

SOUTH AFRICA / JUDGMENT

Nteshe v Christiaan (243/2019)

[2021] ZAFSHC 30 (18 February 2021)

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COURT

Free State High Court, Bloemfontein

BEFORE

M A Mathebula

CASE / FILE NUMBER

243/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Review number: 243/2019

In the matter between:

SMANGA SIMON NTESHE

Applