

SOUTH AFRICA / JUDGMENT

Ndlambe Municipality v Lester and Another (3750/2015) [2016] ZAECHGHC 87 (8 September 2016) [2016] ZAECHGHC 87

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Tilana-Mabece, C Plasket

CASE / FILE NUMBER

3750/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE HIGH COURT, GRAHAMSTOWN)

CASE

NO: 3750/2015

Date

heard: 11/8/16

Date

delivered: 8/9/16

Not

reportable

In the matter between:

NDLAMBE

MUNICIPALITY Applicant

and

MATTHEW ROBERT MICHAEL

LESTER 1st

Respondent

THE SENIOR REGISTRAR OF THE ABOVE

HONOURABLE

COURT 2nd

Respondent

JUDGMENT

MABECE AJ

Introduction

- [1] This is an application to have the decision of the 2nd Respondent to disallow the bill of costs, submitted for taxation by attorneys of the Applicant, reviewed and set aside.

Facts

- [2] The parties have been involved in a protracted legal battle which finally culminated in two applications brought by the 1st Respondent being settled at the doors of the Court and the 1st Respondent agreeing to pay costs of the Applicant on an attorney and client scale. This agreement was made an order by Eksteen J.
- [3] As part of recovering its costs the Applicant submitted its bill of costs, as prepared by its tax consultant, for taxation by the 2nd Respondent. The 1st Respondent opposed the taxation and objected to the bill in its entirety raising the following grounds of objection:-
- [a] That the applicant's attorneys, Wheeldon, Rushmere and Cole, did not have the requisite mandate to act on behalf of the applicant;
- [b] the bill was drawn on a basis that did not correspond with the tariff prescribed in terms of Rule 70 of the Uniform Rules;
- [c] Ndlambe had failed and/or refused to provide a copy of the agreement giving rise to the rates pursuant to which the bill was drawn; and
- [d] the bill fell to be taxed in accordance with the tariff.
- [4] At the taxation the 2nd Respondent found in favour of the 1st Respondent and ruled that Applicant should prepare its bill using the tariff as a guide. I shall set out his reasons in detail below.

The

Issues

- [5] In essence the 1st Respondent raised two issues of objection during the taxation. Firstly he objected to the bill on the basis that Wheeldon, Rushmere and Cole did not have the requisite mandate to act on behalf of the applicant. The 2nd Respondent dealt with the matter and rejected the 1st Respondent's objection on the ground that the purpose of taxation is to quantify liability and not determine liability. The

regularity of the 2nd Respondent's decision relating thereto is not before the court. Not having been challenged by way of review, it stands – and need concern us no further.

- [6] The second objection related to the rate used in the drafting of the bill, which the 2nd respondent upheld. This is the decision that the applicant seeks to review and set aside. The court has to decide whether the 2nd respondent in the exercise of his discretion misdirected himself in deciding that the bill of costs presented to him for taxation ought to have been drafted using the tariff in terms of Rule 70 as a guide.

The law

- [7] Rule 70 (1) (a) sets out the basis for the taxation of a bill by a Taxing Master and provides as follows:

“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 such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the Taxing Master shall not tax costs in instances where some other officer is empowered so to do”.

- [8] Rule 70 (5) (a) states that:

“The Taxing Master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable”.

- [9] The basic principles underlying the taxation of attorney and client bills of costs were considered by the Appellate Division in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 608. The court held that where a litigant is ordered to pay the other party's costs as between attorney and client, the Taxing Master should apply a stricter taxation than he would when taxing a bill as between an attorney and his client. It was further stated that the purpose of an order that costs be paid on the scale as between attorney and client is for the court to ensure, more effectively than it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of expenses caused to him by the litigation.
- [10] However, this does not mean that exceptional costs and charges in the nature of luxuries incurred with the approval of the client, such as unusually high counsel's fees authorised by the client, can be recovered from the losing party. The court held that “when the bill is taxed against the losing party it is essential to apply a stricter taxation to prevent injustice to the latter as a result of the award of attorney and client costs against him”. The test and standard to be applied by the Taxing Master in such a case, i.e. where an award of attorney and client costs is made against a losing party, was referred to as an “intermediate basis of taxation”.
- [11] The intermediate basis of taxation was applied in this court in *Loots v Loots* 1974 (1) SA 431 (E). Eksteen J cited with approval Curlewis J's conclusion in *Gross v Svirsky* 1923 TPD 422 at 425 that it was not correct that “because a bill of costs is one between attorney and client,

the fees allowed should be more liberal; that they should be on a higher scale merely because it happens to be a bill between attorney and client and not between party and party". Eksteen J then made the point that the effect of an attorney and client costs order to be paid by one party to another may amount to "little more than a taxation between party and party" (at 434A-C). The court then stated (at 434E-H) that it was apparent from the authorities cited by it that, in applying the intermediate basis of taxation:

"the Taxing Master is bound to apply, or at least to be guided fairly rigidly, by, the scale of fees provided in the tariff, and only to depart from them when in his discretion extraordinary or exceptional cases present themselves where strict adherence would be inequitable".

[12] The issue was, more recently, exhaustively canvassed by Stegmann J in *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004

(1) SA 123 (W). After a discussion of various cases, including *Nel and Loots*, he held (at para 76):

"Inasmuch as Eksteen J applied the principles of Nel, Loots is in my respectful view further authority for the propositions that:

1. When a bill drawn as between attorney and client is to be taxed, the basis of taxation varies according to whether the costs debtor who must pay the bill is the attorney's own client or the opposing party. A stricter basis of taxation applies when the opposing party must pay ('inter-party attorney and client taxation') than when the attorney's own client must pay ('pure attorney and client taxation'). This is to avoid injustice to the opposing party. This stricter (inter-party attorney and client) basis of taxation is referred to as an 'intermediate' basis because, though 'stricter' (ie less generous to the costs creditor) than the taxation of a bill to be paid by a client to his own attorney, it is nevertheless in principle more generous (to the costs creditor) than the party and party taxation of a bill to be paid by a costs debtor, in the ordinary way - a taxation that must adhere strictly to the tariff in Rule 70 (unless the case is one contemplated by Rule 70(5)(a), so that the Taxing Master may, in his discretion, depart from the tariff).
2. The 'intermediate' (inter-party attorney and client) basis of taxation applies whether the costs debtor has been ordered to pay attorney and client costs, or whether he has merely agreed to do so (cf *Loots* (above at 433H); and *Markman v Richardson* 1969 (3) SA 465 (E) at 467C - D).
3. The 'intermediate' basis of taxation does not justify departures from the tariff in Rule 70 except, in terms of subrule (5)(a) 'in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable'.

4. The mere fact that one party ('the costs debtor') has agreed to pay the costs of another ('the costs creditor') taxed as between attorney and client does not necessarily constitute an 'extraordinary or exceptional' case within the meaning of that phrase in Rule 70(5)(a); nor does the fact that a law association of local attorneys has agreed amongst themselves upon a tariff higher than that contemplated by Rule 70."

[13] At paragraph 85, Stegmann J concluded:

"On a taxation as between attorney and client, irrespective of whether it is an attorney's own client, or the opposing party, who may be obliged to pay the amount taxed, more is required than the mere fact that it is a taxation as between attorney and client before a departure from the tariff is justified. Rule 70(5)(a) determines what more is required. The Taxing Master is bound to apply the tariff in any taxation as between attorney and client unless, in the exercise of his discretion in terms of Rule 70(5)(a), he comes to the conclusion that the case is 'extraordinary or exceptional' within the meaning of that subrule, and that it would be inequitable to adhere strictly to the tariff."

Conclusion

[14] Before turning to the Taxing Master's reasons for his decision, it is necessary to set out the grounds upon which a taxing master's decision may be reviewed. The starting point is the perhaps obvious point that the court is dealing with a review, and not an appeal: that means that the court must accept that the legislation has vested a discretion in the Taxing Master and the question is not whether he was correct or incorrect in his decision, but whether his decision was regular or irregular. The grounds or interference with a taxing master's decision were set out succinctly in *Preller v Jordaan and Another* 1957 (3) SA 201 (O) at 203C-E as follows:

"Since the discretion is vested in the Taxing Master, the reviewing Court will not interfere with his decision unless it is found that he 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 man would have given."

- [15] The Taxing Master furnished reasons for his decision. In his statement of reasons, he said that the Applicant's bill of costs was drafted on the basis of the terms of an agreement that it had entered into with its attorney and that this agreement entitled the attorney "to a rate that is almost double the tariff appended to Rule 70 of the Superior Court Rules of Practice".
- [16] In respect of the objection to the rate at which services were charged, the Taxing Master recorded that it was the Applicant's

argument before him – as it had been before this court – that the attorney and client costs order in its favour entitled it recover from the 1st Respondent what its attorney would have been entitled to recover from it in terms of the agreement. The Taxing Master stated that he “disagreed with this submission and ruled that the [Applicant] could recover its costs within the bounds of reasonableness in terms of Rule 70(5) of the Superior Court Rules of Practice”. He then explained what this meant:

“That means full indemnity for the costs to which the litigation has put the [Applicant], except for luxurious, extravagant, unnecessary and other type of unreasonable expense that it would be an injustice to impose upon the [1st Respondent]. The Appellate Division (as it then was) termed this an intermediate scale – Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597. This authority was relied on by Eksteen J in the matter of Loots v Loots 1974 (1) SA 431 (E). The agreed rate between the Municipal Manager on behalf of the [Applicant] and its attorney is extravagant, possibly based on the [Applicant’s] big pockets. None of the parties to this agreement appears to have had regard to the fact that the Municipal Manager is entrusted with public funds. It would be unjust to expect the [1st Respondent] to pay for this unreasonable expense. It would even be difficult for the attorney of the [Applicant] to justify recovery of these costs against his clients because public funds are involved.”

- [17] The Taxing Master concluded by stating that, based on Nel and Loots, his decision was that the Applicant “should draw its bill using as a guide the tariff appended to Rule 70 of the Superior Courts Rules of Practice”.
- [18] The Taxing Master thus found that the bill of costs was drafted from the wrong premise, namely that the 1st Respondent could be made to pay the amount that the Applicant was liable to pay its own attorneys in terms of their agreement; that it was not drafted in accordance with the tariff and that it was unreasonable because it was based on a rate that was more than twice the tariff; and that, being a bill of costs to be taxed on the intermediate basis, it should be drafted using the tariff as a guide.
- [19] In my opinion, the Taxing Master’s reasoning cannot be faulted. It is consistent with Nel, Loots and Aircraft Completions Centre.
- [20] I therefore come to the conclusion that the Taxing Master did not misdirect himself when he decided that the Applicant should redraft its bill using as a guide the tariff appended to Rule 70 of the Superior Courts Rules of Practice. The Applicant has failed to establish a proper basis for the court to interfere with the decision of the Taxing Master in the exercise of his discretion. In the result, the application to have the decision of the Taxing Master reviewed and set aside cannot succeed.

Order

- [21] The application is dismissed with costs.

S TILANA-MABECE

JUDGE OF THE HIGH COURT (ACTING)

I agree.

C PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: I Smuts SC instructed by Wheeldon, Rushmere and Cole

For the 1st Respondent: D Hodge instructed by Netteltons

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