

SOUTH AFRICA / JUDGMENT

Gqomo v Taxing Master and Another (EL2120/2023) [2024] ZAECELLC 20 (15 May 2024)

[2024] ZAECELLC 20

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL2120/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

NOT

REPORTABLE

CASE

NO: EL2120/2023

In

the matter between

MZINGAYE

GQOMO

Applicant

and

THE

TAXING MASTER

First

Respondent

THEMBEKA

DUNYWA

Second

Respondent

IN

RE: THEMBEKA
 DUNYWA
 Applicant
 and
 MZINGAYE
 GQOMO
 Respondent

JUDGMENT

IN RESPECT OF

PURPORTED REVIEW OF TAXATION

HARTLE J

- [1] The applicant, acting in person, served a “Notice in terms of Rule 48” on the first respondent, the taxing master of this court, calling upon her to state a case for the decision of a judge regarding “her decision to refuse to attend to the taxation which was set down for 26th April 2024” (sic).
- [2] I will refer to the parties by their names and reference this as “the present application” as opposed to the main application which is for a review proper (“the main/review application”) to avoid any confusion herein.
- [3] The bill of costs forming the subject matter of the taxation arises from the review application initiated by Ms. Dunywa against Mr. Gqomo inter alia under the above case number. On 29 August 2023 that application served before Beshe J when she issued an order removing the matter from the roll. In a further order made by her she directed Ms. Dunywa to pay Mr. Gqomo’s “wasted costs”.
- [4] It appears that there is a complex history concerning the main application which is not entirely relevant to the present application. Mr. Gqomo holds the view that the court has no jurisdiction to hear Ms. Dunywa’s dispute in the main application and the matter has been on and off the roll at his instance to finalise the matter on the basis that the application ought to be dismissed in its entirety.
- [5] The bill to be taxed granted in his favour along the way evidently itself is the subject of a complaint lodged by Ms Dunywa with the Legal Practice Council (“The Council”) against Mr. Gqomo or his attorneys, and representations were made to the taxing master when the bill first came before her for taxation that the process should not be proceeded with in the light of that complaint and pending its resolution by the Council. On 17 November 2023 the taxing master ruled that the bill is to be taxed after the outcome of that complaint.

- [6] On 11 April 2024 Mr. Gqomo sought to sidestep the taxing master's ruling by terminating his mandate to his attorney, disavowing that the latter had acted on his instructions in compliantly awaiting the resolution of the complaint by the Council. He wrote to the taxing master in this regard as follows:

"I have been advised by Mr Mashingaidze that you have decided that the taxation be held after May 2024. On further enquiries he informed me that you decided that it should await the LPC complaint. I have terminated my mandate to Mr Mashingaidze with immediate effect as he acted without my instructions in the communications with yourself regarding this. Without getting into the merits of this matter I advise that the LPC matter has no bearing in the litigation which was in court and a Cost Order was made by a Judge and should be complied with.

In the circumstances I will be serving and filing a notice of set down of taxation as previously allocated by you, being the 26th April 2024. I will represent myself going forward with this matter. He advises me that he will forward his withdrawal notice to you.

I hope this is in order and await to hear from you."

- [7] At a taxation on 26 April 2024 the issue of the pending complaint was successfully raised again with the taxing master and she informed Mr. Gqomo that the taxation will not be proceeded with until the disciplinary hearing has been finalized by the Council.
- [8] It is perhaps apposite that I record the taxing master's input sought by me to determine the circumstances surrounding her

ruling:

"The bill of costs for the above matter was set down at our office for 17 November 2023.

TP Dunywa attorneys objected to the bill being taxed, they indicated that there was a complaint lodged with Legal Practice Council about the same Bill and the Court order.

I made a ruling on 17 November 2023 that the bill will be taxed after LPC outcome.

This year Mashingaidze INC, requested a date for taxation.

I made a follow up whether the issues raised last year were resolved and the response from Mashingaidze INC was yes and a date was allocated to tax the bill of costs on 26 April 2024.

On 10 April 2024, after a date was allocated, TP Dunywa attorneys brought to my attention that the matter was not resolved as it was set down for 28 May 2024.

After I heard that the issues were not resolved I told the parties that my last year's decision stands and the matter will be taxed after 28 May 2024, a date after LPC hearing.

On 11 April 2024, Mashingaidze Inc sent me notice of withdrawal as attorneys of record for Mr Gqomo and they copied Dunywa attorneys.

I am not certain whether Mashingaidze INC will still continue with taxation after 28 May 2024 because they drafted the bill not Mr Gqomo.”

[9] Mr. Gqomo’s present complaint as framed against the taxing master’s decision is that her ruling is tantamount to disregarding a costs order granted in his favour and further that she “has disregarded factors and principles which were proper to her to consider or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable person would have given. She has absolutely no ground in law to refuse to (tax) my bill and accordingly I request a Judge be appointed in terms of Rule 48 of the Uniform Rules of Court to deal with this matter.”

[10] The taxing master responded to Mr. Gqomo’s notice in terms of Rule 48 (1), in accordance with her perceived obligation to do so in terms of rule 48 (3), as follows:

“Kindly note that I have not taxed your bill as a result Rule 48 is not applicable in this matter. Rule 48 is applicable if a party is dissatisfied with the ruling made on items in the bill.

I would suggest that you consider Rule 53.”

[11] In response Mr. Gqomo wrote as follows:

“I acknowledge receipt of your response to my Notice in Terms of Rule 48 contents of which have been noted. I vehemently differ with your opinion that Rule 48 is not applicable. In the Notice I have requested, in terms of the Rules, that the Registrar must state a case for a decision of a Judge regarding the refusal to attend to the taxation of the bill. It is the rational or basis of your decision that has to be referred to a Judge for

determination as to whether your decision passes the test of reasonableness and rationality.

Your response does not do so at all but simply to give an advice to apply in terms of Rule 53 (a protracted and cumbersome process). I submit that Rule 48 has been created specifically to assist the litigants to approach a Judge, in chambers for review of taxations without the necessity of utilizing the “normal” review application. Your opinion is precisely what a Judge will ultimately have decided or make a determination. In any event the Taxing Master cannot simply say that the reasons for the refusal was explained to the attorneys who were present when the matter was before her. It is the Taxing Master who has made a decision and it is incumbent upon him/her to disclose the reasons of the decision to a Judge who will be seized of the matter.

As this matter will at the appropriate time be referred to a Judge, the Taxing Master will eventually have to state a case for a Judge to make a decision, if any. It is submitted that the contention that Rule 48 is only available to a litigant in the event that the Taxing Master has actually taxed a bill is incorrect. That is a narrow interpretation of Rule 48 and case law supports this view as will be submitted in this matter.

Accordingly I advise that this matter should follow the procedure as envisaged by Rule 48 and ultimately be referred to a Judge at the appropriate time.

Kindly acknowledge receipt and I await your response if any.”

[12] In a further communication dated 22 April

2024. The taxing master again advised Mr. Gqomo that he could “take the matter on review”.

[13] After receipt of Mr. Gqomo’s request for the review of taxation in the present application I enquired whether Ms. Dunywa had been served with a copy of the papers. His answer was “No”. I further asked both her and the taxing master to weigh in. The latter’s input is as set out in paragraph 8 above. Ms. Dunywa wrote as follows:

“We refer to the above matter and write to inform the honourable Judge that this application for Review was neither served on us electronically nor physically. We have no knowledge of this application.”

We received correspondence stating that the Taxing Mistress stands by her decision to stay taxation pending further investigations by LPC, to a date after LPC furnish us with their decision, then we proceed with appealing the cost order as it was granted in contravention of Rule 16 of the uniform court of rules which provides that:

“If an attorney acts on behalf of any party in any proceedings, such attorney shall notify all other parties of this fact and shall supply an address where documents in the proceedings may be served, (2) (a) Any party represented by an attorney in any proceedings may at any time, subject to the provisions of Rule 40, terminate such attorney’s authority to act, and may thereafter act in person or appoint another attorney on behalf of such party or the newly appointed attorney on behalf of such party shall forthwith give Notice to the Registrar.....”

In this instance, a cost order was granted in favour of Mr Gqomo who is neither an attorney nor an advocate, in the absence of any termination of mandate or a Notice of withdrawal from his then attorneys of record. We annex the complaint herein for easy reference. His former attorneys went (on) to draft a bill of costs using a party and party scale and also claimed attorneys costs.

We hereby request that this taxation is stayed pending finalization of our enquiries with Legal Practice Council to a date after 28 May as advised by LPC.”

[14] The provisions of rule 48 set out the procedure to be adopted in a review of taxation as well as the jurisdictional grounds that must be present for a Judge to be called upon to review a ruling of the taxing master as follows:

“48. Review of taxation

(1) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed mero motu by the taxing master, may within 15 days after the allocatur by notice require the taxing master to state a case for the decision of a judge.

