

SOUTH AFRICA / JUDGMENT

Maluleke Msimang and Associates v Aphiri and Another (90695/15) [2024] ZAGPPHC 84 (31 January 2024)

[2024] ZAGPPHC 84

COURT

North Gauteng High Court, Pretoria

BEFORE

SST Kholong

CASE / FILE NUMBER

90695/15

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case: 90695/15

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

SIGNATURE

DATE: 31/01/2024

In the MATTER between:

MALULEKE

MSIMANG AND ASSOCIATES

APPLICANT

and

JOHN

TSIETSI APHIRI

1st

RESPONDENT

THE

TAXING MASTER OF THE HIGH COURT

2nd RESPONDENT

JUDGEMENT

KHOLONG AJ

Introduction

This is an opposed application in terms of which the applicant, Maluleke Msimang and Associates, a law firm duly registered in terms of the Legal Practice Act with its place of business in Pretoria, has applied for an order that the taxed bill of costs in favor of first respondent, Mr. John Tsietsi Aphiri is reviewed and set aside. Further that the execution of the writs of execution against applicant in favor of first respondent be stayed.

First respondent is Mr. John Tsietsi Aphiri, a major male person residing in Pretoria. First respondent had been practicing as an Attorney and as sole propriety with the law firm Aphiri Attorneys, at least until 2019, when he was struck from the roll of Attorneys. He is acting in this matter pro se.

The second respondent is the Taxing Master of this High Court (herein-after second respondent). The Taxing Master does not oppose the application. Applicant seeks no costs against Taxing Master.

Factual Background

The factual matrix leading to the application can be summarized as follows: Mr Aphiri (herein-after first respondent) had in the main matter which brought about this secondary application, then as an Attorney, took legal action and issued summons against applicants in this matter and various other respondents in 2015. He contended in the main matter that he was given instructions by one Ms de Klerk, a supervisor in the estate under curatorship, to submit various documents of account upon finalization of the third party claim on behalf of a deceased estate.

That he in turn needed to access information from applicants in this matter in order to comply to the foregoing and also to litigate his claim against applicants in this matter for their alleged breach of verbal agreement he had with applicants pursuant to a road accident fund claim for a deceased person.

First respondent in this matter, contended in the main matter that what led to this application was that he had entered into a verbal agreement with applicants in this matter in terms of which first respondent was to refer or hand over a third party claim he was handling and had rights on, pursuant to a contingency fee agreement he alleges to have had with the estate of a deceased person for road accident fund claim, over to respondents. They would then share the contingency fee on a 15 and 10 percent split once the matter was finalized.

Applicants deny existence of such agreement. Respondent instituted proceedings and filed various notices and motions including a motion to compel discovery in terms of rule 35(7). The relief sought in that rule 35(7) application included a request for applicants in this matter to be ordered to pay costs on an attorney and own client scale.

A court order was granted on 21 December 2017 with costs on attorney and own client scale. Notice of intention to tax bill of cost was settled by first respondents through its attorneys on 13th February 2023 and received by applicants on 24th February 2023. What follows appears to have been exchanges and alleged undertakings

between applicants and respondents, together with the taxing master. These undertakings, notwithstanding, there was set down of the bill for taxation and allocatur. What followed was execution of taxed bill against applicants by the Sheriff in Pretoria for which they now seek relief in respect of both the taxed bill and execution.

In support of their application, applicants contend that the matter was not properly set down before court. Further that:

- i) The taxation was improper in that the order was for wasted costs relating to application to compel discovery. That therefore any other costs were to be disallowed.
- ii) That first respondent presented taxed bill of costs to taxing master under the pretext that the matter had been finalized. That the taxed bill of costs presented was related to case number 2777/2010 that had been previously taxed in 2015.
- iii) That the taxing master acted ultra vires in that the taxing master erroneously taxed and allowed the bill of costs as if the whole matter was dismissed whereas it is pendente lite.
- iv) That the taxing master has recalled the bill.

13 Applicants submitted that they became aware of the taxed bill of costs on 24 February 2023. They submitted that this information was casually brought to their attention by first respondent himself even though, even though to their knowledge and on record he had an attorney of record handling this matter on his behalf. That they requested same to be served on them per letter dated 3rd March 2023.

