

SOUTH AFRICA / JUDGMENT

Bothma v Bothma (4182/2020) [2021] ZALMPPHC 80 (8 November 2021)

[2021] ZALMPPHC 80**COURT**

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

4182/2020

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
8/11/21
CASE
NO: 4182/2020
In

the matter between:

CHARLES
BOTHMA
PLAINTIFF
And
LINDY
BOTHMA
DEFENDANT
REVIEW

JUDGEMENT**KGANYAGO J**

[1] On 24th March 2021 the plaintiff had presented his bill of costs before the Taxing Master for taxation. The plaintiff's bill consisted of two bills of two local attorneys drafted on an attorney and own client scale. The local attorneys are Thomas Grobler Attorneys and Niland and Pretorius Attorneys. Thomas Grobler's Attorneys appears to be the attorney for the plaintiff, whilst it is

not clear what was the role of Niland and Pretorius Attorneys in this matter. Both the plaintiff and the defendant are dissatisfied with the rulings of the Taxing Master on certain items, and are seeking to review the rulings of the Taxing Master. Their review is brought in terms of Rule 48 of the Uniform Rules of Court (Rules).

[2] On item 1 Thomas Grobler's Attorneys (herein referred to as plaintiff's attorneys) has claimed 2 hours for preparation and the Taxing Master had allowed 1 hour. The plaintiff has submitted that the matter was set down in the unopposed roll, and the defendant opted to file opposing papers on the date of the hearing at 8h35, and that the plaintiff was therefore ambushed by opposing papers filed 1½ hours before appearing in court in the unopposed roll. The plaintiff further submit that it had to peruse the defendant's papers and prepare on that, and therefore the plaintiff cannot be limited to only preparation on the opposing papers. In his stated case, the Taxing Master has submitted that it is not every cost which will 'be recovered by the plaintiff under wasted costs, and that in his assessment the matter was on the unopposed roll, and that the plaintiff can only claim preparation on opposing papers when the matter is heard in the opposed roll.

[3] On item 2 the plaintiff has claimed a full day's fee, whilst the Taxing Master had allowed 1½ hours for time spent at court. The plaintiff submitted that the issue of the wasted costs was argued before the presiding Judge who awarded the plaintiff wasted costs of the day as opposed to only wasted costs. The plaintiff has also attached the transcript of the record of the proceedings which shows that the order of the court was that the plaintiff was ordered to pay the wasted costs for day of 18th August 2020. The Taxing Master has submitted that the transcribed record shows that the matter started at 11h00 and ended 11h09, and he had considered the time the parties might have spent waiting for the matter to be called. The Taxing Master has further stated that from the transcribed record he did not see the order that had awarded a day fee against the defendant, but only saw discussions about the defendant been ordered to pay wasted costs of 18th August 2020.

[4] The defendant had submitted that the Taxing Master had failed to exercise a proper discretion, alternatively to apply his mind properly in that the Taxing Master had taxed the plaintiff's bill on a scale as between attorney and own client despite the court order stating party and party. On item 1 the defendant has submitted that the perusal of the opposing affidavit is not wasted costs, and further that there cannot be preparation on an unopposed

application of which the attorney had drafted the papers himself, and at the same time ask for a full day fee for the same day on item 2. On item 1 of the bill of costs for Niland and Pretorius, the defendant had submitted that the drafting of an index is not wasted costs, and further questioned why the second bill of costs for another attorney in Polokwane was allowed in the same application.

- [5] The Taxing Master in his stated case for the defendant's attorneys on item 1 relating to plaintiff's attorneys had submitted that it would have been unfair to rule that there cannot be preparation for unopposed application, and he had used his discretion to determine what is reasonable time claimed. With regard to the Niland and Pretorius bill of costs on item 1, the Taxing Master had conceded that he had erred.
- [6] On item 2 of plaintiff's attorneys bill of costs, the defendant had submitted that the Taxing Master must give reasons for allowing an amount of R3500.00 for attendance at court on the unopposed roll whilst the transcript shows that the matter was argued in court from 11h00 to 11h09. On item 2 of Niland and Pretorius bill of costs the defendant had submitted that necessary copies does not amount to wasted costs, and further questioned why the Taxing Master allowed the second bill of costs for another attorney in Polokwane for the same application. On item 2 of plaintiff's attorneys bill the Taxing Master has stated that he allowed the amount of R3500.00 as he had considered the time the parties may have spent waiting for the

matter to be called, and in his view, it would have been unfair to consider 9 minutes of actual time the parties spent addressing the court. On the Niland and Pretorius bill, the Taxing Master conceded that he had erred.

- [7] On item 4 of plaintiff's attorneys bill of costs, the defendant had asked the Taxing Master to give reasons for allowing costs of uplifting the court order, which she alleges that it is the duty normally performed by a messenger. The Taxing Master in his stated case has stated that he believes that it is in the interest of the client and responsibility of his attorney to have a copy of the court order, so he allowed R119.00 for that as he considered it to be fair and necessary.
- [8] It is trite that a costs order is intended to indemnify the successful party to the extent that he/she is not out of pocket as a result of pursuing the litigation to its successful conclusion. In *President of RSA v Gauteng Lions Rugby Union*[1] Kriegler J said:

"It is settled law that when a court reviews taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ case. This means:

'...that the court must be satisfied that the Taxing Master was clearly wrong before it will interfere with the 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 rulings'".

[9] The plaintiff had set down his matter on the unopposed roll of the 18th August 2020. The defendant did not file opposing papers on time, but only did so in the morning of the 18th August 2020. All along the plaintiff was under the impression that the matter was unopposed. On 18th August 2020 the matter was postponed to the opposed roll of the 10th February

2021. That postponement was occasioned by the defendant's late filing of the opposing papers.

[10] The general rule with regard to postponement is that the party which is responsible for the case not proceeding on the day set down for hearing must ordinarily pay wasted costs. (See *Sublime Technologies (Pty) Ltd v Jonker and Another*[2]). In the case at hand the defendant was ordered to pay the wasted costs for the day of 18th August 2020. The court did not specify whether it was on party and party scale or punitive scale. However, when the plaintiff's attorneys drafted their bill of costs, they drafted it of an attorney and own client scale. The Taxing Master taxed the bill on a scale as between attorney and own client.

[11] An attorney and own client scale is a punitive costs order which is generally granted in exceptional cases by court showing displeasure in the manner in which the party against whom a costs order was awarded had conducted himself/herself. That punitive costs order must specifically be granted by the court and the court must further specify on which scale is the punitive costs order granted. If the court merely makes an order that the party at fault is to pay wasted costs without specifically indicating whether it is a punitive costs order and at what scale, the general rule is that it is on a party and party scale.

[12] The order of 18th August 2020 in relation to costs read as follows:

"The respondent is ordered to pay wasted costs for the day, 18th August 2020".

It is clear that the court did not order the defendant to pay the plaintiff's costs on a punitive scale, and therefore the plaintiff was not entitled to have drafted its bill costs on an attorney and own client scale. The Taxing Master was therefore wrong to have taxed the plaintiff's bill on attorney and own client scale whilst there was no specific order for that. On that point alone the Taxing Master's allocator stand to be set aside. However, there are other issues in this matter which need some comments.

[13] Cilliers Law of Costs (service issue 25, para 8.08) defines wasted costs as follows:

"wasted costs, amounting to either costs resulting from a postponement caused by an amendment, if these costs would not otherwise have been incurred, or costs previously incurred which have become useless by reason of the amendment."

[14] The plaintiff's attorneys on item 1 of its bill of costs is seeking 2 hours' for preparation which they allege is for perusal and preparation after receiving the defendant's opposing papers. On receipt of the defendant's opposing papers, it was clear to the plaintiff that if the court was to accept them even at that late hour, the matter had become opposed and had to be transferred to the opposed roll. Had the court not accepted the defendant's opposing papers,

the matter would have been dealt with as unopposed. The court had accepted the defendant's papers even though it was filed out of time, and therefore, perusal and preparation in that regard should left to be dealt with at the finalisation of the opposed application as the matter has become opposed. The plaintiff's costs that had been rendered useless is that of the unopposed application as the matter did not proceed as unopposed as previously planned. Any preparation should therefore be limited to the unopposed application and not on the opposed basis, or costs which the plaintiff would not have incurred, but for the postponement.

