

SOUTH AFRICA / JUDGMENT

Diobuzz (Pty) Ltd and Others v Mvumbi NO (2021/13229) [2023] ZAGPJHC 1228 (27 October 2023)

[2023] ZAGPJHC 1228

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2021/13229

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Source record

REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case Number: 2021/13229

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

NOT REVISED

27/10/23

In

the matter between:

DIOBUZZ

(PTY) LTD

Review

First Applicant

TUNDRANAMIX

(PTY)LTD

Review

Second Applicant

WINTERVIEW

(PTY) LTD

Review

Third Applicant

NADINE

ANTOINETTE SVIRIDOV

Review

Fourth Applicant

And

NOBUNTU

MVUMBI N.O. IN

HER CAPACITY

TAXING MASTER OF

THE HIGH COURT

Review

Respondent

In

re:

KENIAS

SIBANDA

First

Applicant

YTS

LIMITED

Second

Applicant

And

TRANSHUNT

(PTY) LTD

First

Respondent

COMPANIES

AND INTELLECTUAL PROPERTY

COMMISSION

Second

Respondent

THE

MASTER OF THE HIGH COURT, JOHANNESBURG

Third

Respondent

DIOBUZZ

(PTY) LTD

Intervening

Fourth Respondent

TUNDRANAMIX

(PTY)LTD

Intervening

Fifth Respondent

WINTERVIEW

(PTY) LTD

Intervening

Sixth Respondent

NADINE

ANTOINETTE SVIRIDOV

Intervening

Seventh Respondent

ORDER

[1]

The application is dismissed in its entirety.

JUDGMENT

Fisher J

Introduction

[1] This is a review process brought in terms of rule 48 of the Uniform Rules of Court.

[2] The bill of costs in issue was drafted on the scale as between party and party pursuant to a judgment issued on 29 July 2022 by Manoim J.

[3] This bill was presented by Ms van der Merwe on behalf of Andrew Garratt Incorporated Attorneys in its capacity as attorneys of records for the first to fourth review applicants.

[4] The taxation of this matter took place on 22 March 2023 and stood down to 28 March 2023. The taxation proceeded again on 4 April 2028 when it was finalised. It was not opposed.

[5] In terms of the rule 48 notice the applicants seek to review the following rulings of Ms Mvumbi (the taxing master) appearing from

the taxation of the bill of costs on 4 April 2023:

[5.1] The reduction of counsel's hourly rate from R 3 600 to R 3 000.

[5.2] In respect of items 17 and 23 the reduction of the consultation period from two hours to one hour.

[5.3] The disallowance of attorney's fee for perusing heads of argument prepared by his counsel.

[5.4] The disallowance of two hours of counsel's fee of four hours for "finishing" the draft founding affidavit.

[5.5] The disallowance of counsel's fee of four hours for settling the application for intervention and draft founding affidavit in support thereof.

[5.6] The disallowance of counsel's fees in relation to the perusal of the rule 7 and 47 requests.

[6] Before dealing with each ruling seriatim, it is apposite that I set out some salient principles which have application to this process.

Legal principles

- [7] A taxing master has a discretion to reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that the taxing master must act reasonably, justly and on the basis of sound principles having due regard to all the circumstances of the case. [1]
- [8] The court is reluctant to interfere with the decisions of the taxing master upon matters in respect of which she is required to exercise a discretion.[2]
- [9] The general principles governing interference with the exercise of a taxing master's discretion have been stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. ... The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”[3]

The rulings

- [10] With these principles in mind, I turn to examine each of the rulings with reference to the transcript of the taxation, the stated

case of the taxing master and the submissions made on behalf of the review applicants.

Reduction of counsel's hourly rate

- [11] The taxing master reduced the hourly rate of counsel for R 3 600 per hour to R 3 000.
- [12] The applicants submit that this “contributed” to 45% of counsel's fees being taxed off. But this is misleading.

In fact, counsel's rate was only reduced by 16.6%.

- [13] This overstatement of the position is unhelpful. It seeks to elide two different discretions exercised by the taxing master being

the reduction of rate and the reduction of hours.

- [14] The taxing master says that she carefully read the papers and in doing so considered the nature of the matter, the volume of papers

involved, the relative complexity of said matter and whether any new law arose.

- [15] Much is said by the applicants in relation to the determination of complexity. In fact this is a thread that runs through the complaints.

- [16] The taxing master, whilst acknowledging that there was some complexity in the matter, disagreed with the level of complexity which was contended for by the applicants.
- [17] The applicants argued that the matter was complex because there had already been a winding up. This is not a matter which would introduce complexity into the matter. To my mind neither did the fact that the matter was ultimately heard urgently.
- [18] The applicant alleges that there were complicated legal questions “such as the benefit to creditors”. The weighing up of facts relating to the protection of creditors is a common and relatively elementary part of insolvency law.
- [19] The applicants contend for “an incredibly complicated trust structure on both sides” but make no submission as to how
or why the trust structure was so complicated.
- [20] I don’t understand the applicants’ reliance on the need to “wade through all the different entities including those who were foreign nationals” as a factor resulting in significant complexity.
- [21] The submission by the applicants that: “There’s not a lot of case law on bringing a business rescue application against a company that is already under liquidation and wound up and especially not on an urgent basis” is neither correct nor compelling.
- [22] No novelty or uniqueness of the circumstances in light of the existing settled law is proffered. Furthermore, the principles
at hand are well trodden.
- [23] A central argument of the applicants in that the taxing master was inconsistent in her determination of the complexity. They contend
that the taxing master acknowledged the requisite complexity by deviating from customary practice - specifically in the allowing of a drafting fee for counsel and consultation with counsel but then did not apply this appreciation of the complexity to counsel’s fees.
- [24] This is a binary approach which is inappropriate when considering whether there has been a proper exercise of discretion. The sensible proposition suggested by the taxing master to the effect that there are degrees of complexity is accepted.
- [25] The review applicant sought to apply the criteria in *Revisiting S v Makwanyane*,^[4] as to define complexity. To my mind this does not advance the position at all.
- [26] The fact remains that this is an application with some complexity in the fashioning of the factual complex but not in relation to legal prescripts and precedent.

