

REPUBLIC OF SOUTH AFRICA



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

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

2/10/2024
DATE

[Signature]
SIGNATURE

Case No.: 2023/126346

In the matter between:

LINDELA MFAZI

Plaintiff / Applicant

and

Z & Z NGOGODO INC. ATTORNEYS

Defendant / Respondent

JUDGMENT

GRAVES AJ:

[1] This is an opposed application for summary judgment. The Plaintiff is an

Advocate of the High Court of South Africa registered as such with the Legal Practice Council in terms of the LPC Act, 28 of 2014. The Defendant is a firm of attorneys, notaries and conveyancers with its place of practise within the jurisdiction of this court.

[2] In his Particulars of Claim the Plaintiff seeks payment from the Defendant in respect of 18 separate instances on which he was briefed by the Defendant to render legal services on behalf of persons represented by the Defendant. The application for summary judgment seeks payment for Claims 2, 5, 7, 8 and 9 (hereafter “the applicable claims”) in the total sum of R75 250,00. Interest is further sought on a variety of other claims which are said to have been paid by the Defendant after the issue of summons.

[3] In the Particulars of Claim the essential elements of the cause of action is set out:

[3.1] The Plaintiff was briefed by the Defendant to render professional legal services and/or to appear on behalf of the Defendant (which plainly means on behalf of individual clients).

[3.2] The Plaintiff accepted the briefs and rendered the services on the basis that he would after rendering these services, submit an invoice for work done and would be paid “*within a reasonable time*”.

[3.3] It was an implied, alternatively a tacit term of the agreement (the Plaintiff neglects to state whether the agreement was oral or in writing) between the parties that in all interlocutory applications and in matters dealt with in terms of Section 92 of the Legal Practice Act, 28 of 2014, the invoice would be taxed in terms of the court order by the Taxing Master and the Defendant would pay the

Plaintiff the taxed and allowed amounts as agreed and/or taxed as per the Taxing Master's stamped allocatur.

[3.4] The Plaintiff submitted invoices and the Defendant subjected the bills of cost for taxation which were taxed and allowed by the Taxing Master in various sums.

[4] Of the applicable claims in respect of which summary judgment is sought, only Claim 2 is pleaded to have been rendered in terms of Section 92 of Act 28 of 2014.

[5] During February 2024, the Defendant delivered its Plea incorporating two Special Pleas. The first Special Plea admits that the Plaintiff rendered legal services to the Defendant's clients as per the brief in respect of each of the claims from 1 to 20, but contends that it had been the practice that the Defendant would only pay the Plaintiff his taxed legal costs following taxation and payment by the principal debtor. The Defendant further says that the Plaintiff has not alleged that its firm has received payment of any of the taxed amounts from the judgment debtor, contending that the amounts claimed are not due and payable because the taxed fees have not yet been executed on by the Sheriff, alternatively paid by the judgment debtor. The second Special Plea concerns a contingency fee agreement relied upon by the Plaintiff which does not apply to the applicable claims. In its Plea the Defendant deals with each of the amounts claimed in the Particulars of Claim, denying liability in respect of the applicable claims in, and repeating that as payment has not received from the judgment debtor the Defendant is not obliged to pay the Plaintiff. The Defendant's affidavit resisting summary judgment essentially conforms with its Plea. It adds some important detail regarding payments of claims 2 and 5, made after the delivery of the Defendant's

plea on 21 February 2024. More about these payments, below.

[6] Counsel for the Plaintiff, Mr Nodwangu filed heads of argument dealing with the claim and the defences and represented the Plaintiff in argument. Mr Mashao, an attorney in the service of the Defendant similarly filed heads of argument and represented the Defendant in argument.

[7] Before dealing with the claims and defences on what I regard as the substantive issues I dispose of a preliminary contention raised on behalf of the Plaintiff:

[7.1] the Plaintiff maintains that the claims in respect of which summary judgment is sought are “due and payable” because, in accordance with Section 12(1) of the Prescription Act 68 of 1969 prescription starts to run when a debt is due. In the heads of argument it is said that, in accordance with SCA authority a debt is due when it is claimable by the creditor. During argument it became clear that the Plaintiff maintained that a debt which is due and payable must be paid forthwith, irrespective of any defence raised; ¹

[7.2] this judgment quoted is not authority for the contention advanced. The Court was there dealing with the effect of the period in the Prescription Act, after which a debt will become unenforceable. This Act does not apply in circumstances such as the present, where a creditor contends that an invoice is payable, but this is disputed by the debtor. The Prescription Act does not serve to create or supplement a cause of action based upon a contractual entitlement.

