



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No. 150/2012

MAGAGULA & HLOPHE ATTORNEYS

Plaintiff

And

ABEL MPHILE SIBANDZDE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Neutral citation : *Magagula & Hlophe Attorneys v Abel Mphile Sibandze (150/2012) [2019] SZHC 230 (29th November, 2019)*

Coram : **M. Dlamini J**

Heard : **3rd October, 2019**

Delivered : **29th November, 2019**

Civil action : *Bill of costs – untaxed – court ordering parties to first contest the Bill before the Taxing Master – parties agreeing to a figure taxed among themselves – parties submitting to the Master a bill for endorsement – defendant insisting to contest the endorsed bill*

: *court declining to entertain defendant on the basis of compromise – compromise defined*

Summary: The plaintiff, a legal firm, instituted action proceeding demanding the total sum of E828 684.80 as legal fees against the defendant. Defendant raised that there was a verbal agreement where plaintiff would submit to him two separate bills. The first bill would be paid by him while the second by his employer in the event he is successful in his litigation against the said employer.

The Parties

[1] The plaintiff is a law firm duly registered and carrying on its business at First Floor Development House, Swazi Plaza, Mbabane, Hhohho region, in the Kingdom of Eswatini. The defendant is an adult male and former employee of Stanlib Swaziland (Pty) Ltd (Stanlib). He was a managing director based in Mbabane, Hhohho region in the Kingdom.

The Plaintiff's case

[2] In its particulars of claim, the plaintiff pointed out that in June, 2009, it was engaged by the defendant to render legal services on his behalf. Defendant had impending disciplinary hearing instituted against him by his employer Stanlib. The material term of the verbal contract was that defendant would make payment of the services rendered upon plaintiff presenting a statement.

[3] Plaintiff rendered the services and presented statements at intervals. The total sum was for E732 284.80. Defendant failed to discharge his side of the bargain. In March 2011, defendant instructed plaintiff to solicit the services of Senior Counsel in the same matter. Plaintiff duly complied. Senior Counsel rendered legal services on behalf of defendant. Defendant failed to pay the sum of E96 400.00 due to Senior Counsel.

Defendant's defence

[4] The defendant resisted the claim by plaintiff in that the plaintiff failed to submit two separate statements agreed upon between the parties. It was agreed that plaintiff would present two statements. One statement was for the account of the defendant while the other for Stanlib. Stanlib would pay the said statement if, he stated:

“At the end of matter, if I won the matter with costs.”

[5] Defendant proceeded to plead:

“Unfortunately, the plaintiff at the eleventh hour withdrew as Defendant's Attorney and demanded payment of their exorbitant

fees, which fees a thumb-sucked with no due regard to my work future as the disciplinary proceedings against Defendant were commencing.”¹

[6] Defendant stated that plaintiff failed to produce the two statements. He did pay some legal fees a fact which plaintiff failed to divulge. Further plaintiff has failed to advise him how much costs were collected from Stanlib following that in certain proceedings he was awarded costs orders by the court against Stanlib.

Proceedings

[7] The matter was enrolled for trial before me on 9th August, 2016. When it was called, I enquired from both Counsel, **Mr. O. Nzima** for the defendant and **F. Joubert** for plaintiff if the parties have appeared before the Taxing Master to first contest their bill before her. Both Counsel answered in the negative. Without objection from any of the parties, the court directed that the parties must first contest the bill before the Taxing Master. The matter returned to my roll this session. It had taken twist.

Current Pleadings

[8] When the matter was called for trial, Counsel for plaintiff **Mr. Z. Shabangu** rendered some evidence from the bar, demonstrating that the parties had reached a compromise. The court ordered both parties to file affidavit with plaintiff's Counsel, filing a founding affidavit and defendant an answer.

