



REPORTABLE

CASE NO: SA 54/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALEX KAMWI MABUKU KAMWI

Appellant

and

STANDARD BANK NAMIBIA LIMITED

Respondent

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: 9 October 2020

Delivered: 4 November 2020

Summary: This appeal stems from a decision of the court *a quo* not to allow items 1 – 17 contained in the appellant's bill of costs. The court *a quo* made an order in favour of the respondent. The facts are briefly as follows: appellant, in person, instituted an application in the court *a quo* to set aside a warrant of execution against him. His application was successful and the respondent was ordered to pay appellant's costs in respect of the application with the proviso that 'such costs to be limited to disbursements reasonably incurred'. The bill of costs consisted of 22 items amounting to N\$128 200 and it was presented to the taxing officer for taxation. All the

items on the bill of costs were disputed by the respondent. In the exercise of his discretion, the taxing officer disallowed items 1 – 17 on the bill of costs for the reason that what the appellant claimed were fees not disbursements. Those that the taxing officer allowed (ie items 18 – 22) were allowed at reduced amounts. An *allocatur* totalling to N\$41 858,30 was issued by the taxing officer. Both parties were dissatisfied with the taxing officer's ruling. A stated case pursuant to rule 75 of the High Court Rules was submitted by the taxing officer for review. In the stated case, the taxing officer simply indicated that the appellant gave 'justifiable reasons' for the amounts claimed. Further, the taxing officer gave no explanation as to how he arrived at the amounts he allowed and the judge *a quo* thus regarded these amounts as being determined in an arbitrary fashion, hence the court *a quo*, with one exception disallowed all the items on the bill of costs.

The issues raised by the appellant is to determine whether any person other than an admitted legal practitioner is entitled to claim for fees and whether the court *a quo* misdirected itself by finding that the appellant is limited only to claim disbursements reasonably incurred?

Held that, the appellant well knowing that he cannot claim fees when he appears in court and as part of a deliberate strategy, used a company, Alex Kamwi Incorporated, to claim what, is in essence, fees under the guise of disbursements.

Held that, it was incorrect for the taxing officer to adopt an approach that the relationship between the appellant and the company was irrelevant and that the only question was whether the services rendered by the company were reasonable and necessary.

Held that, a taxing officer must, when a stated case is submitted to a judge under give the reasons for his or her ruling otherwise the review judge will not be able to determine whether the taxing officer exercised his or her discretion properly.

Held that, the costs order that appellant based his bill of costs on clearly limited the costs he was entitled to 'disbursements reasonably incurred'. This order was not appealed against and is thus final as between the parties. This issue cannot be raised at the taxation and the taxing officer must act accordingly.

Held that, his attempt to use his own company to justify his disbursements was not shown to be an arm's length transaction, but can reasonably be inferred to have been an attempt to circumvent the law which disentitles him from charging fees for legal work.

Held that, there being no merits in the issues raised by the appellant the appeal that had lapsed due to the late filing of record cannot be reinstated.

The application to reinstate the appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and HOFF JA concurring):

Introduction

[1] Mr Kamwi instituted an application in the High Court to set aside a warrant of execution issued against him on behalf of the respondent. This application was successful and the respondent was ordered to pay the costs of Mr Kamwi in respect of this application with the proviso that 'such costs to be limited to disbursements reasonably incurred'. The said proviso to the costs order is the order usually given where persons act in person and do not utilise legal practitioners to act on their

behalf. This follows from the provisions of rule 125(12) of the High Court which reads as follows (I quote only the relevant portions):

‘ . . . where costs are awarded in favour of a litigant who represents himself or herself, such litigant’s costs are limited to disbursements necessarily and reasonably incurred and they must be taxed by the taxing officer and in that case the rules governing taxation of costs in these rules apply with the necessary modifications required by the context.’¹

[2] Armed with the costs order, Mr Kamwi drew up a bill of costs which was presented to the taxing officer for taxation. On the face of the bill of costs Mr Kamwi claimed an amount of N\$128 200. The legal representative of the respondent disputed all the items on the bill of costs at the taxation and the taxing officer issued an *allocatur* totalling N\$41 858,30. Both parties were dissatisfied with some of the rulings made by the taxing officer and as a result a stated case prepared pursuant to rule 75 of the High Court Rules by the taxing officer was presented to a judge of the High Court for review.

[3] The review turned out to be substantially in favour of the respondent as will become apparent below when I deal with the items in the bill of costs still in dispute. Mr Kamwi, with leave of the court *a quo*, appealed to this court in respect of the items on the bill of costs which the judge on review decided against him.

Fees

¹ See also *Standard Bank Namibia Limited v Nationwide Detectives and Professional Practitioners CC* (I 2051/2007) [2013] NAHCMD 200 (17 July 2013).

[4] Items 1 to 17 of the bill of costs prepared by Mr Kamwi was disallowed by the taxing officer who determined that what was claimed was fees and not disbursements. The judge *a quo* dealt with the matter as follows:

'13 Items 1 to 17 are listed as follows: draft and type Notice of Motion in terms of rule 6; peruse Warrant of Execution; drafting and preparing affidavit; drafting and preparing certificate of urgency; peruse respondent's opposing affidavit and notice; draft and type replying affidavit; peruse Taxing Master's Allocatur; draft and type heads of argument; appearance in court; draft and type notice service to the Taxing officer; draft and type request for set down; draft and type supplementary notice; peruse Taxing Mater's report, draft and type affidavit in terms of order of court, draft and type replying affidavit to the Taxing Master's report, draft and type notice of set down; and appearance in court.

14 In my view the items 1 to 17 constitute charges for time, knowledge and labour expended on such items. It is aimed at remunerating the doer for professional skill recognized by the Legislature. Only persons who have been qualified and admitted in terms of the Legal Practitioners Act, Act No. 15 of 1995 are allowed by law to charge such fees in respect of their professional work. Mr Kamwi, is not an admitted legal practitioner. For that reasons he is not entitled to charge fees for such work. My conclusion with regard to the items 1 to 17 that they constitute fees and therefore the Taxing officer was correct in disallowing such items which constitutes fees to which Mr Kamwi, as a lay litigant, is not entitled.'

[5] In the grounds of appeal, issue is taken with the approach of the judge *a quo* in respect of the said items on the basis that Mr Kamwi is, according to him, not an ordinary layperson, but a person with skills and as a result this court has in a decision refused to treat his non-compliance with the rules as that of an ordinary layperson.² According to Mr Kamwi, this meant that the principle relied upon that 'the taxing

² *Kamwi v Duvenhage & another* (SA 22/2008) [2009] NASC (13 November 2009).

officer should only allow the lay litigant to recoup his actual disbursements, reasonably incurred, and not to make a living, a profit, out of litigation upon which the court relied on are in my instance qualified or simply not applicable . . .'. He also takes issue with the judge *a quo* for stating, that he is not an admitted legal practitioner and according to him, this issue was never canvassed.

[6] Mr Kamwi's submissions are misdirected. Firstly, the costs order in his favour expressly limited the amount to 'disbursements reasonably incurred'. He is thus simply not authorised in terms of this order to claim any other costs. He cannot in the taxation attempt to alter this decision. If he was dissatisfied with this decision, he should have sought leave to appeal against this costs order which he did not do. He is accordingly bound by this costs order. Secondly, as he acted in person and is not an admitted legal practitioner he is not entitled to any costs other than those stipulated in terms of rule 125(12) of the Rules of the High Court. Thirdly, he is not an admitted legal practitioner as is apparent from a number of reported cases.³ As indicated below, he in any event admitted that he is not an admitted legal practitioner.

[7] It is necessary to deal with the submissions made by Mr Kamwi in respect of the alleged two misdirections mentioned above as he maintains that his submissions are not misdirected at all. Thus he maintains the fact that the costs were limited to disbursements does not mean he cannot claim fees under this heading. Similarly, the fact that he is not an admitted legal practitioner according to him is of no relevance as

³ *Kamwi above, Nationwide Detectives & Professional Practitioners CC v Standard Bank Namibia Ltd* 2007 (2) NR 592 (HC), and on appeal *Nationwide Detectives and Professional Practitioners CC v Standard Bank Namibia Ltd* 2008 (1) NR 290 (SC) para 3.

he has legal qualifications which according to him is on par with that of any admitted legal practitioner and which (according to him) have been recognised by the courts.

