

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING APPLICATION: SUMMARY JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/02036

In the matter between:

ANGULACO INCORPORATED

APPLICANT

and

PETRUS SHAMBO

RESPONDENT

Neutral Citation: *Angulaco Incorporated vs Shambo* (HC-MD-CIV-ACT-OTH-2020/02036) [2021] NAHCMD 172 (19 April 2021)

CORAM: SIBEYA J

Heard: 18 March 2021

Delivered: 19 April 2021

Reasons: 20 April 2021

Flynotes: Practice – Summary Judgment – Defendant opposing summary judgment application on grounds of exorbitant fees claimed, amongst other defences raised –

Court using discretion to note that unpaid invoices should be taxed – Summary judgment application dismissed.

Summary: The facts are as they appear below.

ORDER

- a) Summary judgment application is dismissed.
 - b) The Applicant must pay the costs of this application, such costs to be limited in terms of rule 32 (11).
 - c) The matter is postponed to 18 May 2021 at 14h00 for status hearing.
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RULING

[1] The applicant instituted proceedings against the respondent for unpaid invoices for legal services rendered. During December 2020, the applicant lodged an application for summary judgment which the respondent opposed. The respondent's opposition is primarily premised on the following:

- a) Firstly, that in respect of claim 1 to 2, the fees charged or invoiced by the applicant are exorbitant, in respect of claim 3, instructions were never given by the respondent for the applicant to commence with work, in respect of claim 4, the account was settled, and lastly in respect of claims 5, the respondent verbally terminated the applicant's services and that the respondent carried no knowledge of the instructions given nor the fees charged in respect of claim 6.
- b) The respondent presented goodwill by effected payment and furthermore did not consent to the fee structure, and lastly;

c) The application brought by the applicant did not fulfil the requirements as set out in Rule 60 of the High Court rules in that the unpaid invoices do not constitute a liquid document or liquidated amount.

[2] The applicant, in response to the opposition raised by the respondent, formed the view that it has besought Rule 60(5) on the basis that respondent had been satisfied with the amounts reflected on the unpaid invoices generated. Applicant further took issue with the fact that the respondent raised the issue of untaxed bill of cost for the first time in his opposing affidavit, which the applicant submitted does not meet the requirements of Rule 60(5) of the rules of this Honourable Court to resist an application for summary judgment. The applicant therefore submits that the respondent failed to disclose a bona fide defence to applicant's claim.

[3] The applicant further submitted in the written heads of arguments that this Court may exercise its discretion to order applicant's invoices be taxed and have the application for Summary Judgment stand down until the Taxing Master makes a determination on the bill. This stance was however abandoned by Ms. Angula who argued for the applicant during oral arguments.

[4] The law on summary judgment applications is trite and plentiful and need not be repeated in this ruling. However, the general approach regarding summary judgments can be surmised as follows as set out by Corbett JA in *Maharaj v Barclays National Bank Ltd*.¹

'Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.

If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.”

[5] Regarding the issue of liquidated amount, the word ‘Liquidated’ is described by Wille’s *Principles of South African Law*² 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.”

[6] In my view, it is not disputed that the respondent owes the applicant with regard to the invoices generated for legal services rendered, the only issue, as I see it, regards the amounts claimed therein.

[7] Malan JA concluded in *Blakes Maphanga v Outsurance Insurance* that:³

² Wille’s *Principles of South African Law* 9th Ed at 833.

³ *Blakes Maphanga v Outsurance Insurance* 2010 (4) SA 232 (SCA), 239, para [18].

“There are sound reasons for a client’s right to insist on taxation and to regard the amount of 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’. 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.”

[8] In *Kishi Shakumu & Co. Inc v Nisavic*,⁴ the court cited *MB De Klerk & Associates v Eggerschweiler and Another*⁵ where 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.’

[9] As was held in the *Kishi Shakumu & Co. Inc v Nisavic*, I am not convinced that the applicant’s claim is capable of speedy ascertainment as is required in terms of rule

⁴ *Kishi Shakumu & Co. Inc v Nisavic* (HC-MD-CIV-ACT-CON-2020/1784) [2020] NAHCMD 450 (01 October 2020).

⁵ *MB De Klerk & Associates v Eggerschweiler and Another* 2014 (3) NR 609 (HC) 626 D –H as follows on para 64 and 65.

60 and as a consequence, summary judgment cannot be granted at this stage without the unpaid invoices being determined by a taxing master.

[10] In the result, I then make the following order:

- a) Summary judgment application is dismissed.
- b) The Applicant must pay the costs of this application, such costs to be limited in terms of rule 32 (11).
- c) The matter is postponed to 18 May 2021 at 14h00 for status hearing.

O S SIBEYA

Judge

APPEARANCES:

FOR THE APPLICANT:

K Angula
AngulaCo Inc.

FOR THE RESPONENT:

J McLeod-Janser
Shikongo Law

Chambers