JAMBO LEGAL PRACTICE
versus
TN BANK LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 19 February, 29 May 29 July,
26 November 2014

Opposed Matter

R. Jambo, for the applicants
R. Moss & N .Masunda for the plaintiff

DUBE J: This is an application for summary judgment brought in terms of r 64(1) of the High Court rules, 1971.

The plaintiff's claim is for payment of $34 876-34 being fees for services rendered to the respondent by the applicant. On 23 July 2013 the applicant issued summons against the respondent. These were followed by the respondent's appearance to defend entered on 8 August 2013. The applicant responded by filing this application for summary judgment. The basis of the applicant's application is that the respondent has no *bona fide* defence to the claim and has entered appearance to defend for purposes of delaying the matter and frustrating the applicant's claim.

The applicant's version is as follows. The respondent requested the applicant to create an Information Technology based Securities Management System for use by its legal\ securities department. The respondent furnished the applicant with specifications of the various aspects of the system to be addressed. Several meetings were held prior to the appointment to discuss the project. The respondent through its head of Legal Recoveries and Corporate Services, Mr Sain, appointed the applicant to render legal services as evidenced by an appointment letter dated 5 April 2013. The respondent was instructed to attend to a variety of legal and quasi legal matters and instructed to create an information Technology based Securities Management System. Presentations were made at various stages of the development of the system of the prototype to Mr Sain who embraced the prototype. The applicant asserts that the work was carried out to the satisfaction of the respondent. After the final presentation, the applicant sent an invoice for

$34,876,34 to the respondent for payment for services rendered. The respondent denies liability for the fees. The applicant submitted that there is no dispute that the applicant was appointed to carry out the work as this position is supported by the Head of Legal, Mr Sain in a supporting affidavit. The applicant avers that the respondent does not have a *bona fide* defence to the claim and has entered appearance to defend for purposes of frustrating the applicant's claim as there is no dispute that the applicant was appointed to carry out the work and carried it out.

The respondent defends the application. The respondent avers that the applicant was engaged for legal services only and that the engagement was separate from the IT securities management system. The respondent submitted that the later was not covered by the legal services appointment letter dated 5 April 2013 and refuted that there is an agreement for the project related to information technology. It denies engaging the applicant to create the securities management system and liability to pay for it. That the applicant did not create an SMS system but rather a project proposal for presentation to and consideration by the respondent. The respondent submitted that there was no agreement in relation to the design and development of the securities management system and that this is supported by the fact that the applicant has invited at least one other company to present their product for consideration by the bank. The respondent contends that falling short of a written agreement and quotation by the applicant for the alleged claim of payment, the issue regarding the existence of an agreement for provision of information technology based securities management system services between the parties cannot be resolved. The respondent avers that it invited the applicant to submit a proposal for presentation and possible approval and signing off. The bank needed to understand the products on offer, its needs and would determine after the presentation whether the product suffices for the bank's purposes and an agreement would then be entered into. The respondent maintained that the appointment was for the review of legal documents and debt recoveries only. At no time did the parties agree that the respondent would pay for services of design, development and presentation of the system. The respondent was surprised when the applicant sent an invoice for $34 876,34 as there was no quotation received from the applicant and no pricing structure and no tariff agreed on. The respondent contends that the product offered by the applicant does not meet the bank's needs. It argues that there was no meeting of the minds and no agreement on the specifications of the thing and price payable for the thing therefore there can be no contract.

The respondent admits as correct the fact that the respondent through Mr Sain engaged the legal services of the applicant on a six month basis. The respondent has paid the bill for the

legal services amounting to$ 4068-75. The respondent maintained that there exists on the papers material disputes of fact which can only be resolved through a full trial.

The respondent contended that the claim submitted is unlawful. The respondent submitted that the applicant's claim is for legal services rendered purportedly by the applicant to the respondent is unlawful and further that that the applicant claims that it provided "legal and quasi legal services which include the design and implementation of a securities management system. That design and implementation of securities systems are not part of its competences as legal firm. The applicant employs a Microsoft certified systems Engineer who rendered the services in issue. The respondent argued that s 23 of the Legal Practitioners Act [*Cap 27;07*] forbids a legal practitioner to keep accounts jointly with a person who is not a legal practitioner and does not allow a person who is not a member of the profession to raise a fee as if that person were a legal practitioner. The respondent argues that the invoice is in contravention of the Legal Practitioners Act in that Jambo Legal Practitioner practices in conjunction with a person who is not a legal practitioner. That the IT Consultant is under the control of a legal practitioner and that this practice is prohibited and unlawful. The respondent contents that the invoice is for this reason, unlawful and cannot be the object of legal proceedings.

The respondent submitted that the fees charged were not agreed, are unreasonable and disputed by the respondent. The respondent argued that the fees cannot for this reason be subject of summary judgment proceedings. Miss Masunda referred the court to the case of *Kantor and Immerman* v *Chombo*1999 (1) ZLR 300 for the proposition that a legal practitioner may not claim summary judgment on disputed legal fees.

The defendant further contends that the fees claimed are not legal fees as they are not for work done by legal practitioners but an IT Consultant. That is unlawful for the applicant to claim fees charged in these circumstance. The respondent contends that the respondent has through its affidavits exposed facts which if proved at trial will constitute a defence and further that it has a bona fide defence which if proved at the trial would result in the dismissal of the applicant's claim.

The test to be applied at this stage is whether the defendant has alleged in his opposing affidavit facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial. In *Jena* v *Nechipote*, 1986(1) ZLR 29 (S) the court held as follows:-

> "All that the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is a mere "possibility of success", he has a

> plausible case", "there is a real possibility that an injustice may be done if summary judgment is granted".

In *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* SC 139/86 p 4-5 the court remarked that the defendant "must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.

The court must be persuaded that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim. See *Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 @ 228 D-E and Hales v *Doverick Investments (Pvt) Ltd* 1988 (2) ZLR 235 (HC) A where the court remarked as

> "were a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bold and sketchy facts".

Summary judgment is a remedy that affords a speedy remedy to a plaintiff in circumstances where its case is clear and unassailable. It is a drastic remedy and should only be allowed where the respondent's defence is bad at law, bogus and clearly unarguable. The applicant is required to show that the respondent's defence is bad at law and that he has entered appearance to defend merely to delay the matter. A defendant who brings an application for summary judgment is required to raise and allege facts which if he manages to prove at the trial, will result in him being successful. He has an onus to show that he has a good *bona fide* defence to the plaintiff's claim. All he is required to do is set out material facts upon which he relies with sufficient clarity to enable the court to decide whether if the facts are proved at trial, they will constitute a defence to him. The applicant is the claimant and he is still required to prove its case. Where a dispute of fact is shown to exist on the papers, it is undesirable to grant summary judgment. The proper course to take would be to refer the matter to trial.

The first issue relates to the cause of action. The applicant is a legal firm and its claim as illustrated in the summons is for legal services rendered. In the declaration it avers that it rendered a variety of legal and quasi –legal services when it designed and implemented a securities management system and that this is one of its core competencies. There appears to be a variation in the cause of action as set out in the summons and declaration and the founding

affidavit regarding the nature of services rendered. A cause of action is required to be concise and clear should not leave the other party in any doubt as to the nature of the claim preferred. The cause of action is not clearly defined.

The invoice shows that the claim is or services rendered for a securities management system for the respondent. The invoice shows that the invoice was raised for work of an information technology nature, which service is not a service offered by a legal practitioner. The defence that the invoice and ultimately the claim is unlawful is a defence that will need to be explored. Section 23(h) and (f)of the Legal Practitioners' Act [*Cap 27;07*] forbids a legal practitioner to keep accounts jointly with a person who is not a legal practitioner or allow a non-legal practitioner to raise a fee as if that person were a legal practitioner. The trial court will have to decide whether the practice complained of is unlawful or is simply an ethical issue and further whether the applicant can still proceed and claim legal fees for work done under such alleged partnership. The submissions made by the respondent raise various defences. The facts relied upon disclose a defence which if successful will avail the respondent of the claim. There is a need for the defence to be explored further in a trial.

The approach of our courts is that where there is a dispute over legal fees, the disputed fees cannot be the subject of summary judgement before the fees are taxed. In *Mheresi* v *McNought Wickwar 1997 (2) ZLR 386,* the Supreme Court held that where a client is dissatisfied with a lawyer's charges, the claim for the legal fees should first be taxed before a summons is issued. It held further that summary judgement is inappropriate where legal fees are disputed. See also the *Kantor and Immerman case (Supra).* The undesirability of bringing such a claim under summary judgement and enquiring that the fees be taxed is premised on the principle that a legal practitioner is entitled to a fair and reasonable remuneration for services rendered. The client also has the right to have the bill taxed. In any case where legal fees are disputed, they are not liquid and it is essential that the fees be taxed before a claim for summary judgement is brought. The applicant was aware of the dispute over the fees and proceeded to apply for summary judgment. The legal position is clear that the application for summary judgment is not merited and is incompetent at this stage.

The next issue is whether there was an agreement for provision of the services and an appointment to do work on the securities system or whether it was just an invitation to submit a proposal which was subject to the approval by the applicant. The applicant has made assertions that it provided its service to the defendant. The respondent contended that the letter of appointment relates to the legal services which it agreed to pay and not the securities

management system. There is therefore a dispute of fact over whether the parties agreed to the provision of the services. The said letter of appointment reads in part as follows,

> "This serves to advise you that we shall be utilising your legal services on a six (6) month trial basis pending completion of the restructuring of the bank thereafter which the appointment will be reviewed based on performance and quality of service received".

The appointment letter is headed 'Provision of Legal Services'. The appointment appears on the face of the letter to be for legal services for a six month trial basis. Whether the appointment letter referred to the securities management system as well may emerge from evidence. The respondent has raised a defence based on facts which if proved at the trial would entitle it to succeed at the trial. The respondent's defence that there was no appointment for provision of services for the implementation of a securities management system appears to me plausible.

The next issue is whether the fees were agreed to. The respondent maintained that there was no agreement on the fees to be charged. The court was referred to a questionnaire dated 14 May 2013 that enquires what the proposed budget for the software is and the applicant states that they will stand guided by TN Bank, the respondent. The respondent contended that the document reveals that there was no agreement on the price or pricing structure. The respondent denies that the parties agreed that the applicant could charge for the design and development of a proposal or prototype. That other service providers offer the same services for free. Evidence that the respondent was engaging another company for a proposal presentation on a securities management system is available. The respondent submitted that the seller could only be required to pay for the completed product for an agreed price. The respondent maintains that it is not liable to pay. The respondent intends to call evidence at the trial to prove the industry practice. The applicant on the other hand has enlisted the assistance of Mr Sain, a former employee of the respondent to say that there was an agreement between the parties for the provision of the system and that the applicant was entitled to be paid for the services. The respondent dismisses his evidence as coming from a disgruntled employee and should be read with circumspection. The respondent has cast doubt on the reliability of the evidence in the affidavit of Mr Sain. There is a need for the evidence of the witness to be tested and this can only happen during a trial. There is discord over the whether the agreement to provide the services claimed was ever entered into, the nature of the agreement and whether the applicant is entitled to charge for work done. It is not very clear at this stage what work was performed, the cost of the work performed and whether an agreement to carry out the work was entered into. What is clear to me is that there are a number

material disputes of fact between the parties regarding the existence of an agreement over the system, whether any services were rendered and whether the respondent is liable to pay. The material facts upon which the respondent relies on are clear. The respondent has alleged facts which if it succeeds in establishing them at the trial would entitle it to succeed in its defence. These issues will require ventilation at a full trial .The respondent has laid out a *prima facie* case. In the absence of an agreement for the provision of services, thus the design and development of a proposal or proto type or other documentary evidence showing that the respondent appointed the applicant to do the work, agreed to pay for this service and performed in terms of the contract, it becomes apparent that the respondent's defence is good at law, arguable at law as well as on the facts. The respondent should be afforded an opportunity to present its defence.

This application should never have come by way of summary judgment. The applicant brought the application being aware of the disputes of fact saddling this matter. It gambled and lost. There is a defence the claim.

In the result it is ordered as follows:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend the action
3. The applicant to pay the costs of this application.

Jambo Legal Practice, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners