

SOUTH AFRICA / JUDGMENT

Lategan v Alcock and Another (58621/2010) [2019] ZAGPPHC 438 (9 September 2019)

[2019] ZAGPPHC 438**COURT**

North Gauteng High Court, Pretoria

BEFORE

C.J. Collis

CASE / FILE NUMBER

58621/2010

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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(1)**

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED.
CASE
NO: 58621/2010
9/9/2019
In

the matter between:

JOHANNA
LATEGAN
APPLICANT
And
CAREL
FREDERICK ALCOCK
FIRST RESPONDENT THE TAXING
MASTER
SECOND RESPONDENT

JUDGEMENT

COLLIS J:

- [1] In the present application, the applicant seeks an order for the rescission of the taxation of a Bill of Costs by the Taxing Master of the Honourable Court conducted on 13 June 2016. The rescission application is brought in terms of Rule 42(1) (a) of the Uniform Rules of Court.
 - [2] The basis for seeking rescission of the taxation is premised on the ground that the applicant did not receive notice of the amount of R 89,100.00, being the costs of counsel. The applicant contends that counsel's fees was not indicated in the Bill of Costs.
 - [3] The Notice of Taxation which was delivered to the applicant's attorneys of record merely contained an inscription of R1, 00 under item 73, which resulted in the applicant not opposing the taxation as this account seemed reasonable.
 - [4] Subsequent to the delivery of the Notice of Taxation, the applicant was provided with a copy of the Bill of Costs, depicting a handwritten inscription next to Item 73 reflecting the amount so taxed as substantially different to what was contained in the Notice of Taxation served on the applicant.
 - [5] It is on this basis that the applicant applies for a rescission of the taxed Bill of Costs in terms of the provisions of Uniform Rule 42(1).
 - [6] The first respondent opposes the application and proceeded to raise three points in limine. The first ground being *lis pendens*; the second ground refers to the nature of the application and the third ground, the respondent attacks the time period not adhered to by the applicant.
 - [7] As a starting point it would be apposite to set out the relevant time periods.
- 7.1. On 25 August 2016 this court granted an order in favour of the first respondent, which order was accompanied by a cost order in favour of the first respondent.
- 7.2. Pursuant thereto the first respondent drew up their bill of costs and thereafter proceeded to serve a Notice of Taxation to Tax on the applicant's attorneys.[1]
- 7.3. The applicant did not oppose the taxation and did not file a Notice of Intention to Oppose.
- 7.4. On 13 June 2017 the Taxing Master proceeded to tax the Bill of Costs in the absence of the Applicant.[2]
- 7.5. The attorneys thereafter informed their counterpart that the Bill of Costs had been taxed, and in response the applicant's attorneys recorded his complaint under letter dated 20 June 2017.[3] In this letter an indication was already given that the taxation would be rescinded.

7.6. On 23 July 2017, the first respondent's attorneys replied to this letter and also did so in a subsequent letter dated 28 August 2017.[4]

7.7. Ultimately the present application for rescission of the taxation was served on 25 October 2018, some 16 months after the Applicant received a Notice of the Taxed Bill of Costs.

7.8. On 28 November 2018, the first respondent then served his Notice of Intention to oppose this application via electronic mail and proceeded to file his Answering Affidavit on 17 January 2019. [5]

7.9. Prior to the enrolment of the application, the applicant had failed to file his replying affidavit and as a result thereof the first respondent then proceeded to apply for a date from the registrar to enrol the application for hearing.

7.10. On 3 July 2019, the application was enrolled and on the date of the hearing the applicant applied for condonation for the late delivery of his replying affidavit. This request was without merit and as a result refused by this Court as the applicant failed to show good cause for the delay.

[8] At this juncture it would be apposite to set out the relief sought as per the Notice of Motion. [6]

"Please Take Notice That the Applicant intended to make an application to the above Honourable Court at the hearing of this matter for an order in the following terms:

- (1) That the taxation of the bill of costs by the Taxing Master of this Honourable Court dated 13 June 2017, be set aside;
- (2) That the First Respondent be ordered to pay costs of such application on an attorney and client scale;
- (3) Further and alternative relief."

[9] As set out above the basis of the application is in terms of Rule 42(1)

(a) of the Uniform Rules of Court.

[10] The Applicant's case is that upon service of its Notice of Intention to Tax, the respondent and/or its costs consultant failed to disclose to the applicant that counsel's fees will be included in the taxed Bill of Costs.

[11] Rule 42(1)(a) empowers the Court to rescind an order erroneously sought or erroneously granted in the absence of a party seeking rescission provided that such a party is affected by such order or judgement. The prerequisite factors for granting rescission under this Rule are the following:

11.1 Firstly the judgement must have been erroneously sought or granted;

11.2. secondly such judgement must have been granted in the absence of the applicant; and

11.3. lastly the applicant's rights or interest must be affected by the judgement. Although the language used in Rule 42(1) indicates that the Court has a discretion to grant the relief, such discretion is narrowly circumscribed. The use of the word "may" in the opening paragraph of the Rule indicates the circumstances under which the Court will consider a rescission or variation of the

judgement.

[12] Once those three requirements are established the applicant would voluntarily be entitled to succeed. He is not entitled to show good cause in addition thereto.[7]

[13] In order for an applicant to be successful under the sub-rule, it is necessary for the applicant to show that the prior order was

erroneously sought or erroneously granted.

[14] In general terms a judgement is erroneously granted if there exists at the time of its issue, a fact of which the Court was unaware of, which would have precluded the granting of the judgement and which would have induced the Court if aware of it not to grant the judgement.
[8]

[15] I will proceed to deal succinctly with the requirements under Rule 42(1) as mentioned above.

Failure to include Counsel's Fees in the amount of R89 0001 00 in the Bill of Costs.

[16] As mentioned above the Applicant contends that he did not receive notice of the amount of R89, 100.00 being the costs of counsel, as counsel's fees was not included in the Bill of Costs.

[17] As per the Founding Affidavit the deponent sets out that on the 22nd February 2017, the first respondent delivered a Notice of Intention to Tax on the Applicant.[9]

[18] Thereafter on 15 June 2017, the first respondent delivered a Taxed Bill of Costs for the sum of R103, 935.00 (One Hundred and Three Thousand Nine Hundred and Thirty-Five Rand).[10]

[19] Upon perusal of the taxed bill he immediately investigated the marked difference, with reference to item 73 (counsel's fees) being reflected on the taxed bill, which item was not reflected on the bill of costs received on 22 February 2017.

[20] As a result thereof the deponent thereafter directed a letter to the First Respondent's Attorneys informing them that the Bill of Costs as annexed to the Notice of Intention to Tax is different from the Bill of Costs as taxed by the Taxing Master on 13 June 2017 in that as the deponent asserts, in the bill of counsel was added the sum of R89 100.00 in respect of counsel's fees.[11]

[21] In the opposing affidavit the first respondent denied that the applicant never received knowledge of the Bill of Counsel's expenses.[12] In this regard the first respondent alleges that the Taxing Consultant Ms Pauline Pretorius of the firm P.P. Cost Consultant, who

was responsible for the drawing up of the Bill of Costs, was at the time when the Bill of Costs was prepared, not yet in possession of counsel's bill and as such could not include same in the drawn Bill of Costs.

[22] The deponent further asserts that it is the practice in this Division that when any expense is not available at the time of drawing the bill of costs, such item is identified by allocating a nominal amount of R1.00 and when the relevant bill or account is received it is attached with service of the Bill of Costs prior to Taxation. In this regard, Ms. Pretorius the cost consultant, personally attended to the service of the Notice of Taxation to which were attached the Bill of Costs drawn up by her as well as the account of counsel.[13]

[23] In support of this assertion, Ms. Pretorius deposed to a Supporting Affidavit wherein she confirmed having personally attended to the service of the Notice of Taxation where the Bill of Costs, Court Order as well as Bill for Counsel in the matter was attached.[14]

[24] As previously mentioned, the late delivering of the replying affidavit was not condoned by this court and as such there was no evidence in rebuttal presented by the applicant as to whether the bill of counsel was indeed served on him when the Notice of Taxation was served.

[25] In this regard the evidence of the first respondent therefore remains uncontroverted.

[26] An attorneys' Bill of Costs in the High Court are taxed in accordance with the provisions of rule 70. Uniform Rule 70(1) provides that:

"The Taxing Master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and as such bill shall be taxed subject to the provisions of sub- rule (5), in accordance with the provisions of the appended tariff:....."

[27] 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 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 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 and to other persons or by other unusual expenses."

[28] The Taxing Master is enjoined with the Taxing of Bill of Costs. He/she has a discretion, to allow, to reduce and to disallow any item in the Bill of Costs. The Taxing Master must exercise such a discretion, judicially, fairly and reasonably having the regard to the complexity of the case the time spent and the reasonableness of the costs incurred.

[29] Where the Taxing Master failed to properly exercise the discretion or failed to apply his/her mind properly or at all his/ her decision will be subject to review. The Court may however still interfere with the exercise of the Taxing Master's discretion even when such discretion was exercised properly where the decision of the Taxing Master is based on a misrepresentation as to the facts or circumstances or as to the practice of the Court.[15]

[30] Furthermore, Rule 48(1), provides that:

"Any party dissatisfied with the ruling of the taxing master as to any item or part of any 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."

[31] To the matter at hand, it's important to restate that the Applicant is not seeking a review of the Taxing Master's ruling is allowing counsel's fees of R89 100.00 to be included in the taxed bill. In the present instance Mr. Niedinger was not present when the Bill of Costs was taxed and as such no objection was raised by the Applicant to the inclusion of Counsel's fees in the amount of R 89 100.00. It bears mentioning that during argument counsel appearing for the Applicant aptly conceded that a review of the taxed bill was also not sought.

[32] Support for the above reasoning is found in DAYWINE PROPERTIES (PTY) LTD v MURPHY AND ANOTHER 1991 (3) SA 216(D), where Broome J stated as follows at 21BE-F:

"In my judgement there can be no escape from the clear meaning of the language used in Rule 48 (1) and (2). If the party opposing the taxation fails to object when before the Taxing Master, he cannot thereafter invoke the review of taxation procedure provided by Rule 48 in a belated attempt to attack items which the Taxing Master allowed."

[34] It therefore follows that in order to attack items which the Taxing Master allowed, a litigant needs to be present when the taxation of the Bill is taking place and in the present instance, Mr Niedinger was absent.

[35] What then remains is whether there was an error which occurred when the Taxing Master allowed counsel's fee in the amount of R89, 100.00 when the Bill of Costs was taxed?

[36] The uncontroverted evidence in this regard as presented by the first respondent is listed as follows:

36.1 Mr. Niedinger personally appeared at the hearing which resulted in the cost order and at which hearing the first respondent was represented by counsel;

36.2 that when the Notice of Intention to Tax was served, such notice was accompanied by the bill of counsel which depicted counsels fees in the amount of R89 100.00;

[37] It thus follows the escapable conclusion to be reached, is that no error occurred when the Taxing Master allowed counsel's fees as an item on the bill of costs as the bill of costs was correct to have included same and any challenge to the said fee or scale should have been raised when the bill was taxed.

[38] Consequently, this Court cannot find any basis for the application to succeed.

ORDER:

[39] In the result the application is dismissed with costs on an Attorney and Client Scale.

C.J. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARENCES:

For the Applicant

: Adv. A.A. Sasson

Instructed by

: Walter Niedinger & Associates

For First Respondent

: Adv E. Jansen Van Ransburg

Instructed by

: Baartman Du Plessis Attorneys

Date of Hearing

: 28 August 2019

Date of Judgement

: 9 September 2019

[1] Index p89 annexure "B3"

[2] Index p.25 annexure "WN4"

[3] Index p 27

[4] Index p29

[5] Index p 43 and p 49

[6] Ind exp 1-2

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- [7] De Sausa v Kerr 1978 (3} SA 635 (W} and Topal v L S. Group Management Services (Pty} Ltd 1988 (1) SA 639 (W} at 650 D-J.
- [8] Nyingwa v Moolman N.O. 1993 (2) SA 508 (TK) at 570D-G
- [9] Founding Affidavit p 7 para 7.1
- [10] Founding Affidavit p.7 para 7.2
- [11] Founding Affidavit p.7 para 7.4.
- [12] Opposing Affidavit p.66 para 15.2
- [13] Opposing Affidavit para 7 p 60
- [14] Supporting Affidavit. P 1 21-123 para 2.
- [15] Cash Wholesalers Ltd v Natal PharmaceuticaIs Society and the Taxing Master 1937 NPD 418@ 425.
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