

SOUTH AFRICA / JUDGMENT

Delport v Maroela Properties CC t/a Maroela Holiday Flats (12655/2011) [2018] ZAKZDHC 40 (10 September 2018) [2018] ZAKZDHC 40

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

12655/2011

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IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12655/2011

In the matter between:

FRANCOIS STEPHANUS DELPORT PLAINTIFF

and

MAROELA PROPERTIESCC t/a

MAROELA HOLIDAY FLATS DEFENDANT

REVIEW OF TAXATION

Date: 10 September 2018

MBATHA J:

- [1] This is a review of taxation in terms of rule 48 of the Uniform Rules of Court. The defendant contends that the Taxing Master (the Master) did not exercise his discretion properly when he taxed off costs on their bill of costs for a number of reasons. It is submitted that the Master taxed off fees which were incurred as a result of the appointment of legal representatives based in Gauteng when the matter was before the KwaZulu-Natal High Court; he considered certain fees to be attorney and client costs; he failed to take into account that the postponement was at the instance of the defendant; that the defendant was entitled to all the costs which were taxed off and that he failed to take into account the complexity of the matter.

[2] Briefly, the facts in this case are as follows: The plaintiff issued summons in the KwaZulu-Natal High Court, Durban Local Division, for a claim for damages arising from the injuries which he sustained at a resort in Margate, KwaZulu-Natal. The defendant in this action is Maroela Properties CC t/a Maroela Holiday Flats, Margate, KwaZulu-Natal. After the close of the pleadings the matter was finally set down for hearing for 11 May 2015. On 29 April 2015 a request for a postponement was made by the plaintiff. A letter dated 6 May 2015 was forwarded to the Judge advising him not to read the papers as the matter was to be adjourned on 11 May 2015. A consent order, which adjourned the matter sine die and ordered the plaintiff, to pay the defendant's wasted costs occasioned by the adjournment was made an order of court on 11 May

2015. That is how the bill of costs came before the Master for taxation.

[3] The plaintiff raised various objections to the costs charged by the defendant arising from the employment of attorneys and counsel based in Gauteng and additional costs of a correspondent attorney in Durban. The plaintiff also tabulated various correspondence and calls costs, which he considered to be attorney and client costs and proposed that they be taxed off.

[4] The stated case given by the Master is that he exercised his discretion in the exercise of his duties. He itemised the items that he taxed off, on the basis that they were attorney and client costs; were fees where counsel had not consulted with certain witnesses; were fees for the drawing of an affidavit to oppose the postponement which was done prematurely and never used in court as the defendant consented to the postponement; he disallowed certain preparation fees charged on 4 May 2015 long after it was agreed that the matter was not proceeding and he also took into account that the matter was timeously postponed, even though it was at the instance of the plaintiff.

The Law

[5] Uniform rule 70(3) provides as follows:

‘With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.’

(a) Rule 70(3) clearly expresses the intention of the Legislature by protecting the interests of the successful litigant, in that

expenditure reasonably incurred should be reimbursed to him, without overburdening the unsuccessful litigant with unreasonably incurred expenditure.

- (b) The Master is vested with a discretion to allow costs necessarily incurred in the litigation. However, a court of law can still

interfere with the exercise of the Master's discretion even when exercised properly, a court on review will be entitled to

interfere where his decision is based on a misrepresentation of the law or a misconception as to the facts and circumstances or as to the practice of the court. (See *Cash Wholesalers, Ltd v Natal Pharmaceutical Society and The Taxing Master*.^[1])

- (c) In a party and party bill of costs, the Master should apply the tariff. However, rule 70(5) provides for a departure from the tariff in the exercise of his discretion in extraordinary or exceptional circumstances where adherence to the tariff would be inequitable.

This discretion is not only limited to items on the tariff, but also where there is a lacuna in the tariff.

- (d) In general, fees allowed to counsel are often left at the discretion of the Master. It is trite that the court will not interfere with such exercise of discretion, unless the Master has acted upon a wrong principle or exercised his discretion in an incorrect manner.

^[6] It is trite that the discretion of the Master will generally not be interfered with unless it is found that he or she did not exercise a proper discretion, for example, by disregarding factors which were proper for him or her to consider or by considering matters which were improper for him or her to consider, or if he or she has disregarded relevant factors or has had regard to improper factors, or by giving a ruling which the court can see no reasonable person would have given - see *Wellworths Bazaars Ltd v Chandlers Ltd & others*^[2]. The courts have also recognised the principle that the court may interfere in those classes of cases where the court is able to form as good an opinion as the Master and perhaps an even a better opinion (see *Wellworths* above).

^[7] Rule 69(5) states that where the tariff is not applicable, in the taxation of advocates' fees as between party and party, the Master shall allow fees in excess thereof as he or she considers reasonable.

^[8] Certain fees fall within the discretion of the Master in the determination of counsel's fees, taking into account the

following:

- (a) the complexity of the matter, both as regards to facts and law (see *Scott and another v Poupard and another*^[3]).
- (b) the category to which counsel belongs to;

- (c) the prevailing level of fees by counsel;
 - (d) the actual time spent by counsel. This is a decisive factor as fully canvassed in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC* and another;^[4] and
 - (e) the fee allowed by the Master must be reasonable in the circumstances. In the ultimate result, counsel must 'be fairly compensated as a professional man for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter.'^[5]
- [9] It is common cause that our Constitution recognises in s 35(3)(f), the right that a person is entitled to an attorney of his own choice. This appears to be what the defendant asserts when stating that Regent Insurance Company Limited (Regent) was at all times the defendant in this matter, as the insurer of the defendant in the main action. It is submitted that Regent's head office is in Edenvale, Germiston and its legal representatives Botha Attorneys are no further than 7km away from the said head offices. It is the defendant's contention that it was within its rights to appoint legal representatives in Gauteng and correspondent attorneys in Durban.
- [10] In support of its argument I have been referred to a number of authorities including *Santambank Bpk v Dimo*,^[6] *Niceffek (Edms) Bpk v East Vaal Motors (Edms) Bpk*,^[7] *Schoeman v Schoeman*,^[8] and others. In *Schoeman v Schoeman*^[9] the court held that the basis for a litigant to incur the costs of engaging a second attorney at the place where he resides and works was to be 'that for reasons of pressing convenience it is considered reasonably necessary that he does so. By the same token he is disallowed the costs of an attorney who practices far afield, the basis being that it is considered that in such circumstances he could as well give instructions direct to the attorney at the seat of the court corollary of which is that it is not necessary that he engage the other attorney.'
- [11] The facts of this case are that the plaintiff issued summons within the jurisdiction of the court where the defendant carries on business and where the cause of action arose. The defendant is the resort, Maroela Properties t/a Maroela Holiday Flats, not Regent Insurance Company, whose registered offices are in Gauteng. This has got nothing to do with the insurers of the defendant. When one considers the right of the defendant to choose a legal representative, such an exercise of a right cannot be considered in isolation from other relevant facts. The Bill of Rights in s 36(1) provides that there is a limitation to rights, which must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitations;
 - (c) the nature and extent of the limitations;
 - (d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

[12] In this matter the assertion of the defendant's insurers' right to use attorneys within the 7km radius to their offices has had an adverse effect on the nature of the right which the plaintiff sought to protect. Regent Insurers could easily have briefed attorneys and counsel in Durban to handle the matter, more so as the cause of action arose in Margate, witnesses are from Margate, and the summons were issued in the court which has jurisdiction over the matter. The defendant's choice of attorneys has had a negative effect on the plaintiff in terms of costs.

[13] Furthermore the seat of the High Court, Durban Local Division, where the summons was issued is a city with multitudes of attorneys and legal counsel. This is unlike in small town or the rural areas, where a litigant may struggle to get legal representation. The defendant's insurers should have literally stepped into the shoes of the defendant and placed themselves within the jurisdiction of the court by seeking attorneys and counsel in the city of Durban.