¹ **Standard Bank of South Africa Ltd v Miracle Mild Investments 67 (Pty) Ltd** 2017 (1) SA 185 (SCA) para [24].

[8] I turn now to consider the principal points of dispute in the summary judgment application.

The agreement regarding fees (claims 5, 7, 8 and 9)

[9] For these claims the Plaintiff does not rely upon Section 92 of the Legal Practice Act. All of these claims are alleged in the Particulars of Claim to have involved interlocutory proceedings, which is not disputed by the Defendant. My understanding based on the papers before me is that the Plaintiff conducts practice as an Advocate by rendering legal services in expectation of a fee as contemplated by the Legal Practice Act and only upon receipt of a brief from an attorney.²

[10] Fairly understood, the Plaintiff's Particulars of Claim describe his claims as being based upon an agreement concluded with the Defendant which entitles him to payment of monies due for various invoices rendered by him to the Defendant for professional services rendered, and also for fees due pursuant to bills of cost taxed and allowed by the Taxing Master.³ Despite rather clumsy formulation, I read this to reference two different forms of agreement. The first form concerns fees rendered for which the Taxing Master has issued an allocatur. In these instances the Plaintiff alleges he would be paid within a reasonable time after taxation. The second form of agreement relies directly upon Section 92 of the Legal Practice Act which expressly permits recovery, in certain circumstances of legal services rendered for free (*pro bono*) but in respect of which costs have been taxed (which I deal with the following section of this judgment).

² Regulation 27 of the Code of Conduct Gen N 168 of 2019 PART V, promulgated in accordance with the Legal Practice Act.

³ Particulars of Claim ("POC"), para 5.

[11] In the Plaintiff's affidavit in support of his application for summary judgment he relies for the claims under the above header on the effect of the Taxing Master's allocatur, in combination *allocatur*, in combination with being in receipt of a brief respect of the matters for which he claims fees. He postulates that the *allocatur* is a liquid document which has the effect of a court order. He repeats that a letter of demand and then the summons served on the Defendant, rendering the amounts claimed due and payable. He disputes that non- payment by the judgment debtor has the effect of staying payment.

[12] Amongst the numerous reasons advanced by the Defendant in its opposing affidavit it (somewhat elliptically) references the legal nature of an *allocatur*, but restricts this point to the contention – correct in the event – that taxed fees in all cases belong to the individual clients of the Defendant.⁴ Further, it is contented that (i) the matters under this section were interlocutory proceedings where no capital of payments had been made to the client, and that (ii) taxed fees are recoverable from the judgment debtor. When writing this judgment I had some residual concern about the agreement relied on by the Plaintiff. If the agreement relied upon contemplates an arrangement between the parties that the Plaintiff would be paid a fee as allowed on taxation, then in the absence of a contingency arrangement this would contravene Regulation 32.2 of the Code of Conduct Gen N 168 of 2019: PART V, promulgated in accordance with Legal Practice Act 28 of 2014. There is however no clear indication on the papers before me that such an arrangement exists and I consequently say no more about this.

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[13] In my view the Plaintiff has failed properly to appreciate the legal basis of these claims, and of the defences:

[13.1] the purpose of taxation is twofold: first, to fix the costs at a certain amount so that execution can be levied on the judgment, and second, to ensure that the party who was condemned to pay the costs does not pay excessive costs and that the successful party does not receive insufficient costs;⁵

[13.2] this is reinforced by Uniform Rule 70(4) which prohibits the taxation of a bill of costs unless the Taxing Master is satisfied that the party liable to pay the costs has received due notice;⁶

[13.3] to the extent that taxed a bill of costs constitutes a liquid document for summary judgment purposes (which I doubt)⁷, the bills in question are not liquid documents in favour of the Plaintiff. The Plaintiff has failed to appreciate that any exigible right that flows from an *allocatur* accrues to the successful party (the client of the Defendant) in each litigious cause in which he was engaged as counsel;

[13.4] even if the Plaintiff was correct in his reliance upon his entitlement to payment consequent on taxation of the bills (which is not the case) his contention that an *allocatur* has the effect of a court order, is incorrect. The

⁵ **Mouton & another v Martine** 1968 (4) SA 738 (T) at 742 A-C.

