THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 144/2009

In the matter between:

BLAKES MAPHANGA INCORPORATED **Appellant**

and

OUTSURANCE INSURANCE COMPANY LIMITED **Respondent**

Neutral citation: *Blakes Maphanga Inc v Outsurance* (144/09) [2010] ZASCA 19 (19 March 2010)

Coram: NAVSA, MALAN, SHONGWE, TSHIQI JJA and MAJIEDT AJA

Heard: **5 March 2010**

Delivered: **19 March 2010**

Summary: Attorney and client – fees – set-off against moneys collected – whether fees liquidated or taxation necessary.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Hartzenberg, Webster and Vilakazi JJ sitting as Full Court):

The appeal is dismissed with costs including the costs of two counsel.

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JUDGMENT

MALAN JA (NAVSA, SHONGWE, TSHIQI JJA and MAJIEDT AJA concurring):

[1] This is an appeal, with the leave of this court, against a judgment of the full court of the North Gauteng High Court upholding the decision of Van Rooyen AJ in the High Court ordering the appellant, Blakes Maphanga Incorporated, a firm of attorneys, to pay to the respondent, their client, a certain amount of monies collected on its behalf together with interest and costs.

[2] This case concerns the question whether an attorney may set off against a claim by the client for payment of monies, collected on its behalf, fees owing by the client that were disputed and not taxed. The appellant represented the respondent in close to four hundred litigious matters. On 4 March 2005 the respondent terminated the appellant's

mandate and demanded, pursuant to the mandate given to the appellant, that monies collected on its behalf be paid over. The appellant sought to 'invoke' set-off. It asserted that it was entitled to set off against the fees owing to it the monies so collected. The question for decision is whether the fees claimed are liquidated amounts capable of being set off. This, in turn, depends on whether taxation is required to render the fees, which were disputed, liquidated.

[3] The respondent is a short-term insurance company. It instructed the appellant to represent it. Their relationship was governed by an oral agreement which provided for the remuneration of the appellant in accordance with a fee structure and tariff. According to the respondent, all monies collected by the appellant on behalf of the respondent had to be paid over without any deduction or set-off. Separate monthly accounts in respect of all work done and disbursements made had to be rendered to the respondent and payment had to be made within 30 days of delivery of the accounts.

[4] It is in dispute whether the mandate in terms of which the appellant was appointed included a proviso, as alleged by the appellant, that set-off of the appellant's fees against monies collected for the respondent would be excluded only where the respondent paid the appellant's monthly accounts timeously. Nor is it clear what the terms of any ad hoc arrangement were. Also disputed is whether the terms of the mandate would endure after its termination.

[5] When the respondent cancelled the appellant's mandate it requested the appellant to hand over all the relevant files to its new attorneys. Negotiations between the parties followed, leading to the appellant's message to the respondent of 7 March 2005 that the appellant was engaged in closing the files and that it would attend to forthcoming trials during March and April. It stated further:

'We have commenced the necessary administration and wish to advise you that due to the enormous amount of administration involved in closure of the files, that we will be debiting a closure fee of R 150 excluding Vat. The amount includes the courtesy of making your attorneys a complete duplicate file for collection upon final payment of your account. '

[6] The respondent replied on 10 March 2005 by calling into question the necessity of making duplicate files, undertaking to pay disbursements made by the appellant on behalf of the respondent, but disputing the R150 closing fee per file charged by the appellant and reserving the right to refer any fees that may be disputed to the relevant Law Society. In addition the respondent called for delivery of the files by no later than 16 March 2005. In a subsequent letter of 23 March 2005 the respondent intimated that the reason for the termination of the appellant's mandate was, inter alia, that its fees were no longer competitive.

[7] The appellant alleged that during the first half of 2005 the respondent was in arrears with the payment of fees and imposed a moratorium on new work to be given to the appellant. According to the appellant, by February 2005, the respondent's accounts were in arrears for a period of 180 days. The respondent was thus not meeting its obligation to make payment within 30 days of receipt of statements of account. The appellant thereupon resolved, in January 2005, to set off the amounts owing for fees against amounts collected on behalf of the appellant. The appellant asserted that it was entitled not only to invoke set-off but also to enforce its lien to retain the files until it was paid. The appellant rendered its final accounts to the respondent under cover of a letter dated 18 April 2005 which was received on 21 April 2005. In this letter the appellant stated:

'We further confirm that the balance of the remaining files which have not been handed over either to your offices or to TP Mabasa Attorneys will be available for collection against settlement of our accounts.
Please note that should you have any queries and/or disputes with respect to our accounts or any charges levied, we are happy to proceed to have the same taxed and undertake in this respect to refund any differences which may accrue in your favour. The converse obviously applies, in that should we for

any reason tax any amount in excess of accounts rendered, we reserve the right to recover same from you.'

[8] The number of accounts received by the respondent amounted to 389 and the amount claimed by the appellant to R300 471,34. The respondent, on the other hand, alleged that the agreed fee structure and tariff had not been adhered to and that, if the fee structure and tariff had been followed, only an amount of R 66 794,78 would have been owing to the appellant. The latter amount was paid to the appellant and the balance, an amount of R 233 676,56, was paid into the trust account of the respondent's attorneys pending the establishment of the appellant's entitlement to the amounts claimed. In its letter of 26 April 2005 the respondent's attorneys wrote:

'It would appear that you have, in all matters, charged for making copies of the files for withdrawing as attorneys of record and debited an amount which we presume to be a closing fee, which you describe as "to future correspondence and telephone calls". Our clients deny that you are entitled to payment of these amounts and denied liability therefore as far back as their letter of 10 March 2005.

We attach hereto a detailed spreadsheet detailing the payments made into your account and the outstanding balance in each matter, which our clients are not prepared to pay. It must be pointed out that in certain instances, there is a balance brought forward which is not adequately explained or substantiated and our client is not prepared to pay these amounts before they are able to evaluate them. You will note from the spreadsheet that there is an amount of R 233 676,56 that our clients believe they are not liable for….

Our client is accordingly not prepared to pay the balance of R 233 676,56 that you claim and have paid this amount into our trust account, pending the establishment of your entitlement to the amounts you claim, either by way of agreement or taxation. Once the amounts payable to you have been agreed or taxed, we undertake to forthwith make payment to you….

We note your intention to do a set-off, but record that our client's express agreement with you was that no set-off would be done and that you would account to our clients for all amounts recovered on their behalf. Our clients require you to adhere to the arrangement and account to them.'

[9] The appellant responded by letter dated 28 April 2005:

'[P]lease note that the operation of set-off has been applied. In the circumstances, you are requested to collect the remainder of your files by no later than 13h30 on 28 April 2005. Please note that there is a balance due to Blakes Maphanga in the amount of R 12 942,46 … which amount is due and payable. A number of service providers, are still rendering their accounts to our offices and in the light thereof this balance will no doubt increase. We will submit further accounts to your offices at month-end….
[S]hould you dispute any further amount, we suggest that the invoices be presented for taxation in due course. At this stage, we will be able to establish whether reimbursements are due to either party, alternatively whether any further fees are due to our offices.'

[10] The respondent took issue with the contentions raised by the appellant concerning set-off by referring in its attorney's letter of 29 April 2005 to two disputes; ie the one relating to the amount due and the other whether the appellant was entitled to rely on set-off. After referring to rule 68.6.2.1 of the Rules of the Law Society of the Transvaal it stated:

'[W]e fail to see how you can unilaterally decide what "the amount due" to you adds up to in view of the dispute that there exists. Your conduct in unilaterally deciding the true extent of the amount due is nothing more and nothing less than *parate executie* i.e. execution without a Court order….
[W]e are further instructed that it was specifically agreed at the inception of the relationship that there had been between yourselves and Outsurance, that all monies collected on their behalf would be paid over without applying set-off and that any fees and disbursements due to you would be settled separately.'

[11] It is common cause that none of the appellant's bills was taxed. In view of the disputes between the parties the respondent launched proceedings for payment of the amount of R 233 676,56 (alternatively R 220 734,10) being monies collected by the appellant on behalf of the respondent and held in its trust account. It is common cause that the appellant delivered to the respondent batches of statements of account on 23, 24 and 25 March 2005. The last batch of statements of account was received on 21 April 2005. The appellant raised set-off as a defence claiming that its debt to the respondent was extinguished. The respondent contended that an attorney's claim for fees is not liquidated and thus not capable of being set off until such time as they have been taxed. The respondent further contended that if the court were to find that an

attorney's fees constituted a liquidated debt notwithstanding the lack of taxation the matter had to be referred to evidence in regard to the disputes concerning the terms of the mandate and the quantum of the fees owing.

[12] In the high court, Van Rooyen AJ approached the matter on the basis of the allegations made by the appellant in its answering affidavit. He regarded as the real issue the question whether the appellant was entitled to invoke set-off 'as against monies [the appellant] held in trust on behalf of [the respondent] at the time its services were terminated, alternatively at the time set-off was applied.' He said that a bill of costs was only proof of the cause of action and that 'taxation is merely a mechanism of proof and not a condition precedent to the operation of set-off. It follows that set-off will operate in the absence of taxation, provided the debt is liquidated.' He accepted, as alleged by the appellant, that the agreement between the parties entailed that, if payment of fees was not made within 30 days of the rendering of the statement of account, the appellant would be entitled to set off fees owing to it against monies collected for the respondent. However, because set-off had been 'applied' before expiry of the 30 day period (the last account was received on 21 April 2005 and set-off 'invoked' by the letter of 28 April 2005) no set-off was effected. He in effect found that the 30 day period allowed for the payment of fees survived the termination of the agreement and ordered the appellant to pay over the monies collected on the respondent's behalf.

[13] On appeal the full court held that it was settled law that set-off could only operate where two liquidated claims existed that could be set off against another. Hartzenberg J remarked that the courts in a long line of cases held that claims by attorneys for their fees became liquidated upon taxation. That, he said, was still the position. The mere fact, he said, that fees may be owing in terms of an agreed tariff did not have, as a necessary result, that the claim was liquidated. Where the client disputed the fees the claim for them was not liquidated. Since the amount of the fees payable in this matter

was in dispute the appellant's claim, had it sued for payment, could have been met by a dilatory plea for the case to be held over pending taxation.

[14] It is trite that where two persons are mutually indebted to each other their obligations may be extinguished by set-off. Where debts in the same amount are set off, mutual extinction of the debts occur; but where the amounts differ the smaller debt extinguishes the larger pro tanto. Set-off presupposes mutual obligations between two persons in their personal capacities.[1] Thus, where a debt is owed to or by a person in a 'representative' capacity it cannot be set off against a debt owed to or by that person in his or her personal capacity. An example is where a debt is owed to a person in his or her capacity as a trustee.[2] In the present case the question is thus not whether the fees owing to the appellant may be set-off against the monies collected and held in trust but rather whether the fees debited and the monies transferred from the trust account to the appellant's business account may be set off.[3] Since the papers are silent on this aspect, I shall assume that the set-off invoked in this matter concerns debts owing to the parties in their personal capacities.

[15] Although set-off operates ipso iure[4] its operation may be excluded by agreement.[5] In this case set-off was purportedly effected by the appellant deciding to 'invoke' set-off pursuant to the fees agreement between them. Set-off can only take

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[1] S van der Merwe, L F van Huysteen, M F B Reinecke and G F Lubbe *Contract General Principles* 3 ed (2007) p 546ff.

[2] *De Beer v Kotze* 1913 CPD 252 at 254.

[3] Rule 69.5 of the Rules of the Law Society of the Transvaal (*GG* 7164, 1 August 1980 as amended by *GG* 16511, 7 July 1995 and *GG* 17190, 17 May 1996 and *GG* 17617, 22 November 1996) provides: 'A firm shall ensure that withdrawals from its trust banking account are made only – 69.5.2 as transfers to its business banking account, provided that such transfers shall be made only in respect of money claimed to be due to the firm.' E A L Lewis *Legal Ethics A Guide to Professional Conduct for South African Attorneys* (1982) p 276 suggests that 'the attorney must not make such deductions and withdrawals from the trust money unless he has good reason to be certain that the fees cannot be successfully challenged. In any instance where there is uncertainty the money should remain in the trust account until certainty is achieved.'

[4] *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289-90.

[5] *Herrigel NO v Bon Roads Construction Co (Pty) Ltd & another* 1980 (4) SA 669 (SWA) at 676G-H; *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 (3) SA 748 (W) at 761B-G.

place if both debts are liquidated in the sense that they are capable of speedy and easy proof.[6] It was submitted on behalf of the appellant that a claim by an attorney for fees is a liquidated claim in the sense that it is capable of speedy and easy proof. It relied on the judgment in *Lester Investments (Pty) Ltd v Narshi*[7] that was approved of in *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*[8] in the following terms:

'In the last-mentioned case [ie *Lester's* case] the Court regarded a claim in respect of repairs on all the facts before it as a liquidated claim, even though evidence had to be led on the necessity of doing the work, the nature of the work done and the reasonableness of the charge therefor. All the factors connected therewith were readily ascertainable and proof in regard thereto was ready to hand.'

In *Fatti's* the court continued:[9]

'If the claim is based on a contract, the probabilities are that its existence and character can be proved to the satisfaction of the Court speedily and promptly. When for instance a contract of sale is concluded and there is no express agreement as to the price of the article sold, it is an implied term of the contract that a reasonable price will be paid for the article, that is to say a price ordinarily charged by persons who deal in such articles at the time and place of the sale. Similarly, where a contract for the rendering of services is concluded and the parties do not agree as to the remuneration to be paid therefor, it is an implied term of the contract that a reasonable remuneration will be paid for such services; such remuneration depends on what is regarded as reasonable in that particular trade or profession. In our organised society with businesses, trades and professions organised as they are it is normally a matter of no difficulty to determine the usual and current market price of articles sold and the reasonable remuneration for services rendered. These are matters which as a rule can be ascertained speedily and promptly.'

[16] Although these considerations have general application a different approach in relation to attorney's fees evolved. The relationship between an attorney and client is based on an agreement of *mandatum* entitling the attorney, in the absence of an

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[6] *Treasurer-General v Van Vuren* 1905 TS 582 at 589; *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738F-G.
[7] 1951 (2) SA 464 (C) at 470.
[8] At 738G-H (see n 6 above).
[9] At 739C-F.

agreement to the contrary, to payment of fees on performance of the mandate or the termination of the relationship.[10] In *Benson*[11] the court said:

'But what is clear is that by the end of the last century it had become an established practice that the Court did not undertake the task of *inter alia* quantifying the reasonableness of attorneys' fees and that taxation of such a bill of costs was left to the taxing officer. This did not entail, however, that an attorney could not sue or obtain judgment on an untaxed bill. Although … the Court assumed a discretion to order a bill to be taxed, and although a Court would not allow an action to proceed if the client insisted on taxation, there was no reason why judgment could not be given for an attorney if the client was satisfied with the *quantum* of the bill but defended the action on some other ground.'

[17] A client is entitled to taxation of his or her attorney's account. It follows that the amount of a disputed bill of costs is not liquidated. It is not capable of 'easy and speedy proof' .This was decided in so many words in *Arie Kgosi v Kgosi Aaron Moshette & others*[12] where Wessels JP said:

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[10] *Benson & another v Walters & others* 1984 (1) SA 73 (A) at 83A-C. See *Deeb v Pinter; Shane & Stoler v Munro-Scott t/a House of Bernadi* 1984 (2) SA 507 (W) at 509A-D; *Truter, Crous, Wiggill & Vos v Udwin* 1981 (4) SA 68 (T) at 73C-D; *Goodricke & Son v Auto Protection Insurance Co Ltd (In Liquidation)* 1968 (1) SA 717 (A) at 722H-723B.

[11] *Benson* at 85B-D. See *Mouton & another v Martine* 1968 (4) SA 738 (T) at 742; G B van Zyl *The Judicial Practice of South Africa Volume II* 3 ed (1923) p 965; *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) p 736. Rule 4(2) of the rules of the Magistrates' Courts Rules of Court states that 'no judicial officer [ie a magistrate] shall … tax any bill of costs'.

[12] 1921 TPD 524 at 526. Mason J added at 526 that '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 nearly every instance on the discretion of the taxing officer.' This approach has been followed consistently: *Dumah v KlerksdorpTown Council* 1951 (4) SA 519 (T) where Price J said at 521G-H: 'It was common cause between counsel that until these costs had been taxed, set off could not operate. It is unnecessary to quote authority for this proposition. There is no lack of such authority.' Further *Haine v Podlashuc and Nicolson* 1933 AD 104 at 111; *Van Aswegen v Pienaar & andere* 1967 (3) SA 677 (O) at 678G-H; *Gramowsky v Steyn* 1922 SWA 48 at 55-56; *Baskin & Barnett v Barnard* 1928 CPD 58 at 60; *National Bank v Marks & Aaronson* 1923 TPD 69 at 71; *Lovell v Paxinos & Plotkin; In re Union Shopfitters v Hansen* 1937 WLD 84 at 86; *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O) at 123H; *Tredoux v Kellerman* 2010 (1) SA 160 (C) paras 18-21. See further RH Christie *The Law of Contract in South Africa* 5 ed 478; M Jacobs, N E J Ehlers *Law of Attorneys' Costs and Taxation Thereof* (1979) p 29; H J Erasmus *Superior Court Practice* p B1-213 n 4; E A L Lewis *Legal Ethics* p 276; D H Sampson *Randell and Bax The South African Attorneys Handbook* 3 ed (1983) p 159. The only authority to the contrary is J C de Wet and A H van Wyk *Wyk Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) p 279 n 148 who remark with reference to some of the above cases that it seems 'tog of koste danig gou getakseer kan word as dit nodig is.'

'An untaxed bill of costs is not an absolute and present debt, for it is one the exact amount of which is still to be ascertained, as it depends on the arbitrarium of the Taxing Master. It cannot, therefore, be set off as against a liquidated debt.'

In *Tredoux v Kellerman*[13] Griesel J dealt with an application for summary judgment for the amount of the fees of an attorney and counsel. He had to consider whether the amounts claimed were 'liquidated' as required by rule 32 of the Uniform Rules of Court. He said:

'A liquidated amount of money is an amount which is either agreed upon or which is capable of "speedy and prompt ascertainment" or, put differently, where ascertainment of the amount in issue is "a mere matter of calculation". In my view the plaintiffs' claims in question do not fall in this category: they involve an enquiry into the nature and extent of the professional services rendered, the reasonableness of fees charged, and so on. These are not mere matters of calculation; they are matters for taxation, which fall within the compass of duties of the taxing master. It is that official, and not the court, who must determine the reasonableness of professional fees charged by legal practitioners . . . .

In any event, there is authority for the proposition that an untaxed bill of costs does not constitute a liquidated amount in money – at least in circumstances, as here, where the bill is being disputed . . . .

Even if I were to err in coming to this conclusion, and even if the plaintiff's claims were to be regarded as liquidated amounts, it has authoritatively been held that a party cannot recover his or her costs in the absence of prior agreement or taxation . . . .'

[18] The appellant stated in its letter of 18 April 2005 that it was 'happy to proceed' with taxation. It was thus aware of the dispute relating to the accounts well before set-off was 'invoked'. In addition, it was known that the appellant's closing fee was disputed as well as the question whether the appellant adhered to the tariff agreed upon. The amounts claimed as fees were thus not liquidated and would only have become liquidated on taxation. The fact that the fees may be determined in another manner as contended by counsel for the respondent is of no consequence. The fees will be

[13] Paras 18-23 (see n 12 above). Cf *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 253B-D.

determined by the taxing master and not by the court.[14] The duties of a taxing master include the duty to determine whether costs 'have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses'.[15] It is his duty to 'decide whether the services have been performed and he should not close his eyes and ears to evidence which may be readily available to show that any work alleged to have been done was in fact not done.'[16] Even where an agreement exists between an attorney and client a taxing master is empowered to satisfy him or herself that fees related to work done and authorised were reasonable.[17] There are sound reasons for a client's right to insist on taxation and to regard the amount a bill of costs that has not been taxed as not liquidated. The question whether a debt may be capable of speedy ascertainment is 'a matter left for determination to the individual discretion of the Judge'.[18] In the case of a disputed bill of costs in litigious matters, however, the reasonableness is to be determined by the taxing master and not by the court.

[19] It follows that set-off as contended for by the appellant could not occur. There is thus no basis for a referral of the matter to evidence. The appeal should thus be dismissed. The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

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[14] In *Melamed & Hurwitz Inc v Goldberg* (686/2007) [2009] ZASCA 15 (19 March 2009) this court, apparently by agreement between the parties, referred the determination of an attorney's fees to the Law Society. The point is that the court did not itself determine the fees.

[15] Rule 70(3) and cf *Transnet Ltd t/a Metrorail & another v Witter* 2008 (6) SA 549 (SCA) [2008] ZASCA 95 paras 14 ff.

[16] *Botha v Themistocleous* 1966 (1) SA 107 (T) 110C-D. See *Maasdorp and Smit v Sullivan* 1964 (4) SA 2 (E) at 3D-B.

[17] *Malcolm Lyons & Munro v Abro & another* 1991 (3) SA 464 (W) at 469E-F.

[18] *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 470E-F; *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C); *Fatti's Engineering Company (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 376 (T); *S Dreyer and Sons Transport v General Services* 1976 (4) SA 922 (C) at 924G-H.

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F R Malan
Judge of Appeal

APPEARANCES

APPELLANT:	DC Fisher SC (with her CS von Castricum)
	Instructed by Blakes Maphanga Inc, Randburg
	Honey Attorneys, Bloemfontein

RESPONDENT:	PJ Vorster SC (with him WW Geyser)
	Instructed by Weavind & Weavind, New Muckleneuk
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