description of the work performed and the hours spent on the work done.

- [25] One such entry for work done by a certain Wouter Seinín on 24 March 2015, reads as follows:

"Review response letter Boekel (0.3); e-mail to R Lehman; P Matser and M van Dijk (0.2); follow-up correspondence P Matser (0.2) (0.3); Correspondence Lehmann (0.2); discuss sending modality with I. Oosterhoff (0.1) send e-mail with draft to R Lehmann (Gencorp); finalize letter (0.1); prepare e-mails to Boekel (0.2); prepare e-mails to R Lehman (0.1) (0.7)."

- [26] The time spent on this entry was recorded as one hour. The same detailed description and time spent appears in respect of each entry and the 10 April 2015 invoice consists of four pages.

- [27] Oosterhoff explained that some of the items pertained to work done by colleagues in other speciality fields, for example, the IT department. Another strategy employed to put pressure on Kyoto was by filing a complaint with the Dutch data privacy authority which was handled by the IT department. Oosterhoff also pointed out that work that was more simplistic was carried out by a junior associate who charged a lower hourly tariff than the senior associates.

- [28] Oosterhoff received the time schedules from all the persons involved in the work at the end of the month and scrutinised what was done against the time that was

recorded. If seven hours were for instance charged for a specific task and he was of the opinion that it is too much, he will deduct an hour to make sure that the client paid a fair amount for the work that was performed.

[29] Oosterhoff confirmed that the work set out in the 10 April 2015 invoice was performed and that although late, GenCorp paid the invoice without any problems.

[30] Oosterhoff and his team utilised each available legal process to keep the pressure on Drossos. On 14 April 2015, Oosterhoff informed Reinier and some of the other creditors that joined the proceedings against Kyoto of yet another process:

"Ladies and Gentlemen,

Attached herewith you will find the relevant concept letter. It includes the general claim of the creditors on the guarantors but also the specific claims of Banens and Horos.

I will gladly receive your eventual remarks. I would like to send it off tomorrow at approximately the midday hour."

[31] Reinier, for one, was immensely impressed by the move. He responded to the email as follows:

"PRIMA! EXCELLENT! Do we want to send it right away, or do we wait until the 21/22nd?"

[32] On 21 April 2015 judgment was obtained against Kyoto on the strength of pledges it had provided to various creditors, which judgment increased the pressure on Drossos further.

[33] The judgment was exactly what GenCorp wanted to achieve and in Oosterhoff's words:

"It was really a good thing because this would cause a lot of headaches for Kyoto Cooling, for example, having to take care of all these pledges in all these various countries and all these locally registered IP rights, would mean an enormous task with a high time pressure on this and penalties ticking away at the rate of 5000 euros a day, with a maximum of two and a half million."

[34] The judgment had, according to Oosterhoff, the desired effect as GenCorp (being in a stronger position) and Kyoto resumed negotiations with renewed vigour.

[35] From the correspondence exchanged between Reinier and Drossos it appears that the pressure caused by the various court processes and orders did have an effect. On 30 April 2015 in an email to Drossos, Reinier stated the following:

"...In a good faith effort to allow for such a deal, the creditors, without prejudice to any of their rights arising from the court decision or otherwise, are willing to cooperate with suspending execution of the court decision for a period of seven days from the date of this e-mail...Such suspension is fully subject to Kyoto Trading Cooperatief continuing its exclusive negotiations with Gencorp on a transaction pursuant to which it will sell all its share in KyotoCooling to Gencorp."..."

[36] The work performed during April 2015 is, once again, set out in detail in the invoice dated 12 May 2015. The invoice was not paid.

- [37] During May 2015 various emails were exchanged between the plaintiff and GenCorp on the one hand, and GenCorp and Kyoto on the other hand, in respect of the negotiations. The plaintiff continued to provide advice and legal services during this period.
- [38] Although a letter of intent and a draft Share Purchase Agreement were prepared and negotiated between GenCorp and Kyoto during April and May 2015, the deal turned sour on or about 10 June 2015 and negotiations collapsed.
- [39] From June 2015 payment of the outstanding invoices became a problem. A further invoice was sent on 10 July 2015, which also remained outstanding. According to Oosterhoff Reinier kept on making promises of payment, which promises did not materialise.
- [40] On 23 July 2015 Oosterhoff addressed an email to Erwin informing him of the problem with the payment of the invoices and advising him that the plaintiff will not do any further work for Gencorp as of 23 July 2015.
- [41] In response to a letter of demand for the payment of the outstanding fees, Erwin in his capacity as Chief Executive Officer and sole shareholder of Gencorp bluntly denied any knowledge of the written agreement with the plaintiff and denied that it was in negotiations with Kyoto.

[42] This denial is disingenuous if one has regard to an email sent by Erwin on 16 June 2015 to Reinier, Oosterhoff, Petro Master, Marcel van Dijk, Wout Schaap and Cees Prins in which he refers to a consultation earlier that day and sets out a detailed plan going forward, namely:

- "1. John's (Drossos) new offer does not serve the best interests of the creditors, minority shareholders, Stulz's not the company and seems to only be a diversion for him to get more out of the deal.. .*
- 2. John terminated the negotiations last week and this new offer does not remotely come close to our initial agreement and therefore we do not consider this as a continuation of the negotiations.*
- 3. I am willing to consider a deal with John*
- 4. ...*
- 5. For now I suggest that the creditors continue with the path set out...
I am still willing to save the deal... Please keep me informed and let's hope that John sees the necessity of agreeing to the simple deal and stop wasting time and money."*

(own emphasis)

[43] When asked what his reaction to GenCorp's sudden turn about is, Oosterhoff stated he was, in view of all the promises to pay, shocked.

[44] Oosterhoff was, lastly, referred to the August 2015 and September 2015 invoices. Oosterhoff confirmed that the work charged for was done.

[45] During cross-examination, Oosterhoff was requested to explain the process followed in the Netherlands if a client wants to question the reasonableness of an attorney's

bill. Oosterhoff explained that a client will first contact his firm with the problem. The firm will bring the problem to his attention and he will endeavour to resolve the problem. If this approach does not work, which according to Oosterhoff is uncommon, then the matter will be referred to the complaint mechanism that every firm in the Netherlands is obliged to have in place.

[46] Oosterhoff testified that he is not *au fait* with the process from thereon as the reasonableness of his fees have never been questioned in the past. He, however, surmised that a colleague of his will look at the complaint and the invoice to determine the reasonableness of his fees. Should a client not be satisfied with the outcome of the procedure, a client may file a complaint with the Dean of the Bar Association.

[47] Oosterhoff was then asked whether the Dean or somebody else would look at the bill to see if it is reasonable. Oosterhoff responded that he does not know as he has never been in such a situation. Oosterhoff further explained that the Netherlands does not have a system similar to the one in South Africa for taxing bills.

[48] It was put to Oosterhoff that GenCorp questions whether all the work done by Oosterhoff and his colleagues was reasonable and necessary in order to fulfil the plaintiff's mandate. Oosterhoff explained that he and his colleagues practised in specialised fields of the law and have the necessary skill and experience to know what needs to be done in order to execute their mandate. Oosterhoff added that this

is the reason why a client would enlist the services of attorneys with the necessary legal knowledge.

[49] Oosterhoff requested Mr Arnoldi SC, counsel for GenCorp, to refer to the specific items on the invoices with which GenCorp has a problem to enable him to answer the question properly as it is impossible to answer a question couched in such general terms.

[50] Oosterhoff was referred to the invoice of 12 May 2015 and more specifically to the entries that were made in respect of work that was done on 10 April 2015. Firstly, there is an entry in respect of work done by Oosterhoff that reflects the following:

"prepare court hearing / revise pleadings / study file (3,4), meeting with clients (1.0), attend court case (1.5), e-mail W, Seinen (0.1)." The total time spent was six hours.

[51] The following entry is in respect of work done by Liesbeth Maaren, a colleague of Oosterhoff that formed part of the team working on the GenCorp matter and reads as follows:

"Re dispute with KC; prepare the hearing finalize pleadings (3.0); meeting with clients to prepare the hearing with I. Oosterhoff, R Lehmann, P Matser, H van Veen, E Erkens and M Cluasing (1.0); court hearing (1.5); discuss the hearing and further steps with I. Oosterhoff, R Lehmann, H van Veen, E Erkens and M Cluasing (0.5)." The total time spent was also six hours.

- [52] Mr Arnoldi pointed out that 12 hours have been spent by two people on one matter and furthermore explained to Oosterhoff that in South Africa, the Taxing Master will normally have regard to the documentation referred to in the item and decide whether the cost and the application of the tariff is reasonable in the circumstances.
- [53] Oosterhoff replied that he is not conversant with the taxing system in South Africa. Oosterhoff testified that it is normal practice in the Netherlands to work with a junior associate on a matter.
- [54] Mr Arnoldi further explained to Oosterhoff that in terms of South African law, when the fairness and reasonableness of an attorney's fees are in dispute, all the pleadings and documents relied on to substantiate the fees should be discovered, alternatively, a taxing master should have regard to the documents to make an assessment whether the fees are fair and reasonable.
- [55] Oosterhoff replied that the South African taxing system is not utilised in the Netherlands and because the work was done in the Netherlands, the system applicable in the Netherlands should apply.
- [56] Mr Arnoldi proceeded to ask Oosterhoff whether the plaintiff has discovered the documents subsisting the work done in the two items referred to. Oosterhoff replied that he does not know what had been discovered and that the question should rather be answered by the lawyers representing the plaintiff.

