
SOUTH AFRICA / JUDGMENT

Jonker and Others v Taxing Master of the High Court and Another (2769/2017) [2019] ZAFSHC 56 (17 May 2019)

[2019] ZAFSHC 56

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

2769/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2769/2017

In the matter between:

HANNES MARTHINUS JONKER AO[1]

Applicants

and

TAXING MASTER OF THE HIGH COURT[2] 1ST Respondent

LAMBONS (PTY) LTD[3]

2nd Respondent

CORAM:

OPPERMAN, J

DELIVERED ON: 17 MAY 2019

REVIEW OF TAXATION

[1] The file in casu was placed before me in January 2019 for a review in chambers in terms of Rule 48. The file was in shambles. The documents were not indexed and not all relevant to review. I invited the parties to address me in chambers on the situation and it was decided that the matter will be heard and finalised on formal record in court. Heads of Argument would also be submitted. The matter was

argued on 27 February 2019. By this time the papers were still not organised but I allowed the matter to proceed in order for further

delay and costs to be prevented. In the end the documents as per the “Index to the Rule 48 Review Application” were placed before me. The Heads of Argument of the applicants and second respondent were also submitted.

[2] Mr. G Ebersöhn from Gerrie Ebersöhn Attorneys appeared on behalf of the applicants. Mr. CF Botes from Gouws Vertue & Associates Inc. appeared on behalf of second respondent. Webbers Attorneys acted as corresponding attorneys for Ebersöhn during the time of the taxation hearing on 15 February 2018 in Bloemfontein. They did not partake in the review hearing on 27 February 2019.

[3] During the taxation on 15 February 2018 Mr. Ebersöhn did not attend. At the said taxation Mr. Franco Truter from Webbers Attorneys represented the applicants and Me. Sandra van Wyck from Gous Vertue & Associates Inc. represented the respondents.

[4] The applicants’ Bill of Costs was drafted and taxed whereby the applicants’ attorney only objected to items 28, 33, 34, 35, 36, 40 and 41 on the Bill of Costs of Gerrie Ebersöhn.[4] No objections were noted on the Bill of Costs of Webbers Attorneys.[5] It stands undisputed that the applicants’ local attorney did not have their file with them during the taxation.[6]

[5] The purpose of taxation[7] was stated in *Mouton v Martine* 1968 (4) SA 738 (T) at 742:

“In former times it was the function of the court, or one of the judges, to tax the costs of a case. The purpose of the taxation was really twofold; firstly, to fix the costs at a certain amount so that execution could be levied on the judgment and, secondly, to ensure that the party who is condemned to pay the costs does not pay excessive and the successful party does not receive insufficient costs in respect of the litigation which resulted in the order for costs.”

[6] High Court 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.”

[7] Rule 70(3) expresses the clear intention that, granted that litigation is expensive, “the ultimate winner should not have the fruits of his victory bitten into by the necessity of paying too high a proportion of his costs”. On the other hand, the interests of the loser should also be protected: it is true that a successful party should have a full indemnity in respect of costs reasonably incurred, but it is equally important to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs.[8]

[8] Rule 70(3) requires that an expenditure of a type which it was reasonable to incur must be allowed.

[9] Rule 48

“(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 allocator by notice require the Taxing Master to state a case for the decision of a judge.

(2) The notice referred to in sub-rule (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 ground of such challenge, but not argument in support thereof.

(6)

(a) The judge may-

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.”

- [10] The subject of the Bill of Costs is the second respondent that launched a Rule 30-application to set aside the applicants' application for a default judgement as an irregular step. The applicants' opposed the said application. The applicants' attorney appeared on behalf of the applicants at the hearing thereof on 23 November 2017 and the respondent was represented by an advocate.
- [11] The court, per Daffue J, dismissed the Rule 30-application and ordered the respondent to pay the applicants' costs on the party and party scale.
- [12] Pursuant to the above, the applicants served and filed Notice of Intent to Tax to which two Bills of Costs were attached, namely (1) the Bill of Costs of their instructing attorney in Johannesburg and
- (2) the Bill of Costs of their correspondent attorney in Bloemfontein. The respondent served a notice of objection in respect of certain items in the said Bill of Costs.
- [13] On 15 February 2018 the Taxing Master taxed applicants' Bill of Costs. The Taxing Master taxed down and/or disallowed certain items in the applicants' Bill of Costs.
- [14] Perturbed by this the applicants delivered a Rule 48-notice. The second respondent and the Taxing Master opposed the review application. The applicants filed the Notice of Review on 8 March 2018.
- [15] The respondent pointed out; correctly so, that the applicants' local attorney only noted objections to items 28, 33, 34, 35, 36, 40 and 41 of the Bill of Costs of Gerrie Ebersöhn.
- [16] It is apposite to rule from the onset that I will only entertain and deal with items 28, 33, 34, 35, 36, 40 and 41 of the Bill of Costs of Gerrie Ebersöhn in terms of the law as stated, amongst others, in *Rodgers v Rodgers* 103/2010 (2012) ZANWHC 46 (14 Dec 2012):
- "The conclusion that I reach is that both the main objection and its alternative as contained in the notice of review by the defendant is belated, since no objection was made about them to the Taxing Master at the time of taxation, they are accordingly not subjected to review."*
- [17] In *Daywine Properties (Pty) Ltd v Murphy and Another* 1991 (3) SA 216 (D) it was correctly stated that:
- "I confirm the Taxing Master's decision for the simple reason that these matters were not objected to at the time of the taxation. Rule 48(1) is perfectly clear, in my judgment, commencing as it does with the words:*
- "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..."*