14 At this point it is opportune to pause and note that applicants sketch the genesis of the conflict with first respondent differently from the record before Court. They contend that the conflict stems from an attempted claim by respondent for a sum not due to them of R1 014 599.13 for work first respondent did not do but was done by applicants. That this claim was taxed down to R14 813.55 for services first respondent rendered as a curator bonis in the matter prior to his alleged removal by the master of the high court. What appears common cause is that the present application stems directly from case number 90695/2015.

15 The meander of the facts in so far as the genesis of the conflict, and what it is about, is a matter for a different Court. But what is of relevance to this Court is the convergence on the facts at paragraph 17 of the founding affidavit where applicants aver that they were served with an application to compel discovery in terms of rule 35 dated 14 September 2017 on the ‘unopposed roll’. That the application was set on the unopposed roll notwithstanding the fact that they had complied to the notice on 15 December 2017.

16 That following this application, first respondents received in its favor a cost order on an attorney and own client scale against applicants. It appears the Court was satisfied that applicants were deserving of sanction for their lackluster response to the rule 35(7) notice. Applicants contend that they had prior to this matter been heard, complied with and responded to the notice. What this Court notes, however, as contended by first respondent is that this order has not and is not being challenged by applicants. It follows therefore that this Court is not asked to review the Court order itself but the taxed bill of costs as set out in the notice of motion.

17 On 22 February 2022 applicants claim they received a notice of intention to tax a bill of costs, which bill of costs is the subject matter of the litigation before this court. They contend that they opposed the bill of costs on 24 March 2022.

18 The basis of opposition was that:

- i) The action instituted by the plaintiff has not been heard in court and the court has not granted an order for costs.
- ii) That the court order attached to the bill of costs for the 21st December 2017 was in respect of the notice to compel discovery by applicants and that they had complied on 15 December 2017.

19 Applicants proceed to raise issue with various items on the bill of costs. They further raise issue with fact that respondent made out a bill for himself as if he was self-representing when in fact he had an attorney of record. Applicants nevertheless contend that it does not make sense who the bill is due to as the bill at its current state is questionable.

20 That the matter under case number 90695/2015 was not on the roll for taxation as it was not properly before court.

21 That on 6th March 2023 they requested a taxed bill of costs from first respondent’s attorneys wherein they requested to be furnished with the taxed bill of costs. A further request was made on 7th March 2023 which request was met with response of non-execution from first respondent’s attorneys. In this regard exhibit NM17 at 160 of the bundle from 1st respondent’s attorneys Victor Mabe Inc was attached as corroborating evidence. This evidence is unchallenged by first respondent.

22 Applicants further put before court their correspondence addressed to Victor Mabe Inc dated 14 March 2023 received by Victor Mabe on the same day wherein they indicated to first respondents attorneys that they have received direct communication from his client, i.e first respondent, even though they ‘..note that we have not received a formal notice of withdrawal as attorneys of record nor has one been uploaded onto caselines’.

23 At paragraph 30 of the founding affidavit they aver that this correspondence of non-execution by first respondent’s attorneys was forwarded to the registrar pointing out that undertaking by first respondent’s attorneys. Registrar responded to them to the effect that the bill of costs has been recalled because in the registrar’s view there has been ‘major mishaps’ regarding the taxation of that bill. In this regard the Court’s attention was drawn to exhibit NM21 and NM22 at page 204 and 205 of the Court’s bundle.

24 In this correspondence Applicants write to the taxing master informing her that the Sheriff had been to their offices to serve a writ of execution. That they indicated to the sheriff that the bill had been recalled and that the ‘sheriff understood the situation’ and advised that a non-service return will be made.

25 In this correspondence they restate to the taxing master that on 7 March 2023 the taxed bill of 13 February 2023 was recalled and that the taxing master instructed Mr Mabe of Mabe Incorporated Attorneys and first respondent’s attorney of record, to return the original documents to the Court. That despite the Court’s instruction the original bill of costs was handed to Mr Aphiri, first respondent who proceeded to issue the writ of execution pro se on 13 March 2023. They then state that the Sheriff is now in possession of the original bill of costs and requested of the taxing master to instruct the sheriff to return the original documents to the Court. That the Sheriff had also requested same instruction from the taxing master. The sheriff is copied in this correspondence.

