C OF A (CIV) 15/2006

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

VVM KOTELO t/a VVM KOTELO & CO APPELLANT

and

NKOPANE MONYANE 1ST RESPONDENT

EH. PHOOFOLO t/a EH PHOOFOLO & CO 2ND RESPONDENT

27 MARCH and 4 APRIL 2007

CORAM:

STEYN, P
MELUNSKY, JA
PEETE, JA

SUMMARY

Civil Procedure – pleadings – claim for legal costs – no allegation in declaration that costs were taxed – exception taken. Proper procedure by means of special plea and not by exception – in case of exception not permissible to have regard to facts or documents outside pleading which is attacked. Improper joinder of second respondent. Appeal allowed, exception dismissed, no order as to cost in either Court on grounds stated in judgment.

[1] The appellant was the plaintiff in the High Court and the first and second respondents were the first and second defendants respectively. What is in issue in this appeal is whether Majara J in the court *a quo* was correct in upholding an exception to the appellant's declaration.

[2] The appellant and the second respondent both practice as attorneys in the Courts of Lesotho. The essential averments in the declaration may be summarized as follows:

i) The first respondent had engaged the second respondent to represent him in an action which he intended to institute against the liquidator of Lesotho Bank Ltd ("the liquidator").

ii) The first respondent also instructed the appellant to assist the second respondent in carrying out his aforesaid mandate.

iii) Although there is no express averment to this effect, it is implicit that the appellant accepted the said instruction as, according to the declaration, she rendered certain legal services to and for the benefit of the first respondent at times when the second respondent was unavailable or had otherwise failed to carry out his mandate.

iv) The services rendered by the appellant consisted in causing the summons against the liquidator to be issued, briefing counsel

for the trial and performing "all the functions of attorney" for the first respondent in connection with the litigation.

v) Paragraph 5.1 of the declaration reads:-

> "The prosecution of the case included assisting Advocate Jeffreys as junior counsel and disbursing funds on behalf of first defendant in the amount of M53 146.00 …. calculated as follows:
>
> As Junior Counsel - ⅔ of Advocate Jeffreys' fees M48 100.00
> Alternatively, as fees for plaintiff's professional services M48 100.00
> Two thirds of (necessary) expenses incurred (that is ⅔ of M7 600) being M5 046"

vi) The appellant alleges further that she performed her mandate until it was terminated on 30 May 2005; that counsel was remunerated in full for his services; and that it was an implied term of the instructions given to appellant that she, too, would be entitled to be paid for her services and be compensated for the disbursements made on behalf of the first respondent.

[3] Relying on those allegations the appellant claimed payment of M48 100, M5 046, interest on the said amounts and costs jointly and severally from both respondents.

[4] The notice of exception is based on the alleged lack of jurisdiction of the High Court to entertain the appellant's claim. Jurisdiction was claimed to be absent on three grounds, viz that –

i) The action was instituted contrary to the provisions of section 6 of the High Court Act 1978;

ii) The registrar had not taxed a bill of costs in respect of the amount claimed; and

iii) The appellant ought to have proceeded in terms of section 4 (b) of the Law Society Act, 1983.

[5] Majara J upheld the exception on the basis of ground (ii) above.

She said the following:

> "…..although taxation is not a prerequisite to a demand for payment for professional services rendered, where a client insists that the demanded bill be taxed first, the position is that the Court cannot allow the action to proceed …."

[6] When the matter came before this Court, we raised the question of the joinder of the second respondent which appears to us to be irregular as no facts were alleged to entitle the appellant to any relief against him.

No contractual nexus for the second respondent's alleged liability to pay the appellant's fees has been alleged, nor is it averred that he incurred legal responsibility to pay the appellant on any other ground. Counsel for the appellant was unable to advance any argument in support of the joinder of the second respondent but counsel for the respondents submitted that as the joinder was improper, the appeal should be dismissed on that ground alone. He added that as question was one of law, we were entitled to take the point *mero motu*. In my view this imperfection in the declaration is not a factor which should have any bearing on the outcome of the appeal, save in so far as the question of costs is concerned. Nor is it appropriate that we should make any order in this regard. The matter has been drawn to the appellant's attention and she is entitled to apply to amend the declaration, if so advised.

[7] I revert to the question that is before us. The learned judge *a quo* was correct in holding that taxation is not a prerequisite for the institution of an action for payment of legal costs. The corollary is that if a client insists upon taxation, the action cannot proceed until a bill has been taxed. All of this is apparent from Benson and Another v Walters and Others 1984 (1) SA 73 (A) at 84 B and Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC and Others 1998 (3) SA 608 (D) at 610 E.

[8] It was, however, wrong for the learned judge to hold, in effect, that the matter in dispute should be determined by means of an exception. It is understandable that she reached that conclusion as counsel for the

plaintiff in the Court a quo did not raise this point and appeared to be satisfied that the defendant had adopted the correct procedure.

Furthermore she erred in deciding the matter in respondents' favour on the basis of facts not contained in the declaration. I firstly deal with the latter aspect which, too, was not argued before her. It is a well-established principle that in ruling on an exception a court may have regard only to the facts appearing in the pleading that is attacked and not to outside allegations, whether contained in other documents or in counsel's submissions.

This principle is so clear that I can do no better than quote from Erasmus and Others: "Superior Court Practice" (current edition) at B1-151 where the learned authors say:

> "….where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue and no reference can be made to any other document."

Majara J seemed to have been of the view that she could and should have regard to an alleged demand for taxation and an apparent refusal to consent thereto. She did not state what source or sources she relied upon for accepting those allegations. They are not contained in the declaration and should therefore not have been taken into account.

[9] What is more, however, is that a client who insists on taxation should

raise this defence by means of a special plea and not by exception. This, too, was decided in Benson's case (supra) at 85 D, overruling earlier decisions, relied upon by the respondents' counsel, to the effect that an exception was an appropriate procedure is this type of case. More recently, in Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC and Others (supra), the legal position was concisely and correctly stated at 610 F as follows:

> "A client who insists on taxation of a bill of costs should raise this defence, which is of dilatory nature, by a special plea".

The difference between an exception and a dilatory plea is not merely technical, for the latter may introduce fresh matter which requires to be proved by evidence and the former may not (see Erasmus and Others op cit at B1-151).

[10] It follows from the aforegoing that the appeal should be upheld and the exception dismissed. However, this is not a case where the costs should follow the result, either in this Court or in the Court *a quo*. There are two reasons for this. Firstly the declaration was defective on the grounds already stated in par [6] above. This was not disputed by the appellant's counsel and it is obvious that an amendment will be required to remedy the defect. The second reason is that the points upon which the exception succeeds were raised for the first time on appeal to this Court. Had the matters been raised in the Court *a quo* it is probable that the litigation would have taken a different course. It is most unfortunate that pleadings in a matter which commenced by a

summons issued in December 2005 are now nowhere near to being closed. It only remains to state that the other grounds raised in the notice of exception were quite correctly not pursued on appeal.

[11] The following orders are made:-

1. The appeal is allowed;

2. The order of the High Court is set aside and is replaced with the following:

   "(a) The exception is dismissed;
   (b) There is no order as to costs".

3. The respondents are given leave to file whatever further pleadings they deem necessary within 21 days;

4. There is no order as to the costs of the appeal.

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L.S. MELUNSKY

JUSTICE OF APPEAL

I agree _____

J.H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree _____

S.N. PEETE

JUSTICE OF APPEAL

For the Appellant : **T. Thabane**

For the Respondent : **L.A. Molati**