
SOUTH AFRICA / JUDGMENT

J.A Le Roux Attorneys and Another v Madaza and Others (2228/2013) [2017] ZAECMHC 3 (16 February 2017) [2017] ZAECMHC 3

COURT

Eastern Cape High Court, Mthatha

BEFORE

GNZ Mjali

CASE / FILE NUMBER

2228/2013

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

Case No: 2228/2013

Heard on: 25/04/2014

Delivered on: 16/02/2017

In the matter between:

J.A. LE ROUX ATTORNEYS

1ST APPICANT

FRESH CHOICE SUPERMARKET CC

2ND APPLICANT

and

NKOLI MADAZA

1ST RESPONDENT

NKOLI MADAZA & ASSOCIATES

2ND RESPONDENT

THE TAXATION MASTER, MTHATHA

3RD RESPONDENT

THE SHERIFF OF THE HIGH COURT,

MTHATHA

4TH RESPONDENT

REASONS

FOR THE ORDER

MJALI J

1. Following a long history of litigation between the parties as well as a writ of execution against the applicants which was obtained pursuant to an impugned taxation of certain bills of costs, the applicants launched the present proceedings on an urgent basis seeking an order couched in the following terms.

1.1. That the writ of execution issued by the first and second respondents under case number 397A/2013 against the applicants be stayed pending the finalisation of a rescission, alternatively, review of the taxation and subsequent allocator of the taxed bill of costs.

1.2. That the execution of the writs of execution issued by the first and second respondents under case number 1192/2013 out of this Court against the second applicant in favour of the first and second respondents be stayed pending the finalization of a review of the taxation and subsequent allocator of the taxed bills of costs.

1.3. That the taxation of the bill of costs between first and second respondents and the applicants and the subsequent allocator by the

third respondent in case number 397A/2013 on 3 September 2013 be rescinded and set aside.

1.4. That the first and second respondents pay costs jointly and severally the one paying the other to be absolved. In the event of opposition by the third and fourth respondents, that all the respondents pay the costs of this application jointly and severally the one paying the other to be absolved.

1.5. That paragraphs 1.1 and 1.2 above shall serve as an interim interdict pending the finalisation of the application for review proceedings to be instituted.

2. On 12 September 2013 an interim order in favour of the applicants was granted. At the hearing of this matter on 25 April 2014 I gave an order setting aside the decision of the registrar in the taxation that took place on 3 September 2013 in respect of case number 397A/

2013. I extended the interim order in respect of case number 1192/2013 until the finalisation of review of taxation that had been launched in that matter. I further ordered that the respondents should pay costs of this application and that my reasons for the order will follow. These are the reasons.

3. Following a withdrawal of an interlocutory application in case number 397A/2013 as well as the tendering of costs by the applicant, the second respondent filed a bill of costs together with disbursements for an amount in excess of R200 000.00 in respect of the aforesaid interlocutory application. Another bill of costs was also filed in respect of case number 1192/2013. The applicants filed their objections to the items set out in both bills of costs and the taxation of both bills was set down for 8 August 2013. The grounds of objection to the items in the bill of costs included (but not limited to) the following, excessive times being spent on certain items, certain costs being unjustified due to either being reserved at the time of taxation or that a no cost order was issued with regard to them. In some instances the applicant objected to being charged costs of an application which was never enrolled for hearing or was withdrawn upon receipt of a Rule 30 notice.
4. Taxation could not proceed on that day and had to be rescheduled for another day. After numerous postponements only the taxation of the bill of costs in respect of case number 1192/2013 was conducted and finalised on 30 August 2013. At the time of the hearing of this matter the applicants had commenced with the process of the review of taxation in respect of that case (number 1192/2013). The issues challenged therein are subject of that review process and will not be dealt with in this judgment. The only order sought in this application in respect of that case is the stay of the writ of execution.
5. The taxation of the bill of costs in respect of case number 397A/2013 was done on 2 September 2013 and when it could not be finalised it was postponed until the following day. Mr Le Roux who represented the applicants indicated that due to a prior arrangement he would only be available for such taxation on 3 September from 11.30 until 13.00. On that day the taxation proceeded until the third respondent indicated to the parties at 12.50 that he was taking a lunch break. At that time the taxation of the bill had not advanced as the only issue that had been dealt with was whether or not counsel's fees should be allowed.
6. It was at that stage that Mr Le Roux reminded the respondents that he would not be available to proceed with the taxation after the lunch break on that day due to his previous arrangements. That elicited no response from the third respondent who simply went out of his office leaving the parties behind. When that happened Mr Le Roux suggested to the first respondent and his articulated clerk that they reschedule the taxation for the next day alternatively that they file a formal notice of set down for taxation. The first respondent informed him in no uncertain terms that she will not consent to any other date and that taxation would proceed after the lunch break. In his founding affidavit Mr Le Roux alleges that at that time the first respondent was very aggressive and was hurling insults at him which prompted him to leave the Registrar's office.
7. In a letter drafted during that lunch hour and addressed to the respondents, Mr Le Roux reiterated their earlier arrangement made on 2 September 2013 regarding the times of the sitting of 3 September 2013 and that due to his previous engagements he was not available beyond 13.00 on that day. In that same letter Le Roux suggested some dates when he would be available. That letter was served by Le Roux's candidate attorney upon the first

respondent's candidate attorneys but they refused to sign for it. It was also served upon the third respondent who took the letter and placed it on his desk without reading it. When the candidate attorney drew his attention to the contents of the letter, the third respondent asked him to leave his office.

8. The taxation of the bill of costs proceeded in the absence of the applicant's legal representative. The over zealousness of the registrar to continue with the taxation of the bill in the absence of the applicant despite being informed timeously of his non availability and later being reminded when they adjourned for lunch as well as by way of a letter, raises a lot of questions. For that very reason alone the taxation that took place on that day as well as the subsequent allocator by the third respondent falls to be set aside. There are yet even more serious reasons that warrant such a decision which I deal with hereunder.
9. The first and second respondents were 1st and 2nd applicants respectively in case number 397A/13. The first respondent being the sole director of the second respondent which is a firm of Attorneys bears the sole mandate to litigate for and on behalf of the second respondent. The first respondent personally represented both the 1st and 2nd applicants in case number 397A/13. In the bill of costs which is the subject of this application the second respondent claimed a sum of R4265.00 for a 5 hour phone call made on 13 June 2013 to clients informing them about the application dated 11 June 2013. The bill goes on. The very next item is the claim for an amount of R4265.00 for attending to receive instructions and to consult with the first respondent for 5 hours on 13 June 2013. That is followed by the same amount for another 5 hours on the same day for receiving instructions and consulting with the second respondent. The 10 hours spent on that day receiving and consulting with clients is then followed on the same day by telephone calls to the first and second respondent of 4 hours each to confirm instructions. Having received instructions, the respondents then drew a 2 page notice to oppose the application and made copies in preparation of filing and service thereof. Beyond that there was a telephone call to counsel to check his availability which took 2 hours. That was followed by the receipt of a phone call from counsel wherein he confirmed his availability. This also took 2 hours. For such telephone calls the respondents claimed payment of a sum of R1704.00 each. All the aforementioned activities took place on 13 June 2013 which seems to have been busy beyond the normal 24 hour day. On a closer look the activities of the 13 June 2013 took 27 hours. Apart from the impossibility of a person being able to work continuously for 24 hours per day, is a mystery it how one can exceed the normal hours and go up to 27 hours in one day.
10. The bill goes beyond the 13 of June 2013 through to 27 June 2013. Throughout it is characterised by a trend of misrepresentations as well as the inflation of the times taken in respect of the items mentioned therein. For instance on 15 June 2013 there was a telephone to counsel which took 5 hours consulting about the matter. On the same day there was a telephone call to counsel reminding him about the set down of 21/06 /2013 which took an hour. On 19 June 2013 the respondents prepare a brief for counsel and spend 4 hours preparing for the hearing of 21 June 2013 and researching case law. The applicant is billed

for the 5 hours spent on the attendance of court by counsel and attorney on 21 June when the matter was postponed until 24 June 2013. That is followed by attending to uplift and peruse the court order of 21 June 2013. The list goes on and on and manifests nothing less than a regrettable picture of serious character defects, a lack of good faith and integrity. Bearing in mind that the first respondent appeared in person and represented the second respondent, it is difficult to understand why the counsel's fees were charged at all.

11. On 22 June 2013 there is yet another misrepresentation of the respondents calling clients for consultation. That call took 1 hour

followed by consultation with the first respondent for 3 hours. As to how the first respondent being the sole director of the second

respondent and also appearing in person as well as on behalf of the second respondent can make a telephone call to herself and then consult with herself is beyond mystery. In an attempt to justify that glaring anomaly Ms Madaza (who is the first respondent and sole director of the second respondent) argued that the second respondent is a separate entity from her and that she had to take instructions from the second respondent. That argument does not assist her in the circumstances of this matter. As a sole director she is the only one who can litigate for and behalf of the second respondent. By virtue of that she is the only person who can give instructions pertaining to any litigation in respect of the second respondent. It is no wonder that at the hearing of this matter she could not tell where she had to obtain instructions and could not justify the numerous telephone calls made to clients to obtain and confirm instructions from them. She also could not justify the consultations with clients when she in fact represented the first and second respondents. An extremely worrying feature is the first respondent's lack of appreciation of the seriousness of the transgression of the rules of professional conduct she has committed. This is evident from the fact that in the face of the glaring misrepresentations that have been pointed out she could still argue against the setting aside of the taxation and the subsequent allocator.

