

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MTHATHA]**

CASE NO.: CA57/2023

REPORTABLE: YES

In the matter between:-

X.M. PETSE INCORPORATED/ZILWA ATTORNEYS

APPELLANT

and

SICELO NABILE

RESPONDENT

JUDGMENT

NORMAN J:

- [1] This is an appeal against the judgment and order of the magistrate sitting in Mthatha which was delivered on 10 November 2023 where a special plea of jurisdiction was upheld with costs. The magistrate further ordered a stay of the action pending taxation of the appellant's fees.
- [2] The appellant attacks the order of the magistrate on the following grounds : That the Learned magistrate erred and misdirected himself by , *inter alia*, upholding the special plea of jurisdiction; by rejecting the argument that the respondent's conduct of paying the invoice partly without any protest amounted to acquiescence ; respondent was thus estopped from subsequently challenging the statement of account; he misdirected himself in finding that the case of ***Rabaney v Schoeman Attorneys Incorporated***¹ was

¹ ***Rabaney v Schoeman Attorneys Incorporated*** 2020 JDR 1081 (GP).

distinguishable from the facts of this case; and that he erred in finding that the action should be stayed pending taxation of the appellant's fees.

- [3] Mr Zilwa appeared for the appellant and Mr Dzingwa for the respondent.

Background facts

- [4] Appellant is a legal firm trading as Zilwa Attorneys in Mthatha. The respondent is the appellant's erstwhile client to whom it had rendered professional legal services. It instituted an action against the respondent by issuing simple summons. It alleged that it was owed a total outstanding balance in the amount of R130 832.03 in respect of services rendered by it at the special instance and request of the respondent. The alleged legal services were rendered on 13 February 2019 until 16 April 2019 in the matter involving the respondent under case number 718/2019. There was a further claim of an amount of R28 102.50 as fees owed in respect of services rendered by the appellant on 25 June 2019 until 24 October 2019 in a matter bearing case number 219B/19. Litigation involving both cases proceeded before the Mthatha High Court.
- [5] The total amount claimed was R158 934.53 which, according to the appellant, remained owing, due and payable. The invoices and the statements of account were attached to the summons as annexures "A" and "B" respectively.
- [6] Appellant alleged that it presented to the respondent the statement of account and a tax invoice amounting to R230 832.03 and the defendant only paid R100 000.00 leaving the balance of R130 832.03 that is under claim. After the filing of a notice of appearance to defend, the appellant did not file a declaration.
- [7] The respondent raised a special plea that: The magistrate lacked jurisdiction in the matter because the respondent had disputed liability or the extent of his liability to the plaintiff, had communicated the dispute to plaintiff and had

requested that the bill of costs be subjected to taxation; taxation falls within the jurisdiction of the taxing master being the clerk of the court or the registrar and not the court. He pleaded that the matter has been prematurely placed before the magistrate. He also pleaded over and denied owing monies to the appellant or to the extent claimed by it. He disputed his liability and requested that the appellant's bills be subjected to taxation. He further denied that all the work reflected in annexures "A" and "B" had been performed by the appellant and denied that the appellant is entitled to the full amount claimed in respect of each item and he put the appellant to the proof thereof. He further denied that he paid only R100 000.00. He averred that he made further payments including a direct payment of R60 000.00 to the advocate that was instructed by the appellant to represent him. He prayed for the dismissal of the claims with costs.

- [8] The appellant replicated to the defendant's special plea. It averred that the statement of account and invoices were presented to the respondent for settlement. The respondent did not object to the invoices but proceeded to effect part -payment towards settlement thereof. It contended that in the circumstances, the respondent acquiesced and should be estopped from raising this belated challenge. It prayed for the special plea to be dismissed with costs.
- [9] Subsequent thereto, the respondent filed an amended plea wherein he relied specifically on the provisions of section 80(4) of the Magistrates' Courts Act ("the Act") and Rule 33(18) of the Magistrates' Courts Rules ('the Rules') that the disputed bill ought to be subjected to taxation before it is placed before a magistrate who can only entertain it thereafter in terms of section 81 of the Act.
- [10] He contended that the matter was not properly before the magistrate given the fact that section 80(4) is peremptory. In the alternative, he submitted that, the court lacked jurisdiction in that the cause of action (litigious work) that is the subject of dispute took place before the High Court. In this regard he pleaded that Rule 17(1) of the Rules of High Court provides that only the court or

registrar of the court to which litigious work was done has jurisdiction over the costs emanating from such work. He sought an order that the costs incidental to the taxation must be determined by the clerk of the court or the registrar. He further pleaded over that the defendant's claimed amounts, the invoice and bill of costs were unreasonably excessive, improper, over-cautious and unusual.

Submissions by the appellant

- [11] Mr Zilwa submitted that there is no authority that before a claim based on a bill of costs is instituted, the bills must be subjected to taxation. In this case he relied on ***Benson & Another v Walters & Others***² where the court stated:

"It follows that where taxation is not waived, taxation is a condition precedent to enforceability of an attorney's claim for fees and disbursements, the debt is not due until taxation." (its emphasis).

- [12] He submitted that the respondent must be estopped from raising a challenge to the bill because he had acquiesced to it by not objecting instead had proceeded, without protest, to effect part-payment towards settlement of the debt. He further submitted that although the appellant accepted that an attorney and client statement can be converted to a bill of costs and be subjected to taxation where there is a dispute about it, such dispute cannot be raised after an acknowledgment of indebtedness which has led to payment. That, he argued, is what finds the application of the doctrine of acquiescence.

- [13] Relying on the decision of ***Markham v South African Finance & Industrial Company Ltd***³, he argued that, the fact that the respondent had unequivocally made payment of the amount claimed must be construed as a clear admission of liability. Mr Zilwa submitted that payment does not have to be made in full, part payment signifies an acknowledgment of debt. He relied on the remarks of the appeal court in the *Markham* matter where it stated that:

² ***Benson & Another v Walters & Others*** 1984 (1) SA 73 (A) at D – E.

³ ***Markham v South African Finance & Industrial Company Ltd*** 1962 (3) SA 669 (A) at page 671 G – H.

“The section contemplates a voluntary and intentional act by the debtor communicated by him to his creditor. That this is so follows from the three forms of acknowledgment by the debtor specially set out in the section as acknowledgment by part payment, payment of interest and the giving of security.”

[14] He further relied on the **Rabaney** case where Khumalo J remarked:

“[32] In the instance where following a demand notwithstanding a dispute being raised the debt is paid or discharged by the client without reservation the obligation for taxation is also discharged. Payment by the client without reservation means without demour or protest.” He further relied on **Praxley Corporate Solutions (Pty)Ltd v Werksmans Incorporated**⁴ where Van der Linde J remarked:

“[43] But that is different from saying that the client is entitled, after payment without protest, to insist that the attorney initiates and procures a taxation of the invoices it had submitted, and which the client had voluntarily paid, just so that the client can decide whether or not it has a cause of action in enrichment against the attorney. It follows that the appeal cannot succeed.”

[15] In its reliance on the doctrine of acquiescence the appellant relied on the case of **Botha v White**⁵ and on **Policansky Bros v Hermann & Canard** where Wessels J stated:

“It is a principle of our law that if a person has once acquired a right he is entitled at anytime to vindicate that right when infringed, provided that

⁴ **Praxley Corporate Solutions (Pty) Ltd v Werksmans Incorporated** 2017 JDR 0482 (GJ) at para 43.

⁵ **Botha v White** 2004 (3) SA 184 (T) at para 31; see also **Policansky Bros v Herman & Cannard** 1910 DPD 1265 at 1278-9.

the period of prescription has not elapsed. This is the general rule, but in course of time exceptions have been grafted onto this rule. The equitable principle that if a person lies by with a full knowledge of his rights and of the infringement of those rights, he is precluded from afterwards asserting them, has been adopted by our courts. It forms a branch of the law of dolus malus. The principle of lying by is not unknown to the civil law though its application is not so often met with in our system of law as it is in English law. Sometimes the rights are lost through mere acquiescence at other times by estoppel as where the element of prejudice exists in addition to acquiescence. Thus acquiescence can be proved by definite acts or by conduct.”

- [16] Mr Zilwa argued that acquiescence applied in situations where a party's conduct is inconsistent with his or her subsequent action⁶. He submitted that the appeal should be upheld with costs.

Respondent's legal submissions

- [17] Mr Dzingwa, on the other hand, made the following submissions: That the appeal should be dismissed because the court a quo's findings are unassailable. There was no abuse of the court's discretion; the court was correct in the evaluation of the facts against the law; the court was also correct in staying the action pending taxation and that the appellant has no prospects of success in this appeal. He submitted that the respondent properly raised the issue of taxation by a special plea and in this regard relied on *Benson & Another v Walters & Others*⁷. He argued that section 80 (4) and Rule 33 (18) govern taxation of attorney and client costs at any time even after a party had issued summons demanding payment of costs. He submitted that the stay of the proceedings pending taxation is consistent with the provisions of section 80(4) of the Act.

⁶ See ***Mabhuda v Minister of Cooperation & Development*** 1984 (2) SA 49 (CKS) at 53 A – E.

⁷ At page 85 of SALR paras C – D.

[18] He argued that the appellant had alleged that the respondent was refusing to pay the bills despite demand and that, he argued, is consistent with the respondent's defence that he disputed the extent of his liability and had communicated that dispute to the appellant.

[19] The respondent submitted that the cause of action stems from the disputed attorney and client costs. That dispute led the respondent to make only partial payment and demanded that the appellant's bill be taxed. He relied on Albertus J. **Retief and Another v J.P.Kriel & Co**⁸ where Molefe J stated:

"When a client disputes the quantum of an attorney's fees the bill of account must be taxed."

[20] He submitted that this points to a lack of jurisdiction by the court to resolve the cause of action emanating from a disputed bill of costs. He submitted that the magistrate was not in a position to determine the reasonableness or correctness of the bills. Relying on **Trollip v Taxing Mistress of the High Court and Others**⁹ where the court found that the discretion to decide what costs have been necessary or properly incurred is given to the taxing master and not to the court. In this regard, he also relied on **Preller v Jordaan & Another**¹⁰. He contended that it is not the function of the court to delve into the merits of the legal costs and decide the extent of liability of the respondent. That is the function of the taxing master who has that power to decide a party's extent of liability to pay the other party's legal costs.

[21] He argued further that the magistrate did not have jurisdiction to enforce payment of an attorney's bill of costs be at a party and party or attorney and client scale where (a) the extent of liability of a bill of legal costs is in dispute; (b) the bill is not the product of an agreement or mandate; and (c) allegations that fees are fair, reasonable, usual or normal fees due for the work in

⁸ **Retief and Another v J.P. Kriel & CO** Case No. 31971/2011 GDHC at para 19.

⁹ **Trollip v Taxing Mistress of the High Court and Others** (6091/2015) [2018] ZAECGHC 59; 2018 (6) SA 292 (ECG) (31 July 2018).

¹⁰ **Preller v Jordaan & Another** 1957 (3) SA 201 (O) at 203.

question are not made in the summons; and (d) that the bill is not taxed and is not due and enforceable.

- [22] He submitted the factors tabulated above are necessary allegations that should form the foundation for particulars of claim where an attorney sues client for untaxed client and attorney costs. In the absence thereof, he argued, there is absence of a cause of action. He argued that because jurisdiction is linked to a cause of action where there is no cause of action then it means there is no jurisdiction.
- [23] He further submitted that once the taxing master has exercised his or her discretion her decision regarding the quantification of costs is equivalent to that of the court. In this regard, he relied on the judgment of Crutchfield J in ***Sheriff of Pretoria North East v SA Taxi Development Finance (Pty) Limited and Others***¹¹ where she found that it is trite law that an *allocatur* has the effect of a court order.
- [24] He submitted that taxation of the disputed bill of costs precedes enforcement. Relying on the *Benson* judgment he submitted that the debt is not due until taxation. He further submitted that although it is common cause that part payment was made, it is not common cause that payment was made without protest.
- [25] Relying on ***Kali v Incorporated General Insurance Ltd***¹² where it was stated that a pleader cannot be allowed to direct the attention of the party to one issue and then at the trial attempt to canvass another. He submitted that the respondent's plea that , he had denied the extent of liability, his communicated dispute to the appellant, and the request that the bill should be referred for taxation, reveals protest. He further submitted that although the appellant submits that the respondent must be estopped from raising issues about the bill after part-payment none of the allegations or facts pleaded relate to

¹¹ ***Sheriff of Pretoria North East v SA Taxi Development Finance (Pty) Limited and Others*** Case No. 23904/2017 [2023] ZAGPJHC 331 (14 April 2023).

¹² ***Kali v Incorporated General Insurance Ltd*** 1976 (2) SA 179 (O) at 182 (A).

estoppel. He submitted that there was never a clear and unequivocal communication that the respondent accepted liability for the entire bill.

- [26] He referred to the test for waiver as set out by the Constitutional Court in ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another***¹³

“80. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.”

- [27] He submitted that given the facts of the matter it is apparent that the respondent did not waive his right to have the bill taxed. He further submitted that there is no misdirection in so far as the finding by the court that the case of *Rabaney* was distinguishable. He submitted that the exercise of the magistrate of his discretion in not dismissing the action but affording the appellant the opportunity to have the bill taxed does not constitute a misdirection.

- [28] He further relied on ***Arie Kgosi v Kgosi Aaron Moshete & Others***¹⁴ where the court stated:

¹³ ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*** 2009 (4) SA 529 at para 80.

“As soon as the client says I am not ready to pay the attorney must have his bill taxed and as soon as the question of taxation arises the amount depends in every instance on the discretion of the taxing master.”

Discussion

[29] Section 80 (4) provides:

“80. Costs to be in accordance with scales and to be taxed

(1)

(2)

(3)

(4) *Any person who is liable to pay or who is sued for costs of any civil proceedings in a court otherwise than under an award by the court or under a special agreement, may require that those costs shall be taxed by the clerk of the court as between attorney and client; and thereupon any action for the recovery of those costs shall be stayed pending the taxation.* *The costs of and incidental to such a taxation shall be borne, if not more than one-sixth of such costs is disallowed on taxation, by the person requiring the taxation, and, if more than one-sixth is so disallowed, by the person claiming the costs.”* (my emphasis).

[30] Rule 33 (18) provides:

¹⁴ *Arie Kgosi v Kgosi Aron Moshete & Others* 1921 TPD 524 at 526.

“33. Costs

(18) *Where a bill of costs as between attorney and client is required to be taxed, taxation shall take place on at least five days' notice thereof to the attorney or client, whether or not an action therefor is pending: Provided that, notwithstanding the provisions of subrule (3), a bill of costs as between attorney and client may be taxed at any time after termination of the mandate.”* (my emphasis).

[31] Attorney and client costs include all the costs in respect of which the client is indebted for professional services rendered by his or her attorney in legal proceedings to which the attorney had been formally mandated to act. Litigation is very costly, it is for that reason that fees charged to members of the public for legal services must be reasonable. Coupled with that is a right to every litigant to challenge attorneys or counsel's fees where they believe they are exorbitant.

[32] The magistrate found that the case of *Rabaney*¹⁵ is distinguishable from the facts of this case in that in the *Rabaney* matter the claim was settled in full without demur or protest. He also found that there was no authority to support the contention that the defendant is precluded from raising the dilatory special plea that he raised. In the *Rabaney* matter some 250 invoices bar one had been settled by *Rabaney*. In respect of the remaining invoice demand was made and a period of 30 days for objection as agreed between the parties had also passed. *Rabaney* paid the last account on 20 April 2015 in full prior to him collecting his file on 22 April 2020. On 22 June 2016, a year later, he requested taxation of the bill of costs. The court dismissed the application based on, inter alia, the fact that at the time *Rabaney* was insisting that a bill of costs be taxed, the obligation for taxation of the accounts had been discharged and thus he forfeited his right to insist on taxation on those settled

¹⁵ *Rabaney v Schoeman Attorneys Incorporated* 2020 JDR 1081 (GP) para 32.

invoices.¹⁶ Those facts were found by the magistrate herein to be distinguishable. I agree. There is also no allegation made by the appellant that after it demanded payment of the outstanding balance the respondent paid it. The part-payment cannot be viewed as a discharge of the debt. That interpretation goes against the principle articulated in **Harrismith Board of Executors v Odendaal**¹⁷:

“Payment is the delivery of what is owed by a person competent to deliver to a person competent to receive. And when made it operates to discharge the obligation of the debtor, (Grotius 3.39.7; Voet 46.3.1).”

[33] In **Benson & Another v Walters & Others**¹⁸ the Appellate Division, in my view, and contrary to the respondent’s contention, corrected the notion that taxation is a condition precedent that before an attorney sues for the recovery of his bill of costs for legal services in civil matters his bill must have been taxed¹⁹. The Appellate Division re-emphasized the correct position that it is well established that judgment cannot be given on an attorney and client bill until it has been taxed if such taxation has been demanded by the client²⁰. At page 84 at paragraph B of the *Benson* judgment the court held that:

“84. *In my view, this passage is consistent with the view that taxation is not a prerequisite for the institution of action on a bill of costs, but that, if a client insists on taxation, the action cannot proceed until the bill has been taxed. The fact that an appeal against the upholding of an exception was dismissed is of no particular significance in view of what was said in Layton’s case and of the fact that the appeal was not directed against the procedure which had been adopted.” (my emphasis).*

¹⁶ **Rabaney v Schoeman Attorneys Incorporated** 2020 JDR 1081 (GP) para 34.

¹⁷ **Harrismith Board of Executors v Odendaal** 1923 AD 530.

¹⁸ **Benson & Another v Walters & Others** 1984 (1) SA 73 (AD).

¹⁹ See **Clarke v Heming** 1923 EDL at page 315.

²⁰ See also **De Villiers v Scholtz** 1931 CPD at page 94; see also **Benson & Another** (supra) at page 75 paras G – H.

[34] It seems to me that the respondent adopted the stance that the bill of costs had to be taxed before an action could be brought. In this regard, any reliance on *Benson's case* based on this proposition is, with respect, misplaced. That contention, in my view, is what the judgment in *Benson* decried. Mr Dzingwa correctly conceded before us that his client's interpretation in this regard does not find support in *Benson*. It is so that such proposition is not supported by the magistrate's findings that:

"Taxation of an attorney – and – client bill is not a prerequisite for legal proceedings to recover fees."

[35] The magistrate found that where fees have not been agreed, the client may raise a special plea and require taxation of the bill. Only after taxation can the case proceed. That finding, in my view, is consistent with the object of the provisions of section 80 (4).

Acquiescence

[36] The next issue is whether the respondent had acquiesced by effecting part - payments towards the bill furnished to him by the appellant. The appellant contends that the respondent should be estopped from raising the defense of taxation because he has acquiesced by effecting part- payment.

[34] In ***Aris Enterprises (Finance (Pty) Ltd v Protea Assurance Co Ltd***²¹ the court defined the essence of the doctrine of estoppel by representation as:

"A person is precluded or estopped from denying the truth of a representation previously made by her or him to another person if the latter, believing in the truth of the representation, acted thereon to her or his detriment."

²¹ ***Aris Enterprises (Finance (Pty) Ltd v Protea Assurance Co Ltd*** 1981 (3) SA 274 (A) at 291.

[35] In **Trust Bank Van Afrika Bpk v Eksteen**²² Hoexter AJA at 415 H to 416 A stated:

“The doctrine of estoppel is an equitable one developed in the public interest, and seems to me that whenever a representor relies on a statutory illegality, it is the duty of the court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand.”

[36] In **Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd**²³ Freedman AJ stated the following:

*“Acquiescence is, in my view, a form of tacit consent, and in this regard it must, however, be borne in mind that, as Watermeyer CJ said in **Collen v Rietfontein Engineering Works**²⁴ quiescence is not necessarily acquiescence and that conduct to constitute an acceptance must be an unequivocal indication to the other party of such acceptance.²⁵”* (my underlining).

[37] In **Makgosi Properties (Pty) Limited v Fichard No and Others**²⁶ Meyer J stated:

“[27] Whether a party can be said to have acquiesced in the conduct complained of is a question of fact. The acts or conduct relied upon to prove acquiescence must be

²² **Trust Bank Van Afrika Bpk v Eksteen** 1964 (3) SA 402 (A) at 415 H – 416 C.

²³ **Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd** 1974 (2) SA 125 (C) at 137 D – F.

²⁴ **Collen v Rietfontein Engineering Works** 1948 (1) SA 413 (A) at 422.

²⁵ See also **Safari Surf Shop CC v Heavywater and Others** [1996] 4 All SA 316 (D) at 323 I – J; **New Media Publishing (Pty) Ltd v Eating Out Web Services CC and Another** [2005] ZAWCHC 20; 2005 (5) SA 388 (C) at 407 E – I.

²⁶ **Makgosi Properties (Pty) Limited v Fichard NO and Others** (24249/2015) [2016] ZAGPJHC 374 (13 July 2016) at para 27

unequivocal and inconsistent with any intention to enforce a party's infringed right. As was said by Innes CJ in **Dabner v South African Railways and Harbours**²⁷, "[i]n doubtful cases acquiescence, like waiver, must be held to be non-proven." (my emphasis).

- [38] The fact that the respondent made part-payment and raised taxation is consistent with the fact that he wished to enforce his rights in this regard. It cannot be said that he waived any of his rights or he unequivocally acknowledged indebtedness of the full amount. In fact, it proves the contrary. It follows that estoppel does not find application herein. The appellant's reliance on the *Markham* decision is misplaced as the court was dealing with a decision related to certain provisions of the Prescription Act 18 of 1943, and in particular with interruption of prescription.
- [39] No one is presumed to waive his rights. It is for that reason that the onus is on the party alleging it who must provide clear proof of an intention to do so²⁸. The conduct from which waiver is inferred, as frequently stated, must be unequivocal, that is to say, consistent with no other hypothesis²⁹.
- [40] Coming to the pleaded facts it is apparent that the appellant had to resort to litigation to recover the balance of the fees because the respondent was refusing to pay. An acknowledgement of liability must be unequivocal. There is, in my view, no bar to a client, who recognizes the work that had been done by his attorneys, from effecting part-payment of what he deems to be reasonable whilst demanding taxation of the bill in order for him to be placed in a position to challenge what he believes to be unreasonable and excessive fees. In those circumstances, it cannot be said that by making part-payment he waived his right to taxation and had acquiesced as submitted by the appellant. The respondent challenged the extent of his liability to the

²⁷ **Dabner v South African Railways and Harbours** 1920 AD 583, at 594

²⁸ **Hepner v Roodepoort- Maraisburg Town Council** 1962 (4) SA 772 (A) 778 D – 9A

²⁹ **Road Accident Fund v RE Mothupi** case number: 518/98, SCA , heard 15 May 2000 , delivered 29 May 2000.

appellant as demonstrated in the amended plea. His reasons for seeking taxation of the bill differ materially from those in *Praxley*, supra, where *Praxley* insisted on taxation of even past, paid invoices to determine whether overreaching in respect of those invoices may have occurred, in circumstances where the debt to the attorney had been discharged voluntarily and without reservation.

[41] Most importantly, there are no facts advanced in the claim to show that if the respondent's right to taxation is enforced there would be real inequity and the respondent's conduct would amount to unconscionable conduct.

[42] Section 80 (4) affords a litigant, if he or she wishes, a right to challenge a bill upon which a claim is based, even when litigation is in progress. The fact that the person has paid partly the fees due to the attorney does not amount to acknowledgment of liability to pay the bill in its entirety. The interpretation contended for by the appellant would not only deprive a litigant of a right to defend the action itself but would undermine the very right to demand taxation that section 80 (4) affords litigants including those who are liable to pay. The Legislature was aware that once that demand for taxation is made the court will either proceed with the action and disregard that demand or accede to it. It made it easy for the courts by using peremptory language that the court '*shall*' stay the action. That is exactly what the magistrate did. He did not need to do anything else other than to act in a manner that is consistent with the spirit and purport of section 80 (4). That provision also caters for both mischievous litigants and attorneys by regulating liability for costs of taxation in that: 'The costs of and incidental to such a taxation shall be borne, if not more than one-sixth of such costs is disallowed on taxation, by the person requiring the taxation, and, if more than one-sixth is so disallowed, by the person claiming the costs.' That in my view takes into account the interests of both clients and attorneys who have disputes of this nature.

[43] The only basis relied upon by the appellant for acquiescence and waiver is the part - payment made. But that cannot be the only consideration. The reason for failure to pay the balance of the fees must be taken into

consideration when one determines whether or not the respondent acquiesced when he made the part - payment. According to the respondent's plea he was insisting on taxation and that is the reason why he did not pay the balance. To me, those facts do not demonstrate an unequivocal intention to abandon the rights that the respondent has in so far as taxation of fees is concerned. That is a right that is made available to any litigant and that right cannot simply be taken away by assuming that by making part-payment that amounts to acknowledgement of liability to pay the full amount, without any protest, especially in the light of the facts pleaded by the respondent. That is not how intention is to be determined.

- [44] In my view, for as long as the entire bill had not been satisfied or paid in full it is open to a litigant to raise the issue of taxation and it cannot be that by raising the issue the court must simply view the conduct of the part -payment and not view the conduct that resulted in the non-payment of the balance of the fees. Therefore, the fact that the appellant itself had indicated in the summons that there had been a refusal to pay the balance of the fees is not consistent with the defense of acquiescence or waiver or payment without *demur or protest* contended for by it. I accordingly find that there was no misdirection on the part of the magistrate in this regard. On this basis alone the appeal must fail.

An order for the stay of the litigation

- [45] The scope of the power of courts to determine their own procedure is provided for in section 173 of the Constitution. The primary purpose of that power is to ensure fairness in the proceedings before the court. Jafta J in ***Mukaddam v Pioneer Foods (Pty) Ltd and Others***³⁰ held that:

“42. *The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just*

³⁰ ***Mukaddam v Pioneer Foods (Pty) Ltd and Others*** 2013 (5) SA 89 (CC) at para 42.

outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted.”

[46] Madlanga J in ***Mokone v Tassos Properties CC and Another***³¹ held that:

“[67] Courts may regulate their own process taking into account the interests of justice. I will say nothing about equity but, based on this, I do not see why proceedings may not be stayed on grounds dictated by the interests of justice. Whatever the import of what was said by courts previously may be, the Constitution lays down its own test; and it has everything to do with the interests of justice.

[68] In this context, the idea of interests of justice is quite wide. I will not attempt to delineate what it encompasses. Suffice it to say, what justice requires will depend on the circumstances of each case.”

[47] Having regard to the fact that the magistrate stayed the proceedings in order for taxation to take place and having had regard to the decisions of the Constitutional Court, supra, that enjoin a court to formulate a procedure that it believes is in the interests of justice, I do not find that the staying of the proceedings constitutes a misdirection. Section 80 (4) does not give a magistrate a discretion once a litigant requests taxation. A magistrate’s court is a creature of statute. The approach adopted by the magistrate is what is envisaged in section 80 (4). The Legislature was aware when creating section 80 (4) that once a litigant raises an objection to the bill an injustice may result if the magistrate were to proceed with the trial. It was also mindful of the fact that the magistrate, when such an objection is raised, will have to

³¹ ***Mokone v Tassos Properties CC and Another*** (2017 (5) SA 456 (CC) paras 67-68.

defer to the taxing master. It is only after a taxing master has concluded the taxation that the trial may resume. That process has a potential of yielding speedy resolution of the disputes between the parties. In any event, no judgment can issue where the very basis of the bill is being contested. It can only be resolved by the taxing master who will ascertain whether the work was done, whether the costs charged are commensurate to the work that was done, the scale at which the costs were charged and the *quantum* of counsel's fees³². Thereafter the court will decide all issues relating to liability.

[48] In ***South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others***³³ the court held that:

“32. Courts should in principle welcome public exposure of their work in the court room, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open court rooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.”

[49] Having said that I find that there is no merit in the appeal and it stands to be dismissed.

Costs

³² See *Trollip* (supra), para 22.

³³ ***South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others*** 2007 (1) SA 532 (CC) para 39 at para 32.

[50] The Magistrate upheld the respondent's special plea with costs. Given the approach taken in this appeal I have no reason to depart from the normal rule that costs should follow the result. There are no grounds to interfere with the magistrate's exercise of his discretion in this regard by awarding the respondent costs of the special plea.

ORDER

[51] I accordingly make the following Order:

"The appeal is dismissed with costs."

**T.V NORMAN
JUDGE OF THE HIGH COURT**

I agree.

**M.N. HINANA
ACTING JUDGE OF THE HIGH COURT**

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