[27] As to the volume record (746 pages), it was, to my mind, not such as to require any unusual application of skills. The taxing master makes the point that much of the volume comprised annexures.

[28] In conclusion on this head, I cannot find that the taxing master was wrong in her assessment of a reasonable fee or that there was not a proper application of her discretion.

[29] In *Society of Advocates of Kwazulu-Natal v Levin*, [5] it was held:

“But while the time spent by counsel may not always be a reliable indication of the value of the services rendered, the recompense allowed to counsel must be fair, with due regard to all the relevant factors and the fact that counsel must be fairly compensated for preparation and presentation of argument”. [6]

[30] To my mind the reduction of the hourly rate of a senior junior by approximately 16% was not unfair in the circumstances of the case.

Item 17 and item 23 - reduction of consultation by one hour

[31] The taxing master reduced the duration of this consultation to one hour. She explains that she did this on the basis of her consideration of the complexity of the matter.

[32] The taxing master states that, on the assessment of the complexity of the matter undertaken by her, it was fair and reasonable to allow one hour for consultation.

[33] As stated above I can find no fault with the exercise of her discretion on this basis.

Disallowance of attorney's fees for perusing heads of argument prepared by counsel in support of clients' case

[34] Whilst I obviously accept that there are occasions when team preparation which requires an attorney's perusal of the heads

drawn by his counsel is apposite, the taxing master was not incorrect in reasoning that the nature of this matter simply did not require the overseeing of counsel by an instructing attorney.

Disallowance of two hours of counsel's fees for finishing the draft founding affidavit to the intervening application

[35] The taxing master allowed only two hours of the four hours charged to “finish” drafting the founding affidavit. The master's motivation for this is reasonable i.e that to her mind the other two hours was taken account of on the drafting

already allowed for.

Item 131: - disallowance of 15 minutes of attendance at court

[36] The taxing master reduced the time spent in court by 15 minutes. She says she did so as she was not favoured with either a recording of the proceedings or a contemporaneous time note by the attorney. She says that this was notwithstanding her request that she be given such documents.

[37] That this request was made is disputed. However, it is not disputed that she was not given the recording or a contemporaneous note. In the circumstances the approach taken was, to my mind, not unreasonable.

[38] Furthermore, I am in no better position than she was to determine this aspect.

Item 134: Counsel's fees in invoice 1888 as to the rules 7 and 47 requests

[39] The taxing master allowed counsel 15 minutes to peruse the rules 7 and 47 requests and no fee for the additions made to the draft papers.

[40] A rule 7(1) notice is hardly a complicated process. The taxing master states that, all in all, the matter for perusal consisted of

three pages.

[41] These applications of this nature are generally the domain of the attorneys. It was thus not incorrect for the taxing master to make use of the tariff in rule 70 as the applicants allege.

[42] The fact that information was taken from these documents for the purposes of drawing an affidavit is, arguably, taken account of

in the fee for such drawing of the affidavit.

Disallowance of counsel's fee for settling application for intervention and drafting of founding affidavit in support thereof (four hours)

[43] The taxing master disallowed all the fees under this heading, on the basis that counsel cannot "settle its (sic) work".

[44] The assessment that it is not normally function of counsel to draft affidavits is not without precedent.[7]

Conclusion

[45] There is no merit to any of the reviews raised.

Order

[46] I thus order as follows:

[1] The application is dismissed in its entirety.

D FISHER

JUDGE OF THE HIGH COURT

JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 27 October 2023

Heard: 10 August 2023

Delivered: 27 October 2023

APPEARANCES: No appearances.

[1] City of Cape Town v Arun Property Development (Pty) Ltd 2009

(5) SA 227 (C) at 232F–G; Trollip v Taxing Mistress of the High Court 2018

(6) SA 292 (ECG) at 298D–I and Van Pletzen v Taxing Master of the High Court

[2021] ZAFSHC 4 at paragraphs 17–20.

[2] Lander v O'Meara 2011

(1) SA 204 (KZD) at 209H.

[3] Visser v Gubb 1981

(3) SA 753 (C) at 754H–755C.

[4] Klaasen “Constitutional interpretation of the so-called ‘hard cases’: Revisiting S v Makwanyane’ 2017 De Jure 1 17.

[5] Society of Advocates of Kwazulu - Natal v Levin [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP).

[6] Id at para 18.

[7] See Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd 1990 (4) SA 587 (T).

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