IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 5395/00

In the case between:

BERMAN & FIALKOV	Plaintiff
and	
RICHARD HENRY AUGUSTUS LUMB	Defendant

JUDGMENT: 9 Sept. 2002

VAN REENEN, J:

1] The plaintiff on 31 July 2000 issued a summons out of this court against the defendant for the payment of an amount of R230 000, Value Added Tax thereon at 14%; interest thereon at the rate of 15.5% per annum, with effect from 23 June 2000 to date of payment; and costs of suit (Claim A) and alternatively, payment of an amount of R313456,12;

interest thereon at the rate of 15.5% with effect from 23 June 2000 to date of payment; and costs of suit (Claim B).

2] The plaintiff is a firm of attorneys. Mr Abraham Izak Fialkov, one of the partners in that firm, acted as the defendant's attorneys in litigation with his daughter and son-in-law M V & P Hebin.

3] The defendant on 9 January 1998 and at Hout Bay signed an agreement in the following terms:

> "MY CLAIM AGAINST M V & P HEBIN
>
> I the undersigned R H A (Gussie) Lumb do hereby agree to the following in respect of the matter:
>
> 1. I agree to pay A I (Bram) Fialkov all fees in this matter in accordance with the Law Society tariff of fees for non litigious matters on the highest scale.
> 2. I also authorise the said Bram Fialkov to employ the services of two senior Counsel to act on my behalf in this matter.

3. I also grant to the said Fialkov the option to acquire one plot in respect of the plots which I am claiming (in the event that I succeed in this claim) at a price equal to the total amount allowed (or agreed) in respect of attorneys' fees only (excluding disbursements) in paragraph 1 above.

4. If my right to the said plots is settled by way of a cash settlement then one-third of such settlement figure shall become the subject of the option referred to in paragraph 3 above."

4] After the plaintiff's mandate had been terminated it caused a bill of costs to be drawn by an independent cost consultant. The amount thereof, exclusive of disbursements and Value Added Tax, came to R335 000.

5] There were three attempts to have the bill of costs taxed namely on 22 December 1999; 16 March 2000 and 16 May 2000.

6] The taxing master on the last-mentioned date ruled that the bill of costs would be taxed on the basis of the Law Society's tariff of fees for non-litigious matters.

7] After approximately 112 of the approximately 1200 items appearing on the bill of costs had been taxed the parties on the last-mentioned date entered into settlement negotiations. The plaintiff alleges that it (represented by Mr Fialkov alternatively Advocate H. McLachlan) and the defendant (represented by his attorney Mr Craig Delport) reached an oral agreement to the effect that the defendant acknowledged his indebtedness to the plaintiff in an amount of R230 000 plus Value Added Tax in full and final settlement of all fees and disbursements due to the plaintiff. In terms of the alleged agreement the said amount would be settled by way of the payment of an amount of R150 000 plus Value Added Tax by not later than 24 May 2000 and the payment of an amount of R80 000 plus Value Added Tax, on judgment or settlement of the proceedings under case number 89/98, but in any event by not later than 31 December 2000. The alleged agreement was subsequently reduced to writing and signed by the plaintiff but not by the defendant.

8] The alleged agreement of 16 May 2000 forms the subject-matter of Claim A and the written agreement reached on 9 January 1998 and the bill of costs drawn pursuant thereto form the subject-matter of Claim B.

9] The defendant in its plea denied that the agreement on which Claim A is based was entered into. The defendant admitted that he had signed the written agreement entered into on 9 January 1998 but denied that an oral agreement was entered into in conjunction with it. He also denied the express alternatively, implied terms alleged in paragraph 3.3 of the Particulars of Claim. The defendant also admitted that he had given the plaintiff an oral mandate to conduct litigation against M V & P Hebin on his behalf and that it was a tacit term of such mandate that defendant would a) be liable for the plaintiff's fair and reasonable fees and b) reimburse plaintiff for any fair and reasonable disbursements made on its behalf. The defendant in the alternative pleaded that if it is found that the written agreement of 9 January 1998 had been entered into, it is illegal, null and void and unenforceable because a) it constituted an agreement to pay a contingency fee alternatively, a **pactum de quota litis**, alternatively a contract of maintenance; and b) amounted to overreaching the defendant. The defendant together with its amended plea on 4 July 2002 filed a special plea in the following terms:

> "1. In terms of Claim B of the Particulars of Claim the plaintiff is claiming fees and disbursements on an untaxed bill of costs;
>
> 2.1 The fees and disbursements thus claimed amount to overreaching the defendant.
>
> 2.2 The defendant has never agreed to pay the plaintiff's fees and disbursements as set forth in the said untaxed bill of costs.
>
> 2.3 The defendant has at all material times insisted on taxation of the said bill of costs and still does so insist.
>
> 3. In the premises the plaintiff is not entitled to recover fees and disbursements thus claimed until they have been taxed by the

> taxing master of this Honourable court, alternatively the taxing committee of the society."

9] On 3 September 2002 the plaintiff by notice of motion sought an order in terms of Rule 4(1)(a) permitting it to withdraw Claim A. As it is not the function of this court to compel a party to continue with proceedings or part thereof against his/her/its will (See: **Levy v Levy** 1991(3) SA 614 (A) at 620 B) and in order to obviate the squandering of this court's time, leave to withdraw Claim A is granted. Respondent's counsel, not surprisingly, did not object to the order being granted. As the plaintiff did not tender costs, the respondent in terms of Rule 41(1)(c), on notice, applied for the costs occasioned by the institution of Claim A on an attorney and own client scale. As there in my view is no reprehensibility in the prosecution of Claim A or the withdrawal thereof there is no warrant for ordering costs on a punitive scale. Accordingly the costs occasioned by the institution of Claim A is awarded as between party and party. It is ordered that such costs be taxed only once the action has been finalized.

10] The plaintiff in the aforementioned notice of motion also sought orders in the following terms:

> "2. Directing that the issue of the scale upon which the taxation of the bill of costs between the parties be taxed be separated from all other issues, and determined pursuant to the provisions of Rule 33(4);
>
> 3. that all other issues be stayed pending a decision on this issue, and pending taxation of the bill of costs on the scale so determined; and
>
> 4. That this (sic)costs of this application:
>
> 4.1 If unopposed, be costs in the cause;
>
> 4.2 If opposed, be borne by defendant."

11] The basis of the application for the separation of issues is that there is a dispute about the scale on which the bill of costs should be taxed. The nature of the dispute is that the plaintiff, whilst conceding that clauses 3 and 4 of the written agreement of 9 January 1998 are unenforceable, contends that they are severable from the remainder thereof and that the bill of costs should be taxed on the Law Society's non-litigious scale whereas the defendant, averring that the whole of the written agreement of 9 January 1998 is illegal, null and void and unenforceable contends that it should be taxed on the High Court scale.

12] The keystone of the application for the separation of issues is that because of the aforementioned dispute the bill of costs has not been taxed and that if it were to go ahead and the plaintiff's contention is shown to be incorrect, the entire time spent on the taxation would be wasted and that for that reason it would be convenient to separate the issues as prayed and stay all further proceedings pending taxation on the scale found by the court to be appropriate.

13] The defendant in its answering affidavit opposed the relief sought in the notice of motion on the basis that a) the plaintiff is only entitled to attorney and own client costs on a High Court scale as fixed by the Taxing Master of this court, which costs the defendant has tendered and still does; b) that it is for the Taxing Master to decide what the scale or tariff should be and c) that the issue of the applicable scale cannot be determined apart from the issue of legality/illegality of the agreement of 9 January 1998.

14] The applicant in its replying affidavit, impermissibly, amplified the basis of the application to separate the issues as follows:

> "14.2 Defendant has, by means of the amendment to its pleadings raised in April 2002, formally taken the stance

that the agreement relied upon (which agreement contains the consensus regarding the scale of costs to be payable) is illegal, null and void, and unenforceable by virtue of the circumstances set out in paragraph 2 of the amended plea. Plaintiff avers tat it is inappropriate to approach the Taxing Master to make a ruling on these issues, which were raised in the pleadings in April 2002 for the first time. <u>To do so would effectively be to require the registrarto decide issues of legality and severability which otherwise should be determined by the above Honourable Court. It is submitted thatit is unfair upon the Taxing Master</u>

to expect him to make a responsible decision in this regard.

14.3 It would, Plaintiff avers, be an exercise in futility to persuade the Taxing Master one way or the other way, only to have the trial Court differ when it becomes seized of the matter.

14.4 For this reason, it is respectfully submitted that a decision as to the scale upon which the fees should be taxed (including, if necessary, findings as to the averments of illegality and unenforceability made by the Defendants) should be determined **ante omnia**."

(underlining provided)

15] Not only are the underlined averments difficult to reconcile with what appeared to have been common cause between Mr Kirk-Cohen (who appeared for the plaintiff) and Mr Carstens S.C. (who appeared for the defendant) namely, that the parties addressed the Taxing Master fully on 16 May 2002 as regards the legality/illegality of the agreement of 9 January 1998 before he resolved to apply the non-litigious scale of the Law Society, but the averments made in paragraph 14.4 serve as confirmation that prayer 2 of the notice of motion was not unintentionally formulated in the terms that it was. Although Mr Kirk-Cohen conceded that prayer 2 of the Notice of Motion was drafted "infelicitously" he did not move for an amendment thereof.

16] In terms of the provisions of Rule 33(4) in its present form, an application for the separation of issues by any party must be granted unless it appears that such issues cannot conveniently be decided separately (See: **Edward L Bateman Ltd v CA Brand Projects (Pty) Ltd** 1995(4) SA 128 (T) at 132 D) and it is incumbent on the party who opposes such an application to satisfy the court that such an order should not be granted (See: **Braaf v Fedgen Insurance Ltd** 1995(3) SA 938 (C) at 939 G). The convenience to be considered is primarily that of the court and the litigants (**Braaf v Fedgen Insurance Ltd** (supra) at 939 H). Convenience in the context does not only connote facility or ease or expedience but also appropriateness in the sense that in all the circumstances it is fitting and fair to the parties concerned (**Braaf v Fedgen Insurance Ltd** (supra) at 940 C – D). The court's function is to assess to the best of its ability the nature and extent of the advantages and the disadvantages that would result should the order that is being sought be granted (See: **Minister of Agriculture v Tongaat Group Ltd** 1976(2) SA 357 (D) at 364 D – E). Such an application will normally be granted if the advantages that will flow therefrom outweigh the disadvantages (See: **Grindrod Cotts Stevedoring (Pty)**

Ltd & Another v Brock's Stevedoring Services 1979(1) SA 239 (D) at 241 pr – A).

17] Mr Carstens submitted that separating the issues of the legality/illegality of the written agreement of 9 January 1998 as well as the scale on which the bill of costs should be taxed, and adjudicating them separately, would not serve any purpose as the taxing master has already, after arguments submitted thereanent by the parties, decided that the bill of costs should be taxed on the non-litigious scale of the Law Society and has already commenced taxing it; that any decision arrived at by the court could not be foisted upon the taxing master as it would constitute an impermissible interference with his discretion; that the taxation would have to run its course; and that the appropriate remedy is for the taxation to be reviewed once the taxing master has affixed his **allocatur** to the bill of costs.

18] My understanding of the legal position expounded in **Benson and Another vs Walters and Others** 1984(1) SA 73 (A) at 84 A – B, is that taxation is not a prerequisite for the institution of an action based on a bill of costs but that if the fact that it has not been taxed is raised in the plea, the action cannot proceed and has to be stayed until taxation has been completed. The defendant in a special plea raised the fact that the bill of costs on which the plaintiff is suing has not been taxed and requested that the action be stayed pending the taxation thereof. It appears to me that the defendant is entitled to such an order and that if the order sought in prayer 2 of the notice of motion is granted it would result in the defendant's entitlement to such an order being negated.

19] Although that, in my view, constitutes a sufficient basis for refusing the application there is a further basis upon which I would do so.

20] Although the taxation of a bill of costs is an integral part of the proceedings before a court and the taxing master performs a judicial and not an administrative function (See: **Bills of Costs (Pty) Ltd and Another v The Registrar, Cape N.O. and Another** 1979(3) SA 923 (A) at 945 A – C) his/her powers - which are derived from Rule 70(1)(a) - and functions are not unlimited. The general functions of a taxing master were described as follows by Ramsbottom J in **Martens v Rand Share and Broking Finance Corporation (Pty) Ltd** 1939 WLD 159 at 163:

> "… to decide whether the services have been performed, whether the charges are reasonable or according to tariff and whether disbursements properly allowable as between party and party have been made; his function is to determine the amount of the liability, assuming that liability exists, and the fact that he requires to be satisfied that liability exists before he will tax does not show that there is any liability. The question of liability is one for the court, not for the taxing master."

21] It is because a Taxing Master's functions are so circumscribed that courts have held that for instance, a Taxing Master does not have jurisdiction to adjudicate defences of payment and prescription (See: **Lubbe v Borman** 1938 CPD 211); that it is not the Taxing Master's function to assess the nature and extent of a plaintiff's claim and the defendant's counterclaim (See: **NUS South Africa (Pty) Ltd v**

R & E Holdings (Pty) Ltd 2000(3) SA 522 (E) at 528 I – 529 A); that the question whether an attorney acted without a mandate or exceeded it falls outside the ambit of a Taxing Master's functions (See: **Botha v Themistocleous** 1966(1) SA 107 (T) at 111 E – F); and that the question whether or not an attorney and his client had agreed that the former would render his services in respect of an application for a fixed predetermined fee is beyond a Taxing Master's competence (See: **Composting Engineering (Pty) Ltd v The Taxing Master** 1985(3) SA 249 (C) at 250 G – H).

22] The proceedings before the Taxing Master on 15 May 2000 have not been traversed on the papers and I have not have the benefit of his input thereanent. If, as was common cause between the parties' respective counsel, the question of the legality of the agreement of 9 January 2000 was argued before the Taxing Master two possibilities present themselves. The first is that he decided in favour of its legality and for that reason proceeded to tax the bill of costs on the non-litigious scale of the Law Society. The second is that he did not consider the legality or illegality of the said agreement but merely proceeded to apply its terms.

23] Whilst it may be the duty of a Taxing Master to interpret the effect of an agreement recording an undertaking to pay taxed costs (See: **Miller v Edenburg and the Taxing Master** 1938TPD 445) a decision regarding the validity or otherwise of the agreement in which the obligation to pay the costs that are to be taxed is sourced, in my view, falls outside ambit of a Taxing Master's powers and functions: it is an aspect that should be decided by the court.

24] If the Taxing Master in arriving at the conclusion to apply the non-litigious scale of the law society did in fact make a decision on the legality of the agreement of 9 January 1998 be clearly acted beyond his competence. If he did not make any decision regarding the legality/illegality of the said agreement and proceeded with the taxation, as is common cause he did, well-knowing that a dispute existed as regards whether the taxation was to take place pursuant to the terms of the written agreement or an oral mandate, he was in error. In either event, after the taxing master has affixed his **allocatur** to the bill of costs, the taxation could be brought on review in terms of Rule 48(1), (if the dispute falls within its ambit), or the common law or the illegality of the said agreement on which the taxation was based could be raised as a defence in the trial (See: **Lubbe v Borman** (supra)) in which the amount that is payable in terms of the taxed bill of costs is claimed.

25] As the scale on which the bill of costs is to be taxed is dependent on whether the agreement of 9 January 1998 is enforceable or not and that issue will arise only once the taxation is brought on review or in the action after the Taxing Master has affixed its allocatur to the bill of costs, it in my view, would be premature to separate and adjudicate the issues of the legality/illegality of the said agreement and the scale on which the bill of costs has to be taxed. In the premises I incline to the view that the issues that the plaintiff requests to be separated cannot conveniently adjudicated separately.

26] Accordingly the application for a separation of issues pursuant to the provisions of Rule 33(4) is dismissed with costs.

27] It is further ordered that the action be stayed pending completion of the taxation of the plaintiff's bill of costs. It is ordered that the wasted costs occasioned by the stay - other than the costs awarded in paragraphs 9 and 26 above - stand over for determination at the trial of the action.

D. VAN REENEN