12. As an attorney of this Court, the first respondent is expected to maintain the highest standard of integrity to the society at large,

to this Court and to the profession at large. Unfortunately the picture depicted in the bill of taxation as well as her conduct

during the taxation thereof and subsequently is a far cry from the standards expected of an attorney. If anything can be said about it is that, it is at the very least, reprehensible and unbecoming. In *Law Society, Transvaal v Mathews* 1989 (4) SA 389 (T) at 395 F where the learned Judge stated;

"I refer next to the duty of an attorney in general. The attorney is a person from whom the highest standards are exacted by the profession and this Court. If an attorney wishes to digress from that standard he may do so but he must first cast aside his profession by resigning and then pursue his chosen course. He cannot serve two masters. In this regard the standards are admirably dealt with in the founding affidavit as follows: "An attorney is a professional man whose independence and freedom

in the conduct of his practice are recognised and preserved. Within the limits of the law and the rules of professional conduct an attorney conducts, and in fact should so conduct, his practice with a high degree of independence. The profession itself is not a mere calling or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession and by entering it, he pledges himself with total and unquestionable

integrity to society at large, to the courts and to the profession.....only the highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times. The attorneys' profession can only fulfil its obligations to the community and comply with its role in the administration of justice in the land if it inspires and maintains the unconditional confidence of the community and if its members devote their absolute integrity to the conduct of their profession and to the fulfilment of all the requirements demanded of the profession and its members. The integrity of an attorney should inter alia manifest itself in a situation where he must prefer the interests of his client above his own. It is required of an attorney that he observes scrupulously, and complies with, the provisions of the Attorneys Act and the rules"

13. Bearing in mind all the facts in casu, I am convinced that by any standard the first respondent conducted herself disgracefully, dishonestly and contrary to the provisions of the Attorneys Act and the Rules of this Court. Her conduct in my view warrants the attention of the Law Society of which the respondent is a member, as well as the Director of Public Prosecution. With this view in mind the first respondent was asked during the hearing of this matter to make submissions as to why this matter should not be referred to the aforementioned institutions. Her only submission was "I am indebted to the Court". Asked what she meant by that she said the Court must decide what to do". That was said with a very clear display of anger and contempt. When the applicant was invited to make submissions in this regard, its attitude was that because of the great clash of personalities and animosity between the parties, the applicant would not want to appear as vindictive.
14. Yet another cause for great concern is that despite the glaring misrepresentations which ordinarily should have raised some concerns

even to a lay man, as to the substance of the bill as well as the times taken in respect of each item in the bill, the registrar

allowed the costs. Some costs were allowed in full and others partially. That was also despite the fact that the applicant had

served a notice to the respondents on 17 July 2013 wherein they set out a catalogue of its grounds of objection to the bill. The nature of the objections raised therein should at the very least have alerted the third respondent to the glaring anomalies in the bill. Apart from the impossibility of working for the full 24 hours in a day, it can never occur that a day can be in excess of 24 hours. The total hours, worked on 13 July 2013 simply do not add up.

15. The Taxing Master derives his or her authority to tax bills of costs from Rule of Court 70(1) (a). In *Grindlays International Finance (Rhodesia) Ltd v Ballam* 1985 (2) SA 636 (W) at 645E it was stated that Rule 70(3) provides:

“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.”

16. That means that the taxing master must provide an independent and impartial assessment of the legal costs involved in any matter that comes before him for taxation. He clearly failed in that regard and his assessment of costs in this matter can by no means be described as fair and reasonable. That together with his overzealousness referred to earlier on in this judgment warrants the attention of the relevant people in the management of the employer Department.
17. On the question of costs. The general rule that costs follow the event. Only the first and second respondents opposed this application. The third and fourth respondents did not oppose the application. Costs should therefore be borne by the first and second respondents. In the result I make the following order.

1.The application succeeds. The taxation that took place in respect of case number 397A/2013 on 3 September 2013 as well as the subsequent allocator are set aside.

2.The interim order that was granted in respect of case number 1192/2013 is hereby extended until the review of taxation proceedings in respect of that matter have been finalised.

3.The first and second respondents are ordered to pay the costs of this application jointly and severally on a party and party scale.

4. The Registrar is directed to forward a copy of this judgment, the transcript and the copy of the record to;

4.1. The Law Society of which the first respondent is a member,

4.2. The local office of the Director of Public Prosecutions,

4.3. The Chief Registrar of the Eastern Cape High Court to consider appropriate steps if any.

GNZ MJALI

JUDGE OF THE HIGH COURT

On behalf of the Applicant Adv.Hobbs Instructed by J A Le Roux Attorneys On behalf of the first and second Respondents Ms N. Madaza Instructed by Messrs Nkoli Madaza & Associates

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