¹ Para 2.3 at page 87 of book of pleadings

Affidavit by Plaintiff's Counsel

[9] **Mr. Z. Shabangu** deposed that the parties agreed to debate the statement of account submitted by it. After a series of engagement, they eventually agreed on a figure. He deposed in that regard:

“The parties proceeded to debate the items listed in the Bill of Costs striving to compromise a figure in respect of each and every item.”²

[10] He also averred:

*“13. To confirm that the itemized bill contained the figures agreed upon by the parties, they inserted their initials on each and every page of the itemized Bill of Costs hence at the bottom of each page are the initials of the Deponent **ZS** and **Mpumelelo Mabuza M.M.**”*

[11] He then proceeded:

“14. The parties proceeded to the Taxing Master to present the Taxed Bill as taxed by and between the parties for formalities and for the Taxing Master to endorse the compromise between the parties.

*15. The Taxing Master indeed endorsed the agreed upon attorneys' fees in the sum of E 547,213.60 (**Emalangeni***

² Paragraph 11 of affidavit by Z. Shabangu

Five Hundred and Forty Seven Thousand Two hundred and Thirteen and Sixty Cents). ”

Defendant Counsel’s answer

[12] **Mr. O. Nzima** deposed:

“7.

For various reasons, the taxing master could not tax bill, and the parties decided to tax the bill by themselves and come up with a figure that will be endorsed by the taxing master as agreed taxed amount.”

[13] He concludes however as follows:

“9.

It is our humble submission that the amount claimed as per the particulars of claim was taxed by the parties and thus the end result was the reduced amount of E612 075-81 (Six Hundred and Twelve Thousand and Seventy Five Emalangi and Eighty One Cents). It is our further submission that even if the bill was taxed by the taxing master, the end result was going to be the same that is, arriving at a certain amount and/or figure.”

[14] He disputes any compromise.

Issue

[15] The question for determination is whether there was any compromise between the parties.

A Compromise?

[16]

D. Mazibuko J³ at paragraph 18 referred to **Gibson** as follows:

“18.1 *Compromise, transactio, is a form of novation. It is an agreement between parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something; either diminishing his claim, or increasing his liability.....*

*A compromise may be effected by the parties themselves, or by their agents or attorneys; or it may be made judicially, by entry in the records of the Court. It may be made before or after the close of pleadings (litis contestatio) in a law suit, **and its effect is the same as res judicata**”.*

18.2 *“Compromise is, in the wide sense, an agreement between persons for the settlement of a matter in dispute (whether or not arising from a previous contract), each party abating some of his previous demands.*

*If parties to a contract dispute each other’s rights in terms of the contract and subsequently compromise, **their rights are then regulated by the compromise and***

³ Ngwenya v Swazi Bank 679/09 [2014] SZIC 14 (31 March 2014)

not by the original contract, which falls away
(*Cachalia vs Harberer & Co. 1905 TS 457*). *In such a case, as the parties enter into a new contract which replaces the old one, it is clear that compromise is a form of novation...*”

[17] The learned Judge proceeded to wisely propound from the above definitions:

“19.1 *A compromise is an agreement that is concluded by parties who have an existing dispute or lawsuit.*

19.2 *The purpose of a compromise is to settle the dispute or lawsuit.*

19.3 *When settling their dispute the parties will abate some of their demands.*

19.4 *Once the parties have concluded the compromise, their relationship is governed by the new agreement viz. the compromise itself, and the original contract falls away. A compromise therefore, has the same effect as a plea of res judicata in respect to the parties’ previous claims, demands or lawsuit”.*

[18] I agree with the analysis by the learned Judge. I might add though that a compromise results in novation.

Present case

[19] Turning to the case at hand, it is common cause from both counsel's affidavits that the Bill of Costs submitted to the Taxing Master was debated by both Counsel on behalf of their clients. Each item in the bill was considered. They eventually reached through consensus an agreed figure in each item. The totals in the bills costs were therefore a result of debatement and lastly an agreement. Over and above, both Counsel agreed that there would be no further contestation once the bill was presented to the Master. The bill was submitted to the Master for her mere endorsement and not a further contention.

[20] The above set of circumstances are all in fours with the principle on compromise. The defendant compromised his defence. If he was contesting the bill, he would have done so before the Taxing Master. He did not do so. Instead he gave the Taxing Master a nod to endorse the bill. When the court referred the bill for taxation, it was saying start your opposition before the Master. You could not start it before the court. If any of you is dissatisfied with the Taxing Master's figure then you may continue to contest it before court.

[21] The contrary however happened. No contentions were raised before the Taxing Master. The taxing of the bill in short was by consent. There is therefore no contention to take before court. The contention became *res judicata* when the parties applied to the Taxing Master to endorse the bill whose figure had been agreed among the parties. There was

novation. The defendant cannot then come to court to contest a figure which he agreed upon.

[43] The defendant points out that they did not agree on the Senior Counsel's bill. It was only taxed by the Taxing Master. There is no reply to this averment.

[22] From the documents attached, Senior Counsel's fees are reflected in separate sheets. Unlike **Mr. Shabangu**, these were not argued by both parties. This supports the evidence by defendant that he is still contesting the advocate's fees. Now the defendant has deposed as follows with regards to Senior Counsel's fees:

“17. The dispute that arose between the parties at taxation was in respect of Senior Counsel's fees. The Taxing Master therefore proceeded to Tax the Bill in respect of Counsel's fees which was taxed at the discretion of the Taxing Master. Using her discretion, the Taxing Master taxed and allowed the Counsel's fees at E58,800.00. In awarding this figure, the Taxing Master took into consideration that Plaintiff's claim as tabulated in the Particulars of Claim had already been diminished by part payments received from Defendant yet she had to tax Counsel's fees holistically from scratch.”

[23] It is not clear as to why defendant failed to appear before the Taxing Master and contest the Senior Counsel fees. The order by this court to

first contest the bill before the Taxing Master was for that purpose. I appreciate that during hearing of this matter defendant Counsel drew the court's attention to its defence as follows:

*“The second bill was running concurrently with the first bill and it was agreed that this bill would be presented to Defendant’s employer (Stanlib Swaziland and Liberty Life Swaziland) at the end of the matter, **if I won the matter with costs.** Unfortunately, the Plaintiff at the eleventh hour withdrew as Defendant’s Attorney and demanded payment of their exorbitant fees, which fees are thumb-sucked with no due regard to my work future as the disciplinary proceedings against Defendant were commencing.”*

[24] However, it is common cause that the resolute clause did not materialise. The defendant did not win his disciplinary hearing. Defendant, pleaded that by agreement two bills would be drawn. One for his attention. The other for Stanlib in the event he wins in the disciplinary hearing. Now that he did not win, it is inherent that he must foot both bills. He was given the opportunity to appear before the Taxing Master to contest the said bill. The Taxing Master taxed the bill without any contestation. He did so at his peril.

[25] In the final analysis, the following orders are entered:

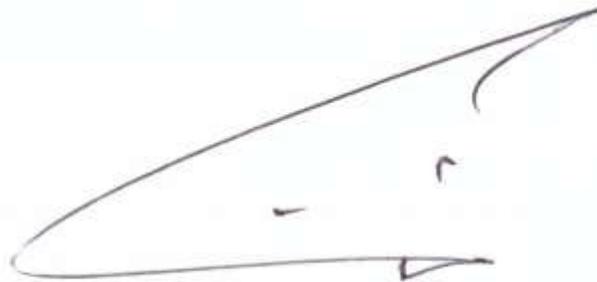
25.1 Plaintiff’s action succeeds.

25.2 Defendant is ordered to pay plaintiff the following:

2.2 E612 075.81 (Six Hundred and Twelve Thousand and Seventy Five Emalangi and Eighty One Cents).

2.3 Interest thereof at the rate of 9% per annum a *tempore morae*.

2.4 Cost of suit.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that tapers to a point on the right, with several smaller, less distinct strokes below it.

**M. DLAMINI
JUDGE**

For the Plaintiff : **Z. Shabangu of Magagula & Hlophe Attorneys**

For the Defendant : **O. Nzima of Nzima and Associates**

