

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> KISHI SHAKUMU & CO INC v PERISA NISAVIC	<b>Case No:</b> HC-MD-CIV-ACT-CON-2020/01784
	<b>Division of Court:</b> MAIN DIVISION
<b>Heard before</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 28 September 2020
	<b>Delivered:</b> <b>1 October 2020</b>
<b>Neutral citation:</b> <i>Kishi Shakumu &amp; Co Inc v Nisavic</i> (HC-MD-CIV-ACT-CON-2020/01784) [2020] NAHCMD 450 (1 October 2020)	
<b>Results on merits:</b> Not on the merits. Application for Summary Judgment.	
<b>The order:</b> Having heard <b>WOLFGANG PFEIFFER</b> , on behalf of the Defendant and having read the documents filed of record:  <b>IT IS HEREBY ORDERED THAT:</b> <ol style="list-style-type: none"><li>1. The application for summary judgment is refused.</li><li>2. The defendant is granted leave to defend the action.</li><li>3. The matter is postponed to <b>22 October 2020</b> at <b>15h00</b> for further case planning conference.</li><li>4. The parties must file a further joint case plan on or before 19 October 2020.</li></ol>	
<b>Reasons for orders:</b>	
PRINSLOO J	

### Introduction

[1] The applicant is moving an application for summary judgment for payment of the amount of N\$ 74 750 plus interest from the defendant for professional services rendered.

### Particulars of claim

[2] According to the particulars of claim the defendant approached the plaintiff's director, Mr Shakumu (acting on behalf of the plaintiff), on 10 January 2020 to engage legal services in order to secure bail in a criminal matter. The plaintiff rendered professional legal services to the defendant on an urgent basis from 10 January 2020 until 13 January 2020 when bail was secured for the defendant.

[3] The plaintiff pleaded that the material terms of the agreement (express alternatively implied) was the following:

- a) That the plaintiff would render legal services to the defendant in terms of securing bail in a criminal matter for the defendant;
- b) That the plaintiff would charge its fees at a rate of N\$ 30 000 (excluding VAT and administration costs) per day for services rendered on an urgent basis;
- c) That the defendant would be liable for all the ensuing costs emanating from his instructions to the plaintiff on an urgent basis; and
- d) That the defendant would pay its costs immediately upon receipt of the invoice from the plaintiff.

[4] It is the plaintiff's case that it rendered the professional legal services to the defendant on an urgent basis and subsequently presented the defendant with the invoice for the sum of N\$ 74 750, however the defendant breached the agreement by filing or refusing to make good on the invoice.

### The application

[5] Mr Shakumu deposed to the founding affidavit wherein he confirmed the amount claimed. He further stated that in his opinion there is no *bona fide* defence to the action and that the notice of intention to defend was delivered solely for the purposes of delaying the action.

[6] The defendant opposed the summary judgment application on various grounds, which can be set out

in summary as follows:

- a) The defendant denies that the parties agreed on a fee structure in the amount of N\$ 30 000 per day as pleaded (the defendant further denies the reasonableness of the fee structure or that the fee structure was ever discussed with him).
- b) The defendant is entitled to receive an itemized bill and have same taxed.
- c) The defendant denies that he engaged the service of the plaintiff for bail proceedings or for any other proceedings for that matter. The defendant denies that criminal proceedings were instituted against him of any nature.
- d) The defendant conceded that he was detained on a warrant of detention issued by the Ministry of Home Affairs in terms of s 42 of Act 7 of 1993 but stated that when he was taken to the Ministry of Home Affairs on 13 January 2020 he was required to pay an amount of N\$ 2000 as a guarantee in terms of the said Act and he was released from custody.

#### The applicable rule

[7] Summary judgment application is regulated by rule 60(1) of the Rules of the High Court of Namibia, which provides as follows:

'60. (1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is – (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; or (d) for ejectment.'

#### Discussion

##### *General principles of summary judgment application*

[8] Van Niekerk et al in *Summary Judgment- A Practical Guide*<sup>1</sup> stated as follows regarding the nature of summary judgment applications:

'Summary judgment has never had as its object the resolution of factual disputes between a plaintiff and defendant. It is an interlocutory procedure and is not intended to be as comprehensive as an opposed action or rule 6 application.'<sup>2</sup>

<sup>1</sup> Service issue 11 April 2012.

<sup>2</sup> Para 4.1.

[9] Further to this the learned author indicates:

'Summary judgment is a *sui generis* procedure with its own basis in principle, its own requirements, rules and unique advantages and shortcomings. It is unremarkable, therefore, that the adjudication of such an application differs fundamentally from the adjudication of opposed motions in terms of rule 6, opposed applications for provisional sentence and opposed actions.'<sup>3</sup>

[10] The learned author also makes it clear that summary judgment proceedings are not and never have been intended as a forum for the resolution of factual disputes. A trial is a proper forum for the resolution of factual disputes.<sup>4</sup>

#### *Untaxed professional fees*

[11] Generally a liquidated amount in money is an amount 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*'.<sup>5</sup>

[12] 'Liquidated' is described by *Wille's Principles of South African Law*<sup>6</sup> as follows:

'A debt is liquidated when its exact money value is certain or when the amount is admitted by the debtor, or even if the claim be disputed by the debtor, it is of such a nature that the accuracy of the amount can be clearly and promptly established by proof in court; e.g. an amount due under a judgment, or a taxed bill of costs, or a liquid document signed by the debtor, or a claim for goods sold and delivered, or for salary, or for commission for an agreed amount, or upon an agreed basis.' (my underlining)

[13] In *Blakes Maphanga Inc v Outsurance*<sup>7</sup> Malan JA seems to accept the aforementioned proposition and stated as follows:

[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 where Wessels JP* said:

<sup>3</sup> Para 11.1.

<sup>4</sup> Para 11.2.2.

<sup>5</sup> Erasmus *Superior Court Practice* at B1-210 and the cases cited in footnote 2.

<sup>6</sup> 9<sup>th</sup> ed at 833.

<sup>7</sup> (144/09) [2010] ZASCA 19 (19 March 2010).

“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*<sup>8</sup> 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<sup>9</sup> . . . .

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 . . . .’ (my underlining)

[14] In the *Arie Kgosi* matter<sup>10</sup> Mason J further 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.’

[15] The position as set out in the *Blakes Maphanga*<sup>11</sup> matter has been adopted and applied in our

<sup>8</sup> Paras 18-23. Cf *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 253B-D.

<sup>9</sup> Also see Erasmus *op cit* at B1-213.

<sup>10</sup> Supra at footnote 8 at 526. This approach has been followed consistently: *Dumah v Klerksdorp Town 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 Kontrakereg 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.

<sup>11</sup> See footnote 7.

jurisdiction in *Friedrich Christian Brandt T/A Chris Brandt Attorneys v Windhoek Truck & Bakkie CC*<sup>12</sup> and *MB De Klerk & Associates v Eggerschweiler and Another*.<sup>13</sup>

[16] In *MB De Klerk & Associates v Eggerschweiler and Another* Damaseb JP stated as follows:

[64] It is settled that a client is entitled to have an account of a legal practitioner taxed before payment. Malan JA in *Blake Maphanga Inc. v Outsurance Insurance Co Ltd* at 239 held that the purpose of such taxation is to determine the extent of the indebtedness as an untaxed bill of costs does not constitute a liquid amount in money, especially where the bill is being disputed. Although it has also been held that an attorney may sue on an untaxed bill if the client is satisfied with the *quantum*, it is an established practice that the courts assume discretion to order a bill to be taxed. In such circumstances, the taxing master must determine whether the costs have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee.

[65] The court also held that the taxing master's duty to tax is not ousted by an agreement between an attorney and a client and that even in such circumstances the taxing master must satisfy himself/herself that the fees charged are justified by the work done and are reasonable. I see no reason either in principle or logic why an instrument acknowledging personal indebtedness to the plaintiff by directors of a company who would not otherwise be but for such acknowledgement of debt, would deny them the right that the legal practitioner justifies how that amount was made up. In my view the situation is no different from a client agreeing to an agreed fee, which must still be reasonable and borne out by the work actually performed.'

[17] Having considered the papers and the arguments advanced by the respective counsel it is clear that the court is not only presented with a dispute on the contents of the alleged agreement to render professional legal services (and whether such an agreement existed at all), but also with a dispute as to the billing and quantum of the fees charged in the absence of taxation. An enquiry into the nature and extend of the professional services rendered and the reasonableness of the fees charged was called for by the defendant.

[18] I am not convinced that the plaintiff's claim is capable of speedy ascertainment. Therefor the plaintiff's claim does not fall within the ambit of rule 60 and as a result the plaintiff is not entitled to summary judgment.

[19] My order is as set out above.

<sup>12</sup> Case NO. I 1762/2011 delivered 5 April 2012.

<sup>13</sup> 2014 (3) NR 609 (HC) 626 D –H as follows on para 64 and 65.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
S K Shakumu from Kishi Shakumu & Co Inc Windhoek	W H Pfeiffer from Behrens & Pfeiffer Windhoek