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THE HIGH COURT OF SWAZILAND

Civil Case No.3185/01

In the matter between:

SAMUEL S. EARNSHAW & PARTNERS **Plaintiff**

AND

PAUL MABANDLA SHIBA **Defendant**

CORAM : **MASUKU J.**

For Plaintiff : **Mr W.E. Mkhatshwa**
For Defendant : **Adv. E.V. Thwala (Instructed by J.S. Magagula & Company)**

JUDGEMENT
1st August, 2002

This is an action in which the Plaintiff seeks recovery of E2, 800 in respect of professional services rendered to the Defendant. In response, the Defendant filed what he referred to as a special plea and in which he stated that the Plaintiff's claim is fatally defective and ought to be set aside for the reason that Plaintiff seeks to enforce payment of its costs before presenting the same for taxation before the Taxing Master.

I pause to state that it is regrettable that this Court should still be burdened with dealing with minor claims at this day and age. The legislation should be amended increasing the monetary jurisdiction of the Magistrates' Courts to enable them to deal with such claims.

The Legal Position

Authority is legion for the proposition that taxation of the attorney and client bill is not a prerequisite for legal proceedings for the recovery of fees but that should a client require Taxation of the bill, the bill must be taxed before the matter can proceed.

In **BENSON AND ANOTHER VS WALTERS AND OTHERS 1981 (4) SA 1981 (4) SA 42 (CPD)** at **49 C – D**, Van den Heever J. stated the following:-

> *"Taxation is not a prerequisite to a client's liability. If the client is satisfied with the attorney's charges or had agreed them in advance, there is no reason why the attorney should not claim his fees. Taxation is merely a method whereby the reasonableness of the fees charged by one of the officers of the Court is* ***prima facie*** *determined by another, where this is put in issue by the client."*

On appeal against this judgement, van Heerden J.A. stated the following in **BENSON AND ANOTHER VS WALTERS AND OTHERS 1984 (1) SA 73 (AD) at 84 A – B.**

> *"In my view, this passage is consistent with the view that taxation is not a prerequisite for the institution of an action on a bill of costs, but that, if a client insists on taxation, the action cannot proceed until the bill has been taxed."*

In **DE VILLIERS VS SCHOLTS 1931 CPD 91** at **94**, Gardiner J.P. said: -

> *"It is well established in our practice that judgement cannot be given on an attorney and client bill, until it has been taxed, if such taxation has been demanded."*

See also **ALLISON VS MASSEL AND MASSEL [1954] (4) SA 569 (T.P.D.)** at **575; KRUGER VS RESNIK 1955 (3) SA 378;** and Herbstein and Van Winsen, "The Civil Practice of the Supreme Court of South Africa", 4th Edition, Juta, 1997 at page 736.

The next question, having determined the operative principle is the manner in which the client, already in receipt of a summons requiring payment in respect of fees should raise the issue of taxation. The learned author Harms, in his work entitled, "Amler's Precedents of Pleading", Fourth Edition, at page 40 states the following:-

> *"Taxation of the attorney and client bill is not a prerequisite for legal proceedings for the recovery of fees. A client may however by way of special plea require taxation of the bill. Only after taxation can the case then proceed."*

It would appear that the above excerpt provides the appropriate manner, indicating that the question can be raised by way of a special plea, which is dilatory in nature. I pause to state that this is what the Defendant has done *in casu.*

An attorney, who is desirous of claiming his fee from his client must allege and prove:-

(a) the mandate;
(b) the performance of the mandate; and
(c) an agreement as to the amount payable
(d) in the absence of the last agreement, he must allege and prove the reasonable remuneration for the work done in terms of an implied term.

It is my view, that taxation is one way in which a litmus test of the reasonableness of the fee can be conducted. The further question, which was raised by the Plaintiff's attorney, is the assessment of the reasonableness of the fee in non-litigious work. I must however point out, contrary to Mr Mkhatshwa's view that the instant matter is not a non-litigious one. By non-litigious, I do not understand that it is meant those matters which are finalised without having been submitted to the Courts. Rather, it refers to matters which do not involve litigation from start to finish e.g. drafting contracts, conveyancing, patent law e.t.c. A matter, like an MVA claim cannot be classified as non-litigious only because it was settled before it could be filed in Court. I accordingly find that this is a litigious matter which is subject to the tariff set out in the Rules of Court.

In my view, the proper procedure to follow in a quest to determine the reasonableness or otherwise, of an attorney's fee in a non-litigious matter is to be found in the provisions of

Bye-law 16 (2) of The Law Society of Swaziland Bye-Laws, 1992, which provides as follows: -

> *"It shall be competent for the Council or any committee appointed by Council for that purpose, at the request of any person or member, to assess the fees payable by such person to a member in respect of the performance of such person of any work by a member in his capacity as such."*

In conclusion, it is clear that the Defendant has taken a good point. The Bill of Costs annexed to the Plaintiff's Particulars of Claim be and is hereby referred to the Taxing Master for taxation on notice to both parties. The proceedings are stayed pending the taxation.

I order that costs be in the cause.

T.S. MASUKU
JUDGE