- [15] The endorsement of the order of 18th August 2020 and the typed court order are different from the order from the transcribed record. The file has been endorsed that the respondent to pay wasted costs and that led to the typist typing the order of such. It is clear that the Judge's Registrar who had endorsed the court file did not correctly capture the order as pronounced by the Judge in court, as the order of the transcribed record clearly state that the respondent is ordered to pay wasted costs for the day, 18th August 2020.
- [16] The plaintiff's attorneys have submitted that on the day of taxation, they have referred the Taxing Master to the transcribed record. The Taxing Master has submitted that the transcribed record show that the matter started at 11h00 and ended at 11h09, and that he did not see the court order but merely discussions about it, and that the order as it appears on paragraph 2 state that the respondent is ordered to pay the wasted costs of 18 August 2020. It is clear that the Taxing Master had read the transcribed record and did not rely on incorrect order typed by the typist. The order from the transcribed record had two paragraphs numbered 1 and 2. Paragraph 2 which the Taxing Master had referred, refers to the "costs for day",

and does have costs "of" 18 August 2020. It seems the Taxing Master is deliberately trying to mislead this court by stating what will suit him, in that he refers to paragraph 2 of the order and later in his stated case refers to deliberations in court. What is mind boggling is that the Taxing Master in his stated case has stated that he had considered the deliberations in court as an order of court.

- [17] According to the Taxing Master, during the deliberations by the parties in court, the court indicated that it will exercise its discretion over the costs issue and the court ordered wasted costs against defendant, and that is the order which as the Taxing Master he had considered. I fail to understand the logic in the Taxing Master's submission. It will therefore prudent to quote the order as it appears from the transcribed record, which read as follows:

“ _____

ORDER

“

PHATUDI J: Well this matter has become opposed, I am informed, therefore that the parties having agreed that the matter be transferred to the opposed roll, the order is as follows:

1. The matter is postponed/ transferred to the opposed roll to be heard on the 10th of February 2021.
2. The respondent is ordered to pay the wasted costs for the day, 18th August 2020.”

[18] There is nothing confusing about this order, it is clear and straight forward. If the Taxing Master had misread this order on the date of Taxation, after reading the plaintiff’s review papers and in preparation of his stated case, he would have had a reflection on the transcribed record and not try to justify the unjustifiable and also by adding words which does not appear on the order. It is either that the Taxing Master is deliberately trying to mislead this court after realising his errors, or he does not understand his role as the Taxing Master.

[19] In this case it did not matter how many minutes they have argued the matter, or time spent in court, the court has made an order that the plaintiff was entitled to wasted costs for the day. This order has taken away the Taxing Master’s discretion, and the Taxing Master is bound to allocate this cost as per the court order. Therefore, the Taxing Master was wrong for taxing this item on the basis of what he considered as time spent by parties waiting for the matter to be called in court. With regard to the bill of Niland and Pretorius, the Taxing Master has conceded that

he had erred in allowing that bill and I will not take it any further.

[20] In my view, the Taxing Master did not exercise his discretion properly, and was therefore clearly wrong in his rulings, and therefore his rulings need to be interfered with. Both parties have successfully challenged the rulings made by the Taxing Master which affect the entire bill. It will therefore, be fair to both parties if the entire allocation by the Taxing Master is set aside.

[21] In the result I make the following order:

21.1 The review by both plaintiff and defendant is upheld.

21.2 The Taxing Master’s allocation is set aside in its entirety.

21.3 The matter is referred back to be taxed afresh before another Taxing Master.

21.4 There is no order for costs.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

For the plaintiff

: Thomas Grobler Attorneys

For the defendant

: Oosthuizen & Stein Attorneys

Electronically circulated on : 8th November 2021

[1] 2002 (2) SA 64 (CC) at 73C-D

[2] 2010 (2) SA 522 (SCA) at para 3

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