[8] Mr Kamwi relies on a passage in the *Nationwide Detectives and Professional Practitioners CC* case to submit that disbursements include fees and hence he can seek to recoup fees in terms of a passage in the *Nationwide Detectives and Professional Practitioners* case which reads as follows:

‘It is true that the court a quo held that when dealing with an award of costs in favour of a lay litigant, a court must specify that such costs are limited to disbursements, but it seems to me that disbursements are but a genus of costs, the other being fees, and that in specifying the extent of the costs to be paid to the lay litigant, the court is making “an order as to costs left to the discretion of the court”.’⁴

[9] It is clear, in my view, that the passage relied upon, does not support the submission of Mr Kamwi at all. In fact it is wholly contradictory of his submission. It emphasises that the two types of expenses making up costs are fees and disbursements and the court may in its discretion limit this costs to disbursements in appropriate cases. That is exactly what happened in the matter and Mr Kamwi must live with this order and the taxing officer has to abide by it.

Who is lay litigant in context of cost orders?

[10] Mr Kamwi is not an admitted legal practitioner. He, however, submits his qualifications are such that the courts have recognised him as a ‘lawyer’ and in any event his qualifications are such that this will entitle him to some fees, if not the same fees as that allowed to admitted legal practitioners. He takes issue with the fact that

⁴ *Nationwide Detectives and Professional Practitioners CC* above (SC) para 41.

he is referred to as a lay person. In view of the fact that he is in any event limited to the recovery of disbursements only per the court order, it is strictly not necessary to decide this issue. However, the court *a quo* expressed a desire that this issue be addressed so as to create certainty in this regard, presumably because this has been raised at taxation in a number of cases. Thus one of the reasons for granting Mr Kamwi leave to appeal is stated as follows:

‘It is substantially important that the Taxing Master of this Court receives an unequivocal pronouncement from the Supreme Court, about costs in the form of fees, if any, and the type of disbursements a litigant, in the position of applicant, would be entitled to recover.’⁵

[11] The bone of contention seems to be the use of the concept ‘lay litigant’ or ‘lay person’. The general rule with regard to lay persons acting for themselves is that they are not allowed to recover fees in respect of their own time and effort in presenting or defending civil litigation but only disbursements necessitated by such litigation.⁶ Mr Kamwi and apparently also others maintain that they are not lay persons or lay litigants and hence should be entitled to tax fees for their endeavours in litigation. The first point to make is that ‘lay’ person in the context of litigation refers to a person ‘not professionally trained or qualified’ in law.⁷ This means that lay persons include all persons (whatever their qualifications) who are not professionally trained or qualified to practise law.

⁵ *Kamwi v Standard Bank Namibia Limited* (A 101/2011) [2018] NAHCMD 316 (5 October 2018).

⁶ *Nationwide Detectives & Professional Practitioners CC* above (HC).

⁷ *Shorter Oxford English Dictionary* 6 ed 1993.

[12] In the broad sense, all people with tertiary legal qualifications are not lay persons as far as the law is concerned. It is, however, necessary to place the concept of 'lay persons' when regard is had to costs orders flowing from litigation in its proper context. Only admitted legal practitioners are allowed to represent litigants in litigation and to charge a fee in respect of such services and costs are allowed in respect of the reasonable fees charged by an admitted legal practitioner who represented a client in such litigation. Where a person represents him or herself such person obviously is not using a legal practitioner to assist him or her and hence there is no legal costs in this regard. Persons who are not admitted legal practitioners are in this respect lay persons as they are not professionally qualified in the sense that they cannot represent others in litigation. Thus, in the context of costs orders flowing from litigation, lay persons or lay litigators refer to all persons (whatever their qualifications) who are not admitted legal practitioners as they are not qualified in law to represent others. These persons will always appear in person or to a limited extent for legal entities who are their alter egos as they are by law not entitled to appear on behalf of another.