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- (2) The notice referred to in subrule (1) must—
- (a) identify each item or part of an item in respect of which the decision of the taxing master is sought to be reviewed;
 - (b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the taxing master;
 - (c) contain the grounds of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and
 - (d) contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof.
- (3) The taxing master must—
- (a) supply his or her stated case to each of the parties within 20 days after he or she has received a notice referred to in subrule (1); and
 - (b) set out any finding of fact in the stated case.
- (4) Save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed or allowed, as the case may be, and which the dissatisfied party seeks to have allowed or disallowed respectively, is less than R100.
- (5) (a) The parties to whom a copy of the stated case has been supplied, may within 15 days after receipt thereof make submissions in writing thereon, including grounds of objection not raised at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed *mero motu* by the taxing master.
- (b) The taxing master must within 20 days after receipt of the submissions referred to in paragraph (a), supply his or her report to each of the parties.
- (c) The parties may within 10 days after receipt of the report by the taxing master, make further written submissions thereon to the taxing master, who shall forthwith lay the case together with the submissions before a judge.
- (6) (a) The judge may—
- (i) decide the matter upon the merits of the case and submissions so submitted;
 - (ii) require any further information from the taxing master;
 - (iii) if he or she deems it fit, hear the parties or their advocates or attorneys in his or her chambers; or
 - (iv) refer the case for decision to the court.

- (b) Any further information to be supplied by the taxing master to the judge must also be supplied to the parties who may within 10 days after receipt thereof, make written submissions thereon to the taxing master, who shall forthwith lay such information together with any submissions of the parties thereon before the judge.
- (7) The judge or court deciding the matter may make such order as to costs of the case as he or she or it may deem fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge or court.”
- [15] The provisions of the rule self-evidently provide a peculiar basis for a Judge to review a ruling taken pursuant to a taxation (that concerns itself with objections to items in a bill of costs and the taxing master’s decision in each instance as well as a scenarios where the taxing master might decide *mero motu* to disallow or tax off items in such a bill) that culminates in an allocatur where the disallowed amounts must not be less than R100.00. Indeed the jurisdictional basis therefor is that an allocatur has been made, in other words, the taxing master must have exercised his/her discretion and the question which begs itself in a review under Rule 48 is whether there is a basis to interfere with the exercise of that discretion. It ostensibly does not afford a litigant the right to compel the taxing master under its provisions to proceed with a taxation. The rulings that are subject to scrutiny under this rule are ones that concern “any item or part of an item which was objected to or disallowed by the taxing master”. The connection with items or part thereof objected to or disallowed is reinforced by the notice contemplated in sub-rule
- (2) and what it should concern itself with in a review of taxation. It is also qualified by the provisions of sub-rule (4) concerning when the invocation of the rule is warranted.
- [16] Rule 70 (1)(a) of the Uniform Rules of Court provides for the competency and peremptory obligation of a taxing master to tax any bill of costs for services actually rendered by an attorney in his/her capacity as such in connection with litigious work. The sub-rule provides further that such bill is to be taxed subject to the provisions of sub-rule (5) in accordance with the provisions of the tariff. Sub-rules (5) and (5A) set out how the taxing master’s discretion (that is, concerning what amounts, or the total of the amounts, he/she has disallowed or allowed, as the case may be) is to be exercised. Even before reaching this point, sub-rule (2) provides that a taxing master may call for such books, documents, papers or accounts which in his/her opinion are necessary to enable him/her properly to determine any matter arising from such taxation. (Emphasis added.)
- [17] In this instance it appears that the taxing master has determined it necessary to await the outcome of the Council’s decision in respect of the complaint. I see no overreach in that or avoidance of her obligation to tax the bill. Further the attorneys whose bill it is has evidently acquiesced in her earlier ruling to await the outcome of the Council’s disciplinary process.

[18] Even if there was any case law (none was held up to me) to the effect that a refusal to tax can per se can be reviewed under Rule 48,[1] Mr. Gqomo has not been candid about the fact that the taxing master already made a ruling which is certainly not tantamount to a refusal by her to tax the relevant bill of costs.[2]

[19] In the result I make no order on the application and since it is a putative review, I also make no order as to costs.[3]

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 15 May 2024

[1] It is not an issue I am presently required to decide.

[2] It is of concern to me that the present application was not even served on Ms. Dunywa whereas Rule 48 (1) prescribes that the invocation of the rule is to be “by notice” of the party purported to be affected by the ruling requiring the taxing master to state a case for the decision of a judge.

[3] Nedperm Bank Ltd v Desbie (Pty) Ltd 1995 (2) SA 711 (WLD) at 713 D – E.

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