“Similarly, Rule 48(2) envisages that only the matters objected to before the Taxing Master may be the subject of review because it entitles the parties to submit contentions 'including grounds of objection not advanced 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.’”

[18] In *Kruger v Secretary for Inland Revenue* 1972

- (1) SA 749 (C) at 750F - G, Van Winsen J made short shrift of a similar matter by saying succinctly:

“I do not deal with the belated objection to item 16 since no objection was made to the Taxing Master's allowance of this at the time of the taxation. It is accordingly not subject to review. (Rule 48(1))”

[19] Further; as stated by the authors in *Law of Costs*:^[9]

“The discretion vested in a Taxing Master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words ‘reasonable’ and ‘in the opinion of the Taxing Master’ that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the court.”

[20] The Taxing Master has therefore correctly pointed out that she has a discretion to award such costs “as appears (to her) to have been necessary or proper for the attainment of justice or defending the rights of another party”.^[10]

[21] Interference on review is justified where a reviewing court finds that the Taxing Master has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable person would have given.^[11]

[22] The Taxing Master must be clearly wrong. In *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others* 1984

- (3) SA 15 (A) at page 18F-G Rabie CJ re-stated the test to be 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 ruling.

[23] The detail of the items is the following:^[12]

- a) Item 28: Perusing filing notice and applicants' practice note and concise heads of argument, perusing relevant case law and drafting

respondent's practise note and heads of arguments 4hrs 36min.

R8280.00 Taxed: R3542.00 taxed down, R4734.00 allowed.

Second Respondent's Submission:[13]

The second responded objected to:

6.1.1 item 28 on the ground that the applicants' attorney is "familiar" with the contents of the file and that only a perusal fee of the second respondent's heads of argument and an hour for the drafting of the applicants' heads of argument should be allowed;

Applicants' Submission[14]

6.3.1 When the applicants' instructing attorney was reading the second respondent's heads of argument and practice note and when he was drafting the applicants' heads of argument and practise note, he was acting as counsel (an attorney with right of appearance) who would be appearing on behalf of the applicants' at the application.

Stated case: Taxing Master:[15]

6.1.1 It is my submission there is no basis for this argument since the item was rectified, nothing was taxed off. The whole time spend charged is allowed in toto. The calculation is as follows: R263x4 units = R1052.00 so R1052.00x4 = R4208.00 plus R526.00 of the remainder of 36 minutes. A total of R4734.00 was allowed. I then rectified the tariff by saying R8280.00 – R4734.00 = R3546.00 which was correctly taxed off. It is further my humble submission that applicants' attorney Webbers should familiarise themselves with the tariff from time to time.

Finding

I take cognisance of the arguments of the applicants in paragraph 6.3 of the Notice of Review as a whole. The arguments might be correct but are belated. It rather points to a situation where the applicants have not presented their case properly at the taxation hearing. A review is not an extra opportunity to a taxation hearing; it is a review of the status quo.

Further, in *Susanna Maria Loedolff v Road Accident Fund*, Unreported Case no. 280/2011, Free State Provincial Division, 23 April 2015, Kruger J pointed out that:

"Wat die senioriteit van die regspraktisyn betref, is die posisie by taksasie dat dit gaan oor die ingewikkeldheid van die saak, eerder as die senioriteit of ervaring van die advokaat of prokureur, soos dit deur die vroeëre Hoofregter gestel is:

"The measure for determining what is a reasonable fee is the value of the work that was done, and the eminence of counsel is not by itself a good reason for allowing a larger fee."[16]

The Taxing Master did not act mero moto, applied her mind and cannot be found to be "clearly wrong."

b) Item 33:[17] Copying the authorities for court and applicants' counsel.

R448.00 Taxed: R448.00. R448-00 not allowed by the Taxing Master.

This item was not referred to in the Notice for Review.

c) Items 34, 35, 40 & 41:

Item 34:[18] Traveling to Bloemfontein 15h30-19h30 400 km

R3600.00 Taxed R3600.00 (R1400.00 taxed R1400.00)

Traveling expenditure not allowed.

Item 35:[19] Provision for toll fees. R120.00 Taxed R120.00. Disallowed in toto.

Item 40:[20] Traveling to Johannesburg 15h30-19h30 and 400km.

Disallowed in toto.

Item 41:[21] Provision for toll fees. R120.00 Taxed R120.00.

Applicants' Submission:[22]

6.3.12 by disallowing travelling expenses and hotel accommodation for an attorney with the right of appearance (who appears on behalf of a party as counsel) under the same conditions as those set out in paragraph 6.3.11 above, the Taxing Master acted upon the wrong principle, alternative acted unreasonable.

Stated case: Taxing Master[23]

6.1.2 These items were taxed off on the basis that there were corresponding attorneys appointed at the seat of the court who could have attended the matter. If this was applied there will be no travelling expenses incurred. Corresponding attorneys cannot be used as a post box. This matter was not complex and needed not an instructing attorney to incur such expenses. It must be borne in mind that the counsel was briefed for this opposed application. I submit that the losing party cannot be penalised with costs which could have been avoided. The general rule on party and party cases is that cheapest way of litigation must be followed.

The Taxing Master did not act mero moto, applied her mind and cannot be found to be "clearly wrong" in light of the law indicated above. The same rationale as at item 28 applies here. In addition, exceptional circumstances must be shown before the rule that a litigant should use an advocate or attorney practising at the seat of the court will be bent. It has not been shown to exist here. *Windhoek Crushers (Pty) v Voight and another* 1969 (1) SA 574 (SWA) and *Friedrich Kling v Continental Jewellery Manufacturers* 1993 (3) SA 76 (CPD) applies.

d) Item 36:[24] Attorney without counsel preparing for the opposed application, 5h00-7h00, R3600.00, Taxed R3600.00.

Applicants' case as stated in paragraph 6.3.[25]

Stated case: Taxing Master[26]

At paragraph 6.1.3: It is my submission that attorney has intimate knowledge of the matter and therefor he/she could not charge preparation fee since he or she knew the facts of this application from the beginning.

It is indeed the case that Mr. Ebersöhn has and had extensive knowledge of the case and detail. Again, the Taxing Master cannot be faulted.

[24] There is not any substance in the Notice of Review that convinces that it will be prudent to review the matter or in the alternative; to interfere with the decision of the Taxation Master.

ORDER

The application is dismissed with costs.

M. OPPERMAN, J

On behalf of the applicants:

Gerrie Ebersöhn Attorneys

c/o Webbers Attorneys

96 Charles Street

BLOEMFONTEIN

On behalf of the 2nd respondent: Gouws Vertue & Ass Inc.

4 Genl. Hertzog Street

Dan Pienaar

[1] Referred to as “applicants” hereafter.

[2] Referred to as “The Taxing Master” hereafter.

[3] Referred to as “second respondent” hereafter.

[4] Index to the Rule 48 Review Application (Hereafter “Index”) at pages 43 to 45.

[5] Index at pages 46 to 47.

[6] Heads of Argument 2nd Respondent – Rule 48 at paragraph 27.

[7] AC Cilliers, Law of Costs, Last Updated: April 2019, <http://www.mylexisnexus.co.za/Index.aspx> on 12 May 2019 at 13.02.

[8] AC Cilliers, Law of Costs, Last Updated: April 2019, <http://www.mylexisnexus.co.za/Index.aspx> on 12 May 2019 at paragraph 13.02.

[9] AC Cilliers, Law of Costs, Last Updated: April 2019, <http://www.mylexisnexus.co.za/Index.aspx> on 12 May 2019 at paragraph 13.03 (Issue 28).

- [10] Visser v Gubb 1981 (3) SA 753 (C) at 754H-755C.
- [11] Preller v Jordaan 1957 (3) SA 201 (O) at 203.
- [12] Index at pages 43 to 45.
- [13] Index at page 9 (Notice of Review of Taxation in terms of Rule 48).
- [14] Index at page 10.
- [15] Index at pages 99 to 100.
- [16] Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others 1984 (3) SA 15 (A) at 22H-I.
- [17] Index page 44.
- [18] Index page 44.
- [19] Index page 44.
- [20] Index page 45.
- [21] Index page 45.
- [22] Index at page 13.
- [23] Index at page 101.
- [24] Index at page 44.
- [25] Index page 10 to 13.
- [26] Index page 100.

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