[13] What is clear from the record is that Mr Kamwi, according to him, has a plethora of legally related qualifications.⁸ One thing he took away from these courses is that a company is a legal entity distinct from its members. Thus in *Standard Bank Namibia Limited v Nationwide Detectives and Professional Practitioners CC*, Mr Kamwi who was the sole member of the corporation successfully persuaded this court

⁸ Bachelor of Laws (The Open University of Tanzania), Diplomas Legal Studies (Oxbridge Academy), Diploma Paralegal (Thomson Education Direct), Diploma in Company Law (The Institute of Commercial Management-TCM).

to accept that he, not being an admitted legal practitioner could represent the corporation, as in these circumstances, he was the alter ego of the corporation.⁹ In this case, the disbursements he claims in the bill of costs, is expenditure he claims he incurred in making use of the assets of Alex Kamwi & Company Incorporated (the company).

[14] At the taxation and on enquiry by the taxing officer, Mr Kamwi admitted that he was not an admitted legal practitioner and stated 'I am not falling under the category of legal practitioners but I fall within the category of lawyers'. This, he apparently states on the basis of his qualifications referred to above. Once it is clear that he is not an admitted legal practitioner he cannot represent anyone but himself (and corporations which are nothing but his alter ego) in a court of law. In other words, he can only act in person as he did in the present matter. To say he is not a layperson because of his knowledge of the law makes no difference to the principle that costs orders, where a litigant appears in person, and whatever such litigant's academic qualifications are limited to 'disbursements necessarily and reasonably incurred'. There may be exceptions to this rule but this relates to admitted legal practitioners only.¹⁰ Furthermore, as already indicated the order he relied on limited his entitlement to costs to 'disbursements reasonably incurred'.

[15] For Mr Kamwi to refer to himself as a lawyer is misleading. He cannot act as such for anyone in this country where the word or concept lawyer is used to indicate

⁹ *Nationwide Detectives and Professional Practitioners CC* above (SC) paras 3 and 31.

¹⁰ *Texas Co. (S.A.) Ltd v Cape Town Municipality* 1926 AD 467 at 488. It is not necessary to decide if the exception is still applicable seeing the provisions of rule 125(12) of the High Court Rules.

someone who can provide legal advice and represent a client in such capacity whether it be in any court or other statutory tribunal where such client would be entitled to engage the services of a legal practitioner. That this is an essential part of the meaning of 'lawyer' where used to describe one's business, occupation or profession is borne out by all reputable dictionaries and as I have stated this is how this word is understood in Namibia.¹¹ In short, it refers to a person who is an admitted and enrolled legal practitioner. This is opposed to persons such as legal academics, legal advisors or foreign legal practitioners. To simply hold one out in this country as a lawyer without qualification is to make a representation that one would be able to act on behalf of a client in any situation where an admitted and enrolled legal practitioner would be able to do so.

Disbursements to company in which claimant has interest

[16] The legal practitioner of the respondent questioned the existence of the company and its relationship with Mr Kamwi, but the taxing officer was prepared to accept that it existed and to look at the reasonableness of the disbursements claimed and in fact allowed some of the items albeit in reduced amounts. The respondent objected to this and the judge *a quo* agreed with the respondent in respect of most of

¹¹ *Cambridge Dictionary*: 'Someone whose job is to give advice to people about the law and speak for them in court.' <https://dictionary.cambridge.org/dictionary/english/lawyer>. Accessed 5 October 2020.

Merriam-Webster English Dictionary: 'One whose profession is to conduct lawsuits for clients or to advise as to legal rights and obligations.' <https://www.merriam-webster.com/dictionary/lawyer>. Accessed 5 October 2020.

Collins English Dictionary: 'A person who is qualified to advise people about the law and represent them in court.' <https://www.collinsdictionary.com/dictionary/english/lawyer>. Accessed 5 October 2020

Macmillan English Dictionary: 'Someone whose profession is to provide people with legal advice and services.' <https://www.macmillandictionary.com/dictionary/british/lawyer>. Accessed 5 October 2020.

Oxford Advanced Learner's Dictionary: 'A person who is trained and qualified to advise people about the law and to represent them in court, and to write legal documents.' <https://www.oxfordlearnersdictionaries.com/definition/english/lawyer>

these items which I deal with now. Although the judge *a quo* expressed some misgivings as to the use of the company in the above context which, on the face thereof, is nothing but a sham to abuse the notion of a company being a separate legal entity so as to be able to claim expenses not actually incurred or which would otherwise not be claimable. Nothing turned on this as the judge dismissed these claims as not being reasonable or necessary disbursements.

[17] For the taxing officer to adopt the attitude that the existence of the company and its relationship to Mr Kamwi was irrelevant and that the only question was whether the services rendered by the company were reasonable and necessary was not the correct approach in the circumstances. The name of the company Alex Kamwi Inc. in itself indicates that there is a link between it and Mr Kamwi. Mr Kamwi admits it is his company but it was not ascertained whether he is the sole shareholder or whether there are (were) other shareholders. There was in any event not enough information to ensure that the charges from the company to Mr Kamwi was arm's length transactions. Furthermore, the name of the company, by the use of 'Incorporated' suggests a special relationship – usually reserved for professional people – between the company and its members. This was clearly a case where the taxing officer had to scrutinise the relationship between the company and Mr Kamwi to satisfy himself that the company was not simply used as a ruse by Mr Kamwi to charge fees or bolster his earnings or that of the company by disguising such fees or earnings as disbursements. When regard is had to the exorbitant nature of the disbursements claimed, it is likely that this is what happened.

Disbursements

[18] According to Mr Kamwi, the company charged him N\$1900 per day for the preparation of the documents for his application. This he asserts took 22 days. The claim in respect of this item is N\$41 800 of which the taxing officer allowed N\$20 900. The judge *a quo* disallowed this item *in toto* pointing out that the preparations could have been done at home or in a library including the library of this court. In such circumstances the claim is unreasonable. I cannot fault this reasoning.

[19] Similarly a claim for N\$35 200 for the use of the company's computer for the typing of documents was disallowed by the judge *a quo*. This claim was pressed for N\$1600 per day for 22 days. The taxing officer allowed this item to the tune of N\$17 600. As pointed out by the judge *a quo*, on average a new laptop costs in the region of N\$4000 – N\$5000 and that most persons in the position of applicant possess laptops and that is what would have been reasonable to use. This item was thus also disallowed *in toto*. Once again, I cannot fault this approach by the judge *a quo*.

[20] The company let an office to Mr Kamwi for 22 days which rental apparently did not include chairs. Thus a claim for the rental of chairs was submitted for N\$26 400, ie N\$1200 per day for 22 days. The taxing officer allowed N\$13 200. The judge *a quo* disallowed this amount *in toto* and quite correctly so. Mr Kamwi needed only one chair and he could use his own chair for this purpose.

[21] The next item was the charge relating to the use of the company's printer to print documents. Here the amount claimed is N\$1900 for 22 days adding up to a total amount of N\$41 800 for which the taxing officer allowed N\$20 900. The legal practitioner for the respondent submitted that if copies were made at any copy shop these costs would not have amounted to more than N\$1500. The judge *a quo* disallowed this item stating that the costs appears to be exorbitant. This is so because no indication was given of the number of copies made and the reason why the copier had to be hired for a full 22 days. Thus, when taking into account that copiers are normally rented (and not purchased), on the basis of a fixed rental amount plus a charge per copy, it appears that the item is unreasonable and there could have been no need to hire it for a full 22 days at a rate which in itself appears to be exorbitant. As it is self-evident that Mr Kamwi had to incur expenses in respect of copying, he was directed to obtain three quotations or pro-forma invoices from photocopy service providers in Windhoek to obtain an indicative price and have this item taxed afresh. The amount allowed by the taxing officer was thus set aside. Whereas I personally would not have directed the same procedure to have the costs relating to the copying taxed again – as Mr Kamwi clearly must have incurred some expenses in this regard – I would have taken a more robust approach to allow the taxing officer to revisit this award based on his assessment as to such costs, this is no reason to interfere with the discretion of the judge *a quo*.

[22] Lastly, the taxing officer allowed an amount of N\$27 500 in respect of a claim where Mr Kamwi claimed N\$2500 a day for the 22 days, ie a total of N\$55 000 in respect of the use of the company's 'library to research case laws'. The judge *a quo*

commented that it was not clear to him why 'a non-legal company would have a legal library to hire out legal books, particularly at a fee'. He further points out that there are a number of such libraries which Mr Kamwi could have used free of charge like the Supreme Court library, the Law Society of Namibia's library, and the University of Namibia's library. He thus regarded the amounts claimed under this item as unreasonable and unnecessary. I agree with the judge *a quo* for the reasons mentioned by him.

Conclusion

[23] From the foregoing one can infer that Mr Kamwi, well knowing that he cannot claim fees when he appears in court, as part of a deliberate strategy used the company to claim what, is in essence, a fee under the guise of disbursements. The profits of the company are after all his as a shareholder in whatever form they may be retained or distributed. It is trite that in our law, regard is had to substance rather than to form and these kinds of shenanigans Mr Kamwi resorts to should not be countenanced.

[24] As is evident from the discussion above relating to the disbursements claimed, the taxing officer in respect of all items did allow some amounts. The judge *a quo* explains that in respect of all such rulings, the taxing officer gave no explanation as to how he arrived at the amounts he allowed and the judge *a quo* thus regarded these amounts as being determined in an arbitrary fashion. In view of the lack of explanation by the taxing officer, the judge *a quo* had no choice but to do this. The taxing officer must, when a stated case is submitted to a judge under rule 75 give the

reasons for his or her ruling otherwise the review judge will not be able to determine whether the taxing officer exercised his or her discretion properly. To simply state Mr Kamwi gave 'justifiable reasons' means nothing as it states a conclusion but not the basis or reason for the conclusion. The reasons that led the taxing officer to conclude the claims were 'justifiable' should have been stated if indeed there were such reasons.

[25] In conclusion, the costs order that Mr Kamwi based his bill of costs on clearly limited the costs he was entitled to 'disbursements reasonably incurred'. This means that any fees under whatever guise and whatever legal qualifications (or any other academic qualifications) Mr Kamwi may have was totally irrelevant to what had to be established for purposes of this taxation. Further, his attempt to use his own company to justify his disbursements was not shown to be an arm's length transaction, but can reasonably be inferred to have been an attempt to circumvent the law which disentitles him from charging fees for legal work. This is evident from the exorbitant and unnecessary fees supposedly charged by the company for totally unreasonable and unnecessary services supposedly rendered to Mr Kamwi.

Condonation application

[26] The record was filed late as a result of a dispute between the parties as to whether Mr Kamwi should be exempted from the requirement of filing security for the purpose of the appeal. Mr Kamwi was thus compelled to file an application in this regard with the result that he was exempted from complying with this requirement and the record consisting of one volume was only thereafter filed. An application has thus

been brought by Mr Kamwi to condone his late filing of the record. If there were prospects of success on appeal, I would not have hesitated to condone the non-compliance with the rule and reinstate the appeal that technically lapsed when the record was not filed timeously. However, as one of the requirements for a condonation application is that an applicant must show prospects of success on appeal if the appeal is to be reinstated, I cannot grant the condonation application. I have articulated the issues on the merits above and it is apparent from what is stated that there are no prospects of success hence the appeal cannot be reinstated.

Costs

[27] In my view, there are no reasons why the normal costs order should not be granted nor did Mr Kamwi refer to any such reasons and I will issue such an order.

Order

[28] In the result the application to condone the late filing of the record and reinstate the appeal is dismissed with costs.

FRANK AJA

DAMASEB DCJ

HOFF JA

APPEARANCES

APPELLANT:

In Person

RESPONDENT:

A Vaatz

Of Andreas Vaatz & Partners, Windhoek