

SOUTH AFRICA / JUDGMENT

1st Insurance Brokers (Pty) Ltd and Another v Mudavangu and Others (7134/2017) [2021] ZALMPPHC 33 (20 July 2021)

[2021] ZALMPPHC 33

COURT

Limpopo High Court, Polokwane

BEFORE

KGANYAGO

CASE / FILE NUMBER

7134/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 7134/2017

In the matter between: 1st INSURANCE BROKERS (PTY) LTD FIRST APPLICANT KERSTEL
FINANCIAL SERVICES (PTY)LTD SECOND APPLICANT AND GAYLORD TAPIWA MUDAVANGU
FIRST RESPONDENT ABIGAIL PHELADI MOKABA SECOND RESPONDENT THOKOZILE PINKIE
MOHLARI THIRD RESPONDENT ORACLE FINANCIAL SERVICES FOURTH RESPONDENT
REGISTRAR SHORT TERM INSURANCE FIFTH RESPONDENT

REVIEW JUDGMENT-TAXATION

KGANYAGO J

- [1] The first, second, third and fourth respondents (respondents) are dissatisfied with the rulings of the Taxing Master relating to the items taxed off on applicants' bill of costs. The respondents have made their submissions to the Taxing Master's rulings in terms of Rule 48(1) of the Uniform Rules of Court ("the Rules"). The Taxing Master has made her stated case in terms of Rule 48(5)(a) and the respondents have also made their submissions in terms of Rule 48(5)(a). The applicants have also made their submissions in terms of Rule 48(5). Thereafter the Taxing Master has replied in terms of Rule 48(5)(b).

- [2] The matter has now been laid before me for a review of the Taxing Master's rulings. The respondents are challenging the Taxing Master's rulings on allowing party and party costs plus 100% on items 1, 3, 4, 6, 7, 8, 10, 23, 31, 32 and 33 of the bill of cost for Otto Krause based on the court order dated 31st October 2017 (attorney and own client cost award).
- [3] The respondents have submitted that the Taxing Master has erred when making a general ruling of allowing party and party costs plus 100% on the items mentioned in paragraph 2 above, and has further not applied her mind properly before allowing party and party costs plus 100% as reasonable indemnification for the winning party, as she refused to acknowledge and consider case law and precedents before making her rulings. The respondents further submitted that the Taxing Master acted and allowed the bill to be taxed on the wrong principles as she taxed the bill as if the losing party was the client of the attorney presenting the bill despite the respondents' argument that the taxing of the bill of a losing party on attorney and own client scale is a "misnomer" as the losing party can never be the client of the attorney presenting the bill, and therefore the bill should be taxed much stricter and on attorney & client scale.
- [4] The respondents further submitted that the Taxing Master has taken an exaggerated view of the alleged complexity of the matter and time necessary to consult with clients, perusal of documents and drafting of affidavits. That this was an application based on a restraint of trade issue, where Part A of the application was brought before court and heard on unopposed basis. The respondents further submitted that Part B of the application has never been enrolled by the applicants, and subsequently Part B was never heard.
- [5] The Taxing Master in her stated case has stated that on 2nd September 2020 there were 20 bills presented before her by the parties wherein she had made rulings. After her rulings, the parties were able to settle other bills based on her rulings, and that the bill of cost under review is bill no 1 with a court order dated 31st October 2017 which was on a scale of between attorney and own client. That the said bill was presented by Mr Rudolf Fuls and Mr Coetzee (Otto Krause and correspondent attorneys De Bruin Oberholzer).
- [6] The Taxing Master submitted that Mr Rudolf has presented an agreement wherein he had agreed with his client to charge an hourly rate of R3500.00. However, the Taxing Master found that the hourly rate per the agreement was too exorbitant, and ruled that a fair one would be the tariff plus 100% which was double the tariff. That in principle there is no difference between attorney and client and attorney and own client when taxing a bill.

- [7] With regard to the issue that the Taxing Master did not want to listen to case law presented, the Taxing Master has stated that she does not make her rulings based on case law only, and that she is having principles that she follows and the facts of the matter concerned. That if she were to rely on case law only she would not be flexible in her discretion. Further that counsel for the respondents' likes arguing on case law, and she can even take the whole day even when the case law is irrelevant.
- [8] The applicants in their submissions have stated that the Taxing Master has applied her mind on ruling of a reasonable hourly fee and disbursements incurred in this instance. Further that the applicants agree with the rulings made by the Taxing Master and that they will abide by the decision of the court.
- [9] The respondents in their reply have stated that the Taxing Master's discretion is wide but not unfettered. That in exercising that discretion, the Taxing Master must properly consider and assess all relevant facts and circumstances. That the discretion of the Taxing Master was not properly exercised if such facts and circumstances are ignored or misconstrued. That for that reason, the Taxing Master is required to approach the task of taxing a bill of costs with an open mind, and this entails considering the latest amendments to the rules, applicable acts, the common law as well as case law and law reports. That should the Taxing Master fail to do so, the Taxing Master will become a law upon his/her own. That when applying "own" principles unknown to others and principles that might not be considered to be valid legal principles, when tested in a court of law, will result in a great injustice to all the parties concerned.
- [10] It is trite that the court of review will not interfere with a ruling made by the Taxing Master unless it is satisfied that the Taxing Master was clearly wrong. (See *Ocean Commodities Inc & Others v Standard Bank of SA LTD & Others*[1])
- [11] In *President of RSA v Gauteng Lions Rugby Union*[2] Kriegler J said:
- "It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ in the JC1 case. This means:*
- '... that the court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him... viz that the court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling.'*
- [12] It is common cause that as per the order of 31st October 2017 costs were awarded against the respondents jointly and severally on the scale as between attorney and own client. In *Ben McDonald Inc and Another v Rudolph and Another*[3] Van Dijkhorst J described the terminology used for categories of costs as follows:

“1. Party and party costs: These are costs awarded against the losing party in litigation and are taxed in terms of Rule 70 with a view to a full indemnity to the successful party but limited to costs necessary or proper for the conduct of the litigation...”

2. Attorney and client costs:

2.1 In cases where the losing party in litigation is to pay them, this means the same as attorney and own client costs as defined below.

2.2 In cases where the losing party in litigation is to pay them to the successful party this means all reasonable costs incurred on behalf of the client although not strictly necessary or ‘proper’. In practice this means that these costs are taxed according to tariff, but generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on party and party basis. The limited scope of this taxation follows from the fact that Rule 70 also governs taxation between attorney and client.

2.3 Attorney and own client costs, whether in the sense of 2.1 above or where they are to be paid by the losing party to the successful party, means all costs incurred except where unreasonable. Agreed items or amounts are presumed to be reasonable... This presumption of reasonableness cannot be irrebuttable as this would open the door to clients agreeing to exorbitant fees with attorneys or counsel in the knowledge that the opponent will foot the bill. This will be contra bonos mores. My approach that in an attorney and own client bills which have to be paid by the other party the attorney should not be given a free hand, untrammelled by the frown of the Taxing Master, is in conformity with the approach of the Appellate Division in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 19 46 AD 597 at 608. The appellate Division in placing its stamp of approval on orders for attorney and client costs still insisted on a stricter approach on taxation where the bill is taxed against the losing party as ‘it is essential...to prevent injustice to the latter’. Admittedly the term ‘attorney and own client costs’ was not used, but the principle is the same. A court may castigate a party in an award of costs but will not countenance unjust treatment.”

[13] In taxing an attorney and own client bill, the Taxing Master has a discretion to allow all such fees and expenses that appears to be reasonable for the proper attainment of justice or for defending the rights of any party. Usually when a client instructs an attorney, they will have an agreement in relation to the fees payable to the attorney. In the agreement they will normally agree on an hourly rate or globular amount. The successful party will rely on that agreement in preparing his/her attorney and own client bill. However, even where there is a written agreement between attorney and client, as to work to be done or fees to be charged, the Taxing Master is still empowered to enquire into the reasonableness of such a fee in the agreement. An agreement for fees exceeding the tariff rates does not bind the Taxing Master or the losing party. The Taxing Master whilst not necessarily bound by the tariff in the written agreement, will tax the bill on the basis of remuneration that is reasonable in all the circumstances. (See *Ben McDonald Inc and Another* above, and *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*[4])

- [14] The Taxing Master in her stated case has stated that Mr Rudolf presented an agreement wherein the hourly rate was R3500.00. However, the Taxing Master made a ruling that the hourly rate as per the agreement was too exorbitant, and decided that it will be fair to allow the hourly rate as per the tariff plus 100% which was double the tariff. According to the Taxing Master in her stated case, items 1, 3, 6, 7, 8, 10, 23, 31, 32 and 33 were reduced to the double tariff as the applicants' bill was drafted in accordance with the written agreement of the hourly rate of R3500.00.
- [15] Even though the Taxing Master was obliged to have regard to the terms of the agreement, she was alive to the fact that she was not necessarily bound by the tariff in the written agreement, but was entitled to determine whether it had exceeded the bounds of reasonableness. This she did by ruling that the tariff as per the written agreement was exorbitant, and that the fair tariff to be applied under the circumstances was the normal tariff as per the Rules plus 100% which amounted to double the tariff. By applying that formula, she was preventing injustice to the respondents. Her ruling has in fact benefited the respondents as the bill was taxed on a lesser scale than the hourly rate in the written agreement. She cannot be faulted for her conclusion. This court does not find any reasons to interfere with her rulings as they were not wrong. It follows that the respondents' review application stands to fail.

[16] In the result I make the following order

16.1 The respondents' review application is dismissed.

16.2 No order as to the costs.

MF KGANYAGO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

FOR PARTIES

1. For the Applicants :

Otto Krause Inc

2. For the 1st to 4th Respondents : Bosman Attorneys

3. Date of

Judgment

: 20th July 2021

[1] 1984

(3) SA 15 (A)

[2] 2002

- (2) SA 64 (CC) at 73C-D
- [3] 1997
- (4) SA 252 (T) at 257G-258E
- [4] 2004
- (1) SA 123 (W) at para 12
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