⁶ **Turnerland Manufacturing v Taxing Master, WC High Court** 2024 (1) SA 517 at para [32].

⁷ In **Gluckman v Winter** 1931 AD 449 the Court found that a claim based upon a taxable of costs assumes that there has been a proper mandate, which is a matter determined by a court and not by the taxing master. In **Martens v Rand Share and Broking Finance Corporation (Pty) Ltd** 1939 WLD 159, a judgment dealing with provisional sentence it was said that a taxed bill cannot be elevated to the position of a judgment of a Court, regarding the bill as a judgment not only on the amount of the debt, but also on the essence of the liability itself- at 166; followed in **Dyason v Main Pretoria Road Properties (Edms) Bpk** 1977 (3) SA 177 (T) at 179 E-H.

allocatur only constitutes proof of the amount of the debt and does not prove the indebtedness;⁸

[13.5] the Plaintiff is also mistaken that a demand for payment and the issue of summons has the effect of rendering payment in respect of a taxed bill of costs, due and payable. As indicated above this arises from a misplaced reliance upon the Prescription Act.

[14] The Defendant in its plea and in its affidavit resisting summary judgment disputes any right to payment on the part of the Plaintiff. Also disputed is the existence of any agreement concluded with the Plaintiff to the effect that payment would be made within a reasonable time the date of the *allocatur*, and irrespective of whether the judgment debtor had made payment in respect thereof. In this regard the Defendant says that where the Plaintiff had rendered services in interlocutory proceedings (this being common ground) and without a judgment for a capital sum there are no funds available for payment of the Plaintiff's fees which could be executed upon against the judgment debtor.

[15] In effect, the Defendant maintains that the agreement with the Plaintiff was that payment in respect of services rendered for which a bill had been taxed would only be made once payment in respect of the taxed costs was recovered from the judgment debtor. The Defendant disputes the agreement as alleged by the Plaintiff, including disputing the term relating to payment within a reasonable time. It further deals in its plea and affidavit with the specific bills in respect of which the Plaintiff seeks summary judgment, providing reasons why the amounts claimed are not payable. I do not need

⁸ **Martens**, above at [164].

to consider these further reasons in any detail. The Defendant's affidavit alleges that payment of the fees for claim 5 was subsequently made on 20 May 2024. Some documentary evidence is attached which is not entirely clear, but the allegation of payment cannot be ignored.

[16] It is clear from the foregoing that there is a clear dispute of fact regarding both the existence of an agreement regarding payment of the Plaintiff's fees and the contractual terms, which cannot be resolved except through the hearing of oral evidence. Although the Defendant's affidavit resisting summary judgment raises some extraneous grounds for non-payment which are dubious, the essential defence that is raised concerns the agreement with the Plaintiff. What is set out by the Defendant fully discloses the nature and grounds of the defence and the material facts relied on (see Rule 32(3)(b)). Further, and for the reasons set out above the Plaintiff has fallen short in identifying a sustainable cause of action, as implicitly required by Rule 32(2)(b).

[17] The Plaintiff cannot succeed in obtaining summary judgment on these claims.

The claim in terms of Section 92 of the Legal Practice Act

[18] It is necessary to quote the section in full:

"92 Recovery of costs by legal practitioners rendering free legal services

- (1) *Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other party by a legal practitioner or law clinic, and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other*

person must be deemed to have ceded his or her rights to the costs to that legal practitioner, law clinic or practice.

(2)(a) *A litigant or person referred to in subsection (1) or the legal practitioner or law clinic concerned may, at any time before payment of the costs referred to in subsection (1) give notice in writing to –*

(i) the person liable for those costs; and

(ii) the Registrar or clerk of the court concerned,

that the legal services are being or have been rendered for free by that legal practitioner, law clinic or practice.

(b) *Where notice has been given as provided for in paragraph (a), the legal practitioner, law clinic or practice concerned may proceed in his or her own name, or in the name of his or her practice, to have these costs taxed, where appropriate and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).*

(3) *The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant in person to whom the legal services were rendered by the legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned."*

[19] I read this section as providing for the following situation:

[19.1] save in particular circumstances⁹ the judgment of the court or the settlement has awarded costs against the Defendant or Respondent in the litigation;

[19.2] the Plaintiff - litigant who has received free legal services is the party in whose favour that costs award would be granted, and it is that litigant who is deemed to have ceded his or her rights to the legal practitioner (Section 92(1));

[19.3] the person liable for those costs (Section 92(2)(a)(i)) is in the usual course the Defendant in the litigation. I fail to see any grounds to construe this statutory provision as creating an ancillary liability between, for example, counsel and his/her briefing attorney;

[19.4] the costs which are taxable and recoverable (Section 92(2)(b)) would include the costs of counsel who had represented the Plaintiff litigant.

[20] This claim for fees arises from a litigious cause involving a named litigant (S. Skosana, in the claim numbered 2) and is pleaded as being founded upon Section 92 of the LPA. Section 92 is the statutorily-sanctioned exception to the prohibition against counsel agreeing to charge a fee as allowed on taxation.¹⁰ The Plaintiff alleges in his Particulars of Claim and in his affidavit in support of summary judgment that the claim for payment of fees is based upon the Taxing Master's *allocatur* for taxed and allowed fees.

⁹ For example, where a court makes an order that costs are to be paid *de bonis propriis*, for example, by a legal practitioner or by the representative of a legal entity.

¹⁰ See Regulation 32.2 of the Code of Conduct for all Legal Practitioners, above. The Defendant does not in its plea of affidavit resisting summary judgment, dispute the Plaintiff's reliance on Section 92.

[21] The Particulars of Claim contain no allegation that notice has been given by the legal practitioner ¹¹ to the person liable for costs (Section 92(2)(i)) or that the Defendant - against whom payment is now sought- has recovered the costs from person liable (Section 92(2)(b)). These are necessary jurisdictional facts that must be alleged by a party in the position of the Plaintiff. Further, on the basis of my understanding of Section 92 I can see no grounds on which an advocate who rendered free legal services on brief from an attorney can rely upon Section 92 to claim his/her fees from the attorney, before the attorney has recovered such fees from the judgment debtor. This cannot sensibly be read into Section 92. Section 92(2)(b) makes allowance for the legal practitioner who is the beneficiary of the cession of rights to costs, to have the costs taxed and to recover them. As indicated above the Plaintiff does not plead, nor allege in his affidavit in support of summary judgment that payment has been recovered from the judgment debtor. The Plaintiff only pleads in his particulars that his invoice was taxed on the attorney and client High Court scale in terms of a court order, with an *allocatur* issued by the Taxing Master, and that the amount allowed by the Taxing Master is due to him. I find that the amount is not so due and this is another instance where the Plaintiff misapprehends the legal basis of his alleged cause of action. This claim is unsustainable in law.

[22] A final obstacle in the path of the Plaintiff is the contention in the Defendant's resisting affidavit that it has subsequently made payment to him in respect of Claim 2 (R22 500,00) consequent upon payment having been received from the judgment debtor. An annexure attached to the affidavit bearing the reference of the client in question (S. Skosana) is a Nedbank record of payment, reflecting the sum having been

¹¹ In this case, the Defendant as attorney.

paid by the Defendant on 26 April 2024. Although no information is provided in the affidavit to permit me to link the payee account number to the Plaintiff, the reference is given as “ADV FEE CHMO55 SKOSANA S.” I take this as sufficient proof for the purposes of (a further ground for) opposing summary judgment. When I raised this payment with Counsel for the Plaintiff in argument he was not in a position provide clarity as he held no instructions whether payment had been received, as alleged. The Plaintiff cannot succeed in its attempt to obtain summary judgment on this claim.

Conclusion

[23] On the information before me I conclude that no reasonable grounds existed for the Plaintiff to seek summary judgment of the applicable claims dealt with above. The Plaintiff has invoked and persisted with the summary judgment procedure in circumstances where it cannot legitimately be contended that the Defendant does not have a *bona fide* defence to these selected claims. One of the aims of the summary judgment procedure is to winnow out unreasonable defences.¹² Such a pleaded defence, in the words of Rule 32(2)(b) is one that which does not raise any issue for trial. It has been pointed out that the amendment to Rule 32 which permits an application for summary judgment only after delivery of a plea, is aimed at avoiding speculative summary judgment applications.¹³

[24] All of the Plaintiff's pleaded claims are underpinned by the agreement alleged to have been concluded with the Defendant firm which required payment to be made to the Plaintiff for his fees as set out in the allocatur. In his application for summary

¹² **Floridor Construction Co (SWA) (Pty) Ltd v Kriess** 1975 (1) SA 875 (SWA) at 878 A.

¹³ **Tumileng Trading v National Security and Fire** 2020 (6) SA 624 (C) at para [15].

judgment the Plaintiff dismisses the notion that his fees would only be paid once the Defendant had recovered these from the judgment debtor. His primary basis for this rejection is that the *allocatur* alone entitles him payment. As I have indicated above the established, long-standing legal principles show that this is incorrect.

[25] The authors of **Erasmus: Superior Court Practice** note (with reference to reported authorities ¹⁴) that the remedy of summary judgment should be resorted to only where the plaintiff can establish his claim clearly, and the defendant fails to set up a bona fide defence. In the present case the Plaintiff has failed to establish the factual or legal basis of his claims. He has misapprehended the legal basis of all of the applicable claims for which he seeks summary judgment; the consequence is that his purported verification of the cause of action and the amount as contemplated in Rule 32(2)(a) is valueless. Additionally, the Defendant has established a *bona fide* defence on affidavit as required by Rule 32(3)(b) and the Plaintiff should not have persisted with the summary judgment application.

[26] In dealing with the judicial discretion afforded, Rule 32(9)(a) provides that where a plaintiff makes an application where the case does not fall within the provisions of subrule (1), or where plaintiff in the opinion of the court, knew that the defendant relied upon a contention entitling it to leave to defend, the court may direct that the action be stayed until the plaintiff is paid the defendant's costs, which may be on the scale as between attorney and client. In general terms, where a party has put the other party

¹⁴ D1 Rule 32-6.

to unnecessary trouble and expense which it ought not to bear, a punitive costs order may be appropriate.¹⁵

[27] I have considered whether the Plaintiff should be excused for his misapprehension of the legal grounds for his own claims, and also whether this provides some justification for his apparent inability to realise that the Defendant had set out a *bona fide* defence. To my mind he should not so be excused. A Court cannot be expected to show magnanimity to a party that has both failed to perceive the patent weaknesses in his own case as well as ignoring the sustainability of the defence raised. The summary judgment procedure is not intended for parties to test speculative claims. I respectfully endorse the judicial view that if Rule 32(9)(a) is to have any meaning or effect, applications for summary judgment in such circumstances as the present ought to be discouraged, as it not only puts the defendant to unnecessary trouble and expense, but is a waste of the Court's time.¹⁶ In the exercise of my discretion I, however, refrain from granting a punitive costs order.

[28] I make the following order:

1. Summary judgment is refused and leave is granted to the Defendant to defend claims 2,5,7,8 and 9.
2. The Plaintiff is ordered to pay the Defendant's costs of the summary judgment proceedings as follows:
 - 2.1 on the party-and-party scale up to 11 April 2024;

¹⁵ Compare: **Johannesburg City Council v Television & Electrical Distributers** 1997 (1) SA 157 (A) at 177 D-F.

¹⁶ **ABSA Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd** 1995 (3) SA 265 (C) at 268 I-J.

2.2 from 12 April 2024 on scale B in accordance with Uniform Rule 69, read with Rule 67A.



N.J. GRAVES
Acting Judge of the High Court of
South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing: 29 May 2024

Date of judgment: 2 October 2024

Counsel for the applicant:
Instructed by: **ADV. K. NODWANGU**
M T Makhubela Inc
Ref: Mr M. Makhubela

Counsel for the respondents:
Instructed by: **Mr C. MASHAO**
Z & Z Ngogodo Attorneys Inc