26 The taxing master responds per correspondence dated 24 March 2023 to applicants confirming that indeed she recalled the bill on 7 March 2023. That respondent’s attorneys, Mabe Inc confirmed in writing that he would stay the execution of the bill. The Registrar in the same correspondence copied to the sheriff stated that “..I once again request, from the Sheriff (Mr Karabo Machete) to return the said bill to myself as this bill is null and void’. The substance of this evidence is not challenged by first respondent save to raise as a point in limine whether the master can recall its bill of costs without a Court order.

27 Applicants thus submit to this Court that On 24th March 23 they were served with a writ of execution by the sheriff which they seek this court to stay. They contend that the writ was served on them notwithstanding that the correspondence between first respondent’s then attorneys, the second respondent, the taxing master had an understanding for the reasons set out above that the bill must not be enforced.

28 That despite seeking amicable resolution first respondent has blatantly disregarded second respondent's recall of the bill in question and amicable resolution. He continues to insist that the bill be enforced.

Points in Limine raised by first respondent

29 In its answering affidavit first respondent does not offer this Court any explanation to rebut the evidence presented by applicants before this Court save to raise technical points in limine which this Court will now consider below.

30 At paragraph 4.1 of the answering affidavit, first respondent avers that the application has no averments that applicant has resolved to institute application proceedings against respondents. Further at paragraph 4.2 that Ms Nomthandazo Msimang has failed to produce proof that she is authorized to depose of the affidavit on behalf of applicant.

31 This argument was also advanced in argument before this Court. Applicants in their answer drew this Court's attention to an exhibit reflecting a resolution by the law firm, and applicants in this matter authorizing Ms Nomthandazo Msimang to prosecute this matter in this Court. Counsel for applicants further drew this court's attention to various correspondences in evidence before this Court reflecting that Ms Msimang is the attorney assigned and authorized to deal with this matter on behalf of applicants with various external parties including the officials in the taxing master's office; the sheriff and first respondent's attorneys. This Court accepts this evidence.

32 The Court is therefore satisfied that applicants have proven on balance that Ms Msimang has authority to deal with this matter before Court. In the result this Court finds in favor of applicants and dismisses the first respondent's objection on this point.

Non-Compliance with various rules of this Court

33 At paragraph 4.3 of its answer respondents raises a point that applicant has failed to comply with rule 7 and rule 14 of the Uniform Rules in respect of power of attorney and failed to supply the first respondent with particulars as to the full name and residential address of the proprietor or each partner as the case may be.

34 Respondents in reply contend that this objection is meritless and irrelevant given that they are a law firm and applicants in this matter; they sue as such and the question of power of attorney seen against the resolution taken by directors of the firm as dealt with above to prosecute this matter before this Court makes this objection superfluous. This resolution as aforesaid is accepted into evidence.

35 This Court recalls that rule 14(2) allows a partnership, a firm or an association to sue as on the facts of this case in its own name. Reference to rule 14(5) does not take first respondent's defence any further as set out in *Demeillon v Montclair Society of the Methodist Church of Southern Africa*[1] that this rule is there to simplify the method of citation by enabling a body of persons to be sued in the name which it normally bears and which is descriptive of it. In its papers first

respondent besides making a bare reference to rule 14 non-compliance, does not make out a case outlining in what respect is the citations bad in law or may cause prejudice to any of the parties if not addressed prior to determination by this Court of the validity of the taxed bill of costs. Further, various applications and actions before this Court and on record have parties cited as reflected in the notice of motion. This Court thus finds, in the interest of justice, that this objection is meritless for purposes of determining this specific dispute.

36 At paragraph 4.4 of its answer respondent raises the point that the 15 days period has elapsed after the allocatur and that the applicant had not applied for condonation. In reply applicants contend that the fact that the Taxing Master has recalled the bill of costs makes this point a mute point before this Court. First respondent contended that 2nd respondent has no power to recall the bill, this without any reference to authority. This Court is thus called to determine whether the taxing master has the authority or discretion to recall a taxed bill.