[57] Mr Arnoldi concluded his cross-examination by stating that he is not going to question Oosterhoff on the authority issue.

SUBMISSIONS

Authority issue

[58] In view of the failure by Mr Arnoldi to dispute the evidence of Oosterhoff on the authority issue, Mr Cross, counsel on behalf of the plaintiff submitted that the uncontested evidence of Oosterhoff in respect of the authority issue should be accepted and that the court should find that Reinier had the necessary authority to enter into the written agreement on behalf of GenCorp.

[59] This submission is in line with the evidence and I agree.

The fairness and reasonableness of the fees

[60] In order to succeed on the question of whether the fees claimed by the plaintiff are fair and reasonable, the plaintiff bears the *onus* of proof.

Submissions on behalf of plaintiff

[61] In addressing this issue, Mr Cross submitted that the uncontested evidence of Oosterhoff proved the following:

61.1 the plaintiff performed all the services reflected in the invoices without any complaint from GenCorp and even praised the plaintiff's work as late as 23 June 2015. The submission is based on an e-mail sent by Reinier to Werner on 23 June 2015, which reads as follows:

"Can you please update Itse with the payment status?! Any confirmation or issuing documentation would be helpful. B & M is performing good as valuable council (sic) to us and we cannot afford them to stop assistance."

61.2 the services were performed on the instruction or at the request of Gencorp and in terms of the agreement between the parties;

61.3 the invoices were all carefully scrutinised by Oosterhoff to ensure their accuracy;

61.4 the April 2015 invoice was paid without complaint;

61.5 after receipt of the 12 May 2015 invoice in the amount of EUR 35 394, 43 GenCorp continued to instruct the plaintiff to perform work;

61.6 Reinier made several promises to pay the invoices;

61.7 Gencorp paid the 10 April 2015 invoice on 25 June 2015 without demur or complaint. At that stage Gencorp had already received the 12 May 2015 invoice;

61.8 after receipt of the 10 July 2015 invoice in the amount of EUR 70 844, 98, GenCorp continued to instruct the plaintiff to perform further work;

61.9 on 13 July 2015 Reinier unconditionally acknowledged GenCorp's liability to pay EUR 106 239, 39, being the amount outstanding at that stage. The relevant portion of Reiner's email dated 13 July 2015 reads as follows:

"I am once again ashamed because of the late payment!!!....It will absolutely be paid; we cannot get away from that."

61.10 At no stage did Gencorp complain about the time recorded in the invoices or in any way raised the fairness and reasonableness of the plaintiff's fees.

[62] In view of the aforesaid uncontested evidence, Mr Cross, submitted that the plaintiff has successfully established, at the very least on a balance of probabilities, that the invoices were fair and reasonable in the circumstances.

[63] In response, GenCorp did not present any evidence to challenge the fairness and reasonableness of the plaintiff's invoices.

[64] In respect of the taxation of the bill, Mr Cross pointed out that the Taxing Master only has authority to tax bills of costs of attorneys in South Africa.

Submissions on behalf of GenCorp

[65] Mr Arnoldi submitted that when considering Oosterhoff's evidence, one should bear in mind that he was not qualified as an expert on legal costs and was not called as an expert witness. In order for the plaintiff to prove that the fees were fair and reasonable it should have:

65.1 followed the internal process at its firm and in addition should have considered a possible reference to the Dean of the Bar Association in the Netherlands; or

65.2 suggested a taxation of its bill of costs by the Legal Practice Council; or

65.3 called an expert on legal costs.

[66] The fact that the plaintiff did, furthermore, not discover the pleadings, e-mails and other documentation on which time was spent, to make up the hours reflected in the invoices, is according to Mr Arnoldi fatal to the plaintiff's claim.

[67] In the result, the plaintiff did not prove that the fees were fair and reasonable.

Legal principles and discussion

[68] Should a defendant wish to question the fairness and reasonableness of legal fees claimed by an attorney, the defendant may file a dilatory plea requiring the taxation of the bill of costs. The matter will then only proceed, once the bill has been taxed.

[See: *Benson v Walters* 1984 (1) SA 73 A]

[69] In this matter and due to lack of jurisdiction of the Taxing Master, it is clearly not an option.

[70] In *Melamed & Hurwitz Inc v Blank* 2004 CLR 217 C, the court was faced with a bill of costs that was not taxed. At paragraph [39] Van Zyl J stated the following:

"[39] A contract between attorney and client for payment of an agreed fee is not illegal or contrary to public policy (Nicholls v MacMuldraw 1923 CPD 401 at 404-405; Law Society of South 1923 SWA 47 at 52). This is so even if the attorney chooses to place an extravagant value on his work and services (Cape Law Society v Luyt 1929 CPD 281 at 287). A court may, however, interfere with an agreement as to costs if it should appear to be unjust, unfair or unreasonable, or if the client should allege that he has been overreached, in the sense that the attorney has taken undue advantage of him by charging unconscionable, excessive or extortionate fees, or has induced him to agree to payment of the fees in question as a result of duress, fraud, misrepresentation or mistake. The court may remedy the situation by ordering the

costs to be taxed, in which event the matter will be suspended pending the determination of the taxing master. ..."

[71] In the *Melamed* matter *supra*, the defendant was being sued by her husband for a divorce. The defendant, Mrs Blank enlisted the services of Mr Melamed ("Melamed"), an attorney to provide her with legal advice and assistance. In the execution of his mandate, Melamed consulted with Mrs Blank, perused certain documents, including a settlement agreement and provided legal advice to her.

[72] Mrs Blank initially did not have a problem with Melamed's bill. It was only when she learnt that she and not her husband must pay the bill that she suggested for the first time that Melamed's fee was unreasonable. Melamed instituted an action for payment of his bill and during the trial, Mrs Blank, although the issue was not raised on the pleadings, disputed the amount of hours spent by Melamed on the matter. Mrs Blank was of the opinion that, in view of the limited amount of work Melamed had according to her, done he was not entitled to the fees claimed by him.

[73] Melamed during his evidence explained what work he had done and stated that the hours spent accords with the work that was involved in providing legal advice in a divorce action. Mrs Blank in her evidence denied Melamed's assertion without tendering any evidence to support her allegation that the fees were unreasonable.

[74] Having summarised the evidence, Van Zyl J remarked as follows in paragraph [46]:

"...In any event, even if there had been advance notice of this special plea, I am quite satisfied that, on Mr Melamed's evidence, there is no question of unreasonableness of the fee and even less of overreaching. A defendant relying on such serious allegations should at least tender some evidence in support thereof."

[75] GenCorp agreed to pay the hourly tariff of the attorneys involved in the execution of its mandate. The only issue in dispute is therefore whether the amount of time that was spent in the execution of the mandate was fair and reasonable.

[76] The evidence of Oosterhoff clearly and precisely explained the nature and complexity of the work involved in the execution of the mandate given by GenCorp. Oosterhoff, furthermore, testified that he scrutinised each item on the bill to make sure it is reasonable. Should he be of the opinion that the amount of hours charged were not reasonable, he would amend the bill to reflect fewer hours spent on the work.

[77] Each invoice presented to GenCorp meticulously recorded the work that was performed and the time that was spent on the work. Save for the entries of 10 April 2015, none of the other entries were questioned or disputed.

[78] Mr Arnoldi did submit that the plaintiff should have discovered all the documents perused and prepared, to substantiate the amount of time spent on the work. The fact that the plaintiff chose not to discover the documentation and to present the

evidence of Oosterhoff in explaining the extent of the work that was done, is not necessarily fatal to the plaintiff's claim.

[79] The evidence presented by Oosterhoff established at least *prima facie* that the hours spent was justified. The invoices were at all relevant times in GenCorp's possession and GenCorp was at liberty to request discovery of the documents referred to in the invoices.

[80] One should also bear in mind that GenCorp actively participated in the litigation process, was kept up to date with what the strategy entailed and received correspondence and agreements drafted by the attorneys working on the mandate.

[81] It is telling that no complaint was ever raised in respect of the invoices that were presented to GenCorp. The first invoice was paid without problems. Reinier praised the work performed by the plaintiff and went so far as to state: "*!!....It will absolutely be paid; we cannot get away from that*" and "*B & M is performing good as valuable council (sic) to us and we cannot afford them to stop assistance*".

[82] Significantly, the fairness and reasonableness of the fees were raised for the first time in GenCorp's plea. One would have expected Erwin or Reinier to have objected to the hours spent upon receipt of the first invoice. This they did not do.

[83] In presenting its defence it was up to GenCorp to challenge the evidence presented by Oosterhoff. This it did not do. In the result, there is no basis to find that the fees charged by the plaintiff in executing its mandate are unfair and unreasonable.

[84] In having had regard to the evidence as a whole, I am satisfied that the plaintiff established on a balance of probabilities that the fees charged for the work performed by it is fair and reasonable.

ORDER

[85] In the premises, the defendant is ordered to pay to the plaintiff:

1. The amount of EUR 157 422, 23;
2. Interest on the aforesaid amount *a temporae morae* from date of each invoice to date of payment;
3. Costs of suit.



A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 25 January 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 12 March 2021

APPEARANCES

Counsel for the Plaintiff:

Advocate G. Cross

Instructed by:

Baker & McKenzie

Counsel for the Defendant:

Advocate F. Arnoldi SC

Instructed by:

MJ Lombard Incorporated