

SOUTH AFRICA / JUDGMENT

Masawe v Road Accident Fund (12820/04) [2010] ZAKZDHC 18 (1 June 2010)

[2010] ZAKZDHC 18**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Ndlovu

CASE / FILE NUMBER

12820/04

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REPORTABLE**IN THE KWAZULU NATAL HIGH COURT, DURBAN****REPUBLIC OF SOUTH AFRICA CASE NO. 12820/04****In the matter between:****MSEBENZI MICHAEL MASAWA PLAINTIFF****and****ROAD ACCIDENT FUND DEFENDANT****REVIEW OF TAXATION****Delivered :****NDLOVU J**

[1] This is a review of taxation launched in terms of Rule 48(1) consequent upon the taxing mistress of this Court having disallowed certain items in the plaintiff's party and party bill of costs after an objection was raised during the taxation by the defendant's

attorney with regard to those items. The items in question related to the claim for fees charged by counsel in respect of perusal and consultation. Counsel had been involved on behalf of the plaintiff in the action in the capacity of a curator ad litem duly appointed by the Court.

[2] The defendant's attorney had raised the objection on the basis that the curator ad litem was not entitled to charge fees for "consultations" and "perusal of documents" at the advocate's rate. He argued that a curator ad litem essentially replaced the plaintiff in an action and that since the plaintiff would not have been allowed to charge for such costs and expenses, the curator ad litem should equally not be entitled to do so. The taxing mistress agreed. On the other hand, the attorney for the plaintiff held a different view hence he launched this review.

[3] In her stated case in terms of Rule 48(3) the taxing mistress stated:

"At taxation the amounts claimed for perusal of documents and consultations by the curator ad litem were disallowed. The taxing master disallowed these charges in agreement with the opposition. Further the application for the

appointment of the curator ad litem granted costs for such appointment (court order dated 02/12/2005). These are costs of that application and not the action."

[4] The Court order dated 2 December 2005 referred to by the taxing mistress read as follows:

"1. That ADVOCATE BC WANLESS be re-appointed as curator-ad-litem and be granted the powers to make any statutory demand, settle or compromise any claim, institute action against and to take all such steps as may be necessary for the due prosecution of any action against the Road Accident Fund and that he be given the power to apply for the appointment of the curator bonis should the proposed action succeed and should it become necessary.

2. That all the steps taken in the action so far on behalf of Michael be and are hereby ratified.

3. That the costs of this application be costs paid by the defendant."

[5] It appeared therefore that there were two grounds why the claims for the curator ad litem's fees were disallowed, namely:

The taxing mistress agreed with the defendant's attorney that an advocate who was appointed by the Court as curator ad litem on behalf of a plaintiff in an action was not entitled to charge counsel's fees (at the advocate's tariff) since by acting in the capacity of curator ad litem he or she thereby assumed the position of the plaintiff who, if he or she (the plaintiff) had represented himself or herself in the action, would not have been entitled to claim for such costs.

2. The costs awarded in terms of the Court order dated 2 December 2005 related only to the application for the appointment of the curator ad litem and not to the action.

[6] It was significant that in her stated case the taxing mistress referred only to the Court order dated 2 December 2005 in relation to the costs award. However, another Court order dated 18 August 2006 was also in the Court file whereby, among other things, the following order for costs was made:

“4. That the costs of the application for the appointment of the curator ad litem and the costs relating to the exercise of his powers shall be paid by the respondent.”

- [7] When the costs award incorporated in the Court order of 18 August 2006 was brought to the attention of the taxing mistress for her comment (in terms of Rule 48(6)(a)(ii)) her response was that the said Court order was also in respect of the application for the appointment of the curator ad litem. Pertinently the taxing mistress commented as follows:

“2. The order (dated 18 August 2006) and paragraph 4 refer to the costs relating to the ‘exercise of his powers’. Rule 57(5) sets out the responsibilities of the curator ad litem once appointed. The items that were disallowed are not part of the curator ad litem’s responsibilities as envisaged in this rule.

The taxing master is of the view that the curator ad litem’s costs for considering settlement are attorney and client as he replaces the client. Alternatively the costs should have been

quantified and included in the award for damages as held in *Reyneke NO v Mutual & Federal Insurance Company Ltd* 1992

(2) SA 417(G).”

- [8] The first question which arose therefore was whether an advocate who was appointed by the Court to appear on behalf of a party in a litigation was, on account of such appointment, deprived of any entitlement to charge and claim fees for the services rendered by him or her at the prescribed advocate’s tariff. In my view, counsel was entitled to the fees. This was not an instance where counsel appeared pro bono or as amicus curiae, both of which are known to be voluntary free service. The fact that the curator ad litem “replaced the plaintiff in the action” did not, in my view, take away from the curator ad litem his or her legal professional representative status in the matter. In that capacity counsel only acted as plaintiff in a technical sense or official capacity (nominee officii). Counsel did not, by virtue of his or her appointment as curator, become the plaintiff in the real sense of the word.
- [9] In my view *Reyneke’s* case (referred to by the taxing mistress, above) was distinguishable in that, firstly, the Court in that case dealt with the application for the appointment of a curator bonis – the appointment of a curator ad litem having been dispensed with on the ground that it was pointless to consider it due to the “vegetative” state of the claimant patient – and not a review of taxation with which I am dealing in the present case. Secondly, the very fact that the issue in *Reyneke* involved a curator bonis and not a curator ad litem, distinguished the two cases.
- [10] As stated, I am not here required to determine the issue of the appointment of the curator ad litem and the costs incidental to the appointment and consequential upon the performance of his or her duties. I am required to review the decision of the taxing mistress in disallowing in the plaintiff’s bill of costs, the curator ad litem’s account charged at the advocate’s tariff. Indeed, Rule 70(3) conferred a discretion on the taxing master or mistress to “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, ...”. (See also

Visser v Gubb 1981 (3) SA 753 (C)). In Visser the Court went on and set out the guidelines to be followed or considered in a review of taxation, thus:

“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 properly 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 opinion that the Taxing Master was clearly wrong but it will only do so if it is in the same position as, or a better position than, the Taxing Master to determine the point in issue (see Bertish v Standard Bank of SA Ltd 1956

(4) SA 9 (C); Legal and General Assurance Society Ltd v Lieberum NO and Another 1968 (1) SA 473 (A) at 477H-478H; Chemical Formulators and Consultants (Pty) Ltd v Detsave Chemicals (Pty) Ltd and Others 1976 (1) SA 638 (W) at 639E-G; Le Chasseur Boere (Edms) Bpk v Maine Chance Farms (Pty) Ltd 1978

(3) SA 358 (C) at 359G-360A). The Court must be of the view that the Taxing Master was clearly wrong, ie its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal (see Noel Lancaster Sands (Pty) Ltd v Theron and Others 1975 (2) SA 280 (T); Chemical Formulators case supra at 639F; Legal and General Assurance Society Ltd v Lieberum NO and Another (supra at 478G-H)”, (at 754H-755C).

[11] In my view, notwithstanding that the curator ad litem is deemed to replace the plaintiff in an action, the performance of the functions of a curator ad litem still amounts to rendering professional service for which the curator ad litem is entitled to be paid. The person acting as curator ad litem is a professional person, specifically appointed by reason thereof to act in the stead of an incapacitated plaintiff, by employing his or her professional skills, experience and judgment for the benefit of the plaintiff. Indeed, it is not without significance that the learned Judge in Reyneke (supra) stated incidentally, in part:

“As stated by me, the words ‘rendering of a service’ are wide enough to cover the costs of the curatrix bonis.” (at 421E).

There is, to my mind, simply no reason why this construction should not also be applied to the rendering of a service by a curator ad litem.

[12] As to the quantum of fees the curator ad litem was entitled to, that was a separate issue. It was an issue which, in this case, the taxing mistress did not even consider after making an absolute ruling that the curator ad litem was not entitled to be paid at all for the items in question. I will revert to the issue of quantum later on in this judgment.

[13] The next question was whether it could be said that the Court order dated 18 August 2006 dealt only with the costs of the application for the appointment of the curator ad litem, as the taxing mistress appeared to suggest. To my mind, that was clearly not the position. Paragraph 4 of the order did not only deal with the costs of the application for the

appointment of the curator ad litem, but it went further and referred to “the costs relating to the exercise of his (the curator ad litem’s) powers” as such. All these costs were ordered to be paid by the defendant. The said powers included “to make any statutory demand, settle or compromise any claim, institute action against and to take all such steps as may be necessary for the due prosecution of any action against the Road Accident Fund and that he be given the power to apply for the appointment of a curator bonis should the proposed action succeed and should it become necessary” (paragraph 1 of Court Order dated 2/12/2005). Indeed, these powers did not derogate from, nor were they inconsistent with, the general statutory powers and functions of a curator ad litem as envisaged in Rule 57(5), which the curator ad litem in the present case was after all entitled to exercise and perform.

[14] In order to exercise his powers, perform his functions and/or carry out his duties in terms of Rule 57(5) generally and in terms of the Court order aforesaid specifically, the curator ad litem was, in my view, duty bound to peruse certain relevant documentation and conduct certain relevant consultations in relation to the fulfilment of his mandate. In doing so the curator ad litem rendered a professional service and thereby incurred costs for which he was liable to be paid by the defendant and as duly authorised by the Court order of 18 August 2006.

[15] Unlike in the instance of future fees and charges of a curator bonis appointed, for instance, to administer the estate or affairs of an incapacitated person currently and in the future, in respect of which instance the quantification of such costs was virtually impossible, the case of a curator ad litem was different because his or her appointment was confined to a particular court proceeding and thus for a fixed or determinable

duration. (Compare: Reyneke, *supra*, at 420E-F.) The appointment of a curator ad litem terminated with the conclusion of the litigation in question and the fees charged for the services so rendered are part and parcel of the legal costs of the action. These costs were quantifiable at the conclusion of the litigation.

[16] The practice of this Division is that counsel who is appointed as curator ad litem and serves as such becomes entitled to payment for his or her services and such payment is determined on the same basis as legal costs for the purpose of taxation. Indeed, in the cases such as the present it could not be said, in my view, that the acceptance by counsel of appointment as curator ad litem amounted to acceptance of a “pauper brief” obliging counsel to be content with whatever fees were allowed to him or her even where the said fees were grossly inadequate, unreasonable and unfair in the circumstances of a given case. (Compare: Costs in Estates Cases 1943 CPD 293.)

[17] Apart from the purpose as envisaged in Rule 70(3) it is clear that the system of the appointment of a curator ad litem also served, to an important extent, the Constitutional purpose of ensuring that access to justice and the courts is provided to those with legal incapacities, the majority of whom, incidentally, happens to come from the poor and vulnerable strata of our society (section 34 of the Constitution, Act 108 of 1996). It is

therefore a measure worth promoting and commending for the general good of, in particular, our social justice system, in line with our constitutional democracy.

- [18] Having considered the matter, I am of the view that the taxing mistress' decision to disallow entirely the items on the bill complained of was wrong and that, therefore, the decision falls to be reviewed and set aside. The next question is then one of fairness and reasonableness, or otherwise, of the quantum of fees charged. I indicated earlier that the taxing mistress did not consider this issue at all, which was of course not necessary after she had held that the curator ad litem was absolutely not entitled to the claim concerned.
- [19] It seems to me, in the circumstances, that this matter should be remitted to the taxing mistress to consider, in the light of this judgment, the aspect of the fairness and reasonableness, or otherwise, of the fees charged by the curator ad litem. These relate to the items that were the subject matter of the dispute, namely items 259 and 260, for the amounts of R2 850,00 and R570,00 respectively. In so doing the taxing mistress will of course take into account, among other things, the seniority and experience of the advocate concerned, the time reasonably spent and the complexity of the matter. Given the delay in the finalisation of this matter, the taxing mistress is requested now to give the matter urgent attention, in order to bring it to finality.
- [20] In the event, the following order is made:
1. The decision of the taxing mistress, whereby she disallowed items 259 and 260 of the plaintiff's bill of costs, is hereby reviewed and set aside.
 2. The matter is remitted to the taxing mistress to deal with the aspect of quantum in respect of the said items in the light of this judgment and to do so as a matter of urgency.
 3. There shall be no order as to costs of review.
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