37 This Court recalls that at paragraph 4.5 and 4.6 of its answer first respondents further raises bare objections without substantiation on how or in what respect does the application for review not comply with rule 48(2) and (3).

38 Respondents' objection in paragraphs 4.4; 4.5 and 4.6 can thus be summarized as applicant's alleged non-compliance with rule 48. That the notice of motion does not comply with rule 6(5). Again this objection is not motivated for this Court to determine how this bare averment removes the legs upon which applicants' case is built as a matter of law.

39 Notwithstanding the shortcomings presented by respondent's pleadings, this Court elects in the interest of justice to examine the relevant provisions in rules complained of by first respondent. The Court notes that rule 48 review of taxation provision reads:

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".

40 Cursory reading of this rule relates to circumstances where the taxing master has disallowed an item or part of an item on the taxed bill. Rule 48(1) cannot be read to apply to circumstances where the taxing master notes an error or irregularity that has a bearing on the validity of the bill of costs as a whole; recalls such bill and declares it null and void. The evidence is that applicants became aware of the taxed bill of costs, noted what it termed irregularities and the challenges that presented in terms of validity and brought this fact to the taxing master's attention. The taxing master upon this irregularity been brought to its attention recalled the bill and declared it null and void. Rule 48(1) provisions cannot therefore be found to be relevant as there was no valid taxed bill in as far as the taxing master was concerned to which applicants could in line with provisions of rule 48 object

as provided therein.

41 In its commentary on rule 48(1) Superior Court Practice, ErasmusT notes that rule 48(1) reference to “ any item or part of an item which was objected to or disallowed mero motu ” under this rule means that a review of taxation under this rule is limited to those cases where there was an objection and those where the taxing master disallows an item mero motu. This Court finds resonance with the exposition of this principle.

42 Evidently on the facts of this case the taxing master of its own volition and upon realization of its error, recalls the entire taxed bill as a whole after applicants had enquired to it about the case and case number on the basis of which an allocatur was made and whether the allocator was made under the right case referenced number 90695/2015 or a different case; whether case number 90695/2015 was on its roll for taxation on the date in question or a different case; and whether the items allowed were for this case 90695/2015 or a different case. Evidently the taxing master found that there were merits in the query brought to her attention.

43 Clearly having regard to the exchange of correspondences between applicants; the sheriff and the taxing master, which respondents did not rebut, and has been accepted into evidence, the taxing master noted the error it had made in allowing the bill of cost as the matter under case number 90695/2015 was not on its roll on the date set for taxation. This despite many other errors or irregularities identified by applicants and brought into evidence including taxed items allowed that had nothing to do with case number 90695/2015 order to compel discovery.

44 This Court therefore finds that the attack of the applicants case on the basis of non-compliance with rule 48(1);(2) and (3) and resultant procedures that first respondent contends were not followed in terms of rules 6(5) cannot succeed as the taxed bill had been recalled and declared null and void by the taxing master.

45 At paragraph 5.1 of founding affidavit first respondent raises as a point in limine a bare objection that the costs order that the applicant shall pay the costs on a scale between attorney and own client has not been set aside or legally challenged. This Court finds with applicants that this objection is meritless and in this Court’s view, irrelevant as the application does not seek to review the Court order but the taxed bill of costs by the taxing master as set out in the notice of motion.

46 At paragraph 5.2 of its affidavit first respondent avers that applicant approaches this court with dirty hands after being in contempt of Court by preventing the sheriff of the High Court from executing on a writ of execution. First respondents do not make out a case before this Court outlining how and in what respect are applicants in contempt of Court and how they prevented the sheriff from executing on a writ of execution. The evidence before this Court is that they explained to the sheriff the facts of this matter and the sheriff indulged them.

47 As already dealt with above, the evidence before this Court is that the taxing Master has recalled its taxed bill of costs. This recall was confirmed in evidence before this Court and communicated to the sheriff. This argument by first respondent is therefore without merit.

Legal Framework

48 This therefore leaves the question of considering the discretion of the taxing master.

49 The general principle on the question of the discretion of the taxing master is layed out in Visser v Gubb[2] the Court noted the following

“ rule 70(3) clearly confers a discretion on the taxing master to award such costs ‘as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party’. 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 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 the opinion that the taxing master was clearly wrong but it will do so only if it is in the same position or better position than the taxing master to determine the point in issue’.

50 Rule 70(3) reads 70(3) ” 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...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’.

51 Zulman J in Baars v Near East Rand Darts Association and Others[3] noted that the taxing master has wide discretion in regard to matters relating to the taxation of bills of costs and that in reviewing the ruling of the taxing master a Court will not lightly disturb the discretion which he has unless it has been exercised improperly or he has not brought his mind to bear on the question in issue. At 173F the Court held that there is nothing in the Rule which draws distinction between application proceedings and other proceedings. This Court thus finds that the taxing master does have discretion to recall an irregular bill erroneously taxed and that she had properly brought her mind to bear on the facts of this case and exercised her discretion properly.

Conclusion

52 In the result I find that the wide discretion available to the taxing master to allow or disallow taxation of items on the bill or part of the item on the bill as envisaged in rule 70(3) is also available to him to allow or disallow or recall an entire bill of costs, ex post facto, when he realizes an irregularity in the taxed bill of costs in the interest of justice.

53 On the facts of this case the taxing master in this Court's view acted judicially when she recalled the taxed bill of costs upon realizing that the bill, erroneously allowed in the absence of applicants, would result in an injustice.

54 The bill which is now before this Court has over 193 cost items beginning 16 July 2015. This Court finds merit in applicant's objection to the taxed bill and taxing master's recall thereof. From item 1 to approximately item 155 there are cost items charged and erroneously or irregularly allowed that had nothing to do with first respondent's application to compel discovery

as envisaged in rule 35. There are costs amongst many others such as peruse certificate of executor (item 10); draft particulars of claim (item (34); draw amended particulars of claim at 23 pages (item 100) that have nothing to do with the cost order as it relates specifically to application to compel discovery for which respondent had received cost order in its favor. Leaving such travesty uncorrected the taxing master would have lended herself to a miscarriage of justice to applicant's prejudice.

55 This Court therefore finds that applicants have made out a case for this Court to review and set aside the taxed bill of costs under case number 90695/2015 dated 13th February 2023 and for the writs of executorship issued by first respondent under case number 90685/2015 out of this Court against

applicant in favor of first respondent to be stayed.

Costs

56 On the issue of costs, applicants had requested costs on an attorney and own client scale. This Court does not find basis for such punitive cost order as first respondent is entitled within legal bounds to lawfully claim its costs. Attorney and client scale as observed in *Plastics Convertors Association of SA obo Members v National Union of Metalworkers of SA and Others*[4] is an extraordinary scale reserved for exceptional circumstances where litigant conducted themselves reprehensibly and their conduct

warrants sanction. These exceptional circumstances are not found to obtain herein. It is also not lost to this Court that the genesis of this current matter is the alleged non-compliance of applicants themselves which led to the order to compel discovery. The Court

finds that first respondent shall pay the costs of this application, including the costs of Counsel. The application is thus granted in favor of the applicants with costs.

Order

57 Having heard Counsel for the Applicants and for the First respondent acting pro se, and having read the notice of motion and other documents file of record

IT IS ORDERED THAT:

1. The taxed bill of costs under case number 90695/2015 dated 13 February 2023 is reviewed and set aside.
2. The execution of the writs of execution issued by the first respondent under case number 90685/2015 out of this Court against applicant in favor of first respondent is stayed.
3. Respondent to pay the costs of this application, including the costs of Counsel.

SST KHOLONG

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG DIVISION,

PRETORIA

Appearances:

For the Applicant: Adv. K. Letswalo Instructed by Maluleke Msimang and Associates For the Respondent: John Tsietsi Aphiri Acting Pro se Date Heard: 22 January 2024 Date Judgement delivered: 31 January 2024

[1] 1979

(3) SA 1365 D at 1369D

[2] 1981

(3) SA 753 (c) at 754H

[3] 1993(3) SA 171 (WLD) at 172I

[4] 2016 37 ILJ 2815 (LAC).

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Prepared on 11 October 2026 · Esheria