[14] In terms of rule 70(3) the successful litigant is entitled to costs that are reasonably incurred. Though the rule protects the interests of the successful litigant, there should be no overburdening of the unsuccessful litigant with unreasonably incurred costs. The Master when dealing with this aspect referred this court to the old authorities *Sonnenburg v Moima*[10] and *Salie and another v Shield Insurance Company*. [11] This is an indication that this issue has been decided upon on a number of occasions. This is a factual question which requires that each case be considered on its facts. In this case the appointment of legal representatives in Gauteng was only for the convenience and benefit of the defendant's insurance company and not for the benefit of the litigants. In this regard, I find no misdirection on the part of the Master.

[15] In taxing the bill of costs if the party who contends that he is entitled to a fee but fails to properly describe the nature of the fees and his entitlement to it, he does that at his own peril. In *City Deep Ltd vs Johannesburg City Council*[12] at 119G-H the court stated:

'A bill of costs must be a complete bill of the whole of the fees, charges and disbursements in respect of the particular business done. The business to which it relates should be specified item by item. Each item must be dated and should state its subject matter precisely and not in vague and general items. Each item must be charged specifically.'

The taxing off of the fees not specifically identified by the Master is accordingly allowed where there is insufficient particularity. In this case, the Master identified a number of unspecified and unidentified items, which in my view, were correctly taxed off.

[16] The defendant's attorneys were timeously notified of the plaintiff's intention to seek a postponement. The request for the postponement was made during the period 23-29 April 2015, ten

- [10] days before the hearing of the matter. An affidavit was drafted by the defendant to oppose the postponement, upon a mere receipt of a request to postpone the matter, before the issue of the plaintiff to bring a substantive application before the court for such a postponement was even considered. I find this to have been correctly taxed off as it was unnecessarily drafted and never used in court. There are consultations which appear on the bill of costs post the agreement to postpone the matter, which were taxed off. The Master has given a substantive list of the taxed off costs and reasons for such a taxing off. I do not find any irregularity in this regard on the part of the Master, as he gave reasons for those taxed off costs.
- [17] In terms of rule 69(5) it is provided that where the tariff is not applicable, in the taxation of advocates' fees as between party and party, the Master shall allow fees in excess thereof as he or she considers reasonable. Certain fees fall within the discretion of the Master in the determination of counsel's fees. I do not find where he failed to exercise his discretion when he was required to do so.
- [18] In the taxing of this bill of costs, I do not find that the Master failed to take into account the guidelines and principles required in the taxation of a bill of costs. The Master, in the exercise of his duties, has a duty to ascertain if work has been done and should demand proof to his satisfaction that the services for which payment is demanded have actually been rendered.[13] I therefore find that he has every right not to accept fees where proof to his satisfaction has not been provided.
- [19] The objection raised by the plaintiff that most of the costs were attorney and client costs in nature, has been adequately addressed by the Master. This matter was timeously 'postponed' which alleviated the necessity of further preparations by the defendant. That on its own should be beneficial to the party who has been ordered to pay costs, at the same time adequately compensating the defendant of their wasted costs.
- [20] I am of the view that the application by the defendant has no merit.
- [21] Accordingly, I make the following order:
- 'The application is dismissed and each party to pay its own costs.'

MBATHA J

Plaintiff's Attorneys: E Brink Inc

c/o Thorrrington Smith & Silver

14th Floor, Metlife Building

391 Anton Lembede Street

Durban

Defendant's Attorneys: Bothas Attorneys

c/o Askew & Associates

20th Floor, Eagle Building

357/363 Pixley Kaseme Street

[1] 1937 NPD 418 at 425.

[2] 1947 (4) SA 453 (T) at 457-458.

[3] 1972 (1) SA 686 (A).

[4] 2010 (5) SA 124 (CC) para 9.

[5] Kromoscope (Pty) Ltd and another v Rinoth 1991 (2) SA 250 (W) at 256E-F.

[6] 1993 (1) SA 702 (O).

[7] 1993 (2) SA 144 (O).

[8] 1990 (2) SA 37 (E).

[9] Schoeman *supra* n 8 at 42F-H.

[10] 1987 (1) SA 571 (T).

[11] 1978 (2) SA 396 (C).

[12] 1973 (2) SA 109 (W).

[13] Gluckman v Winter and another 1931 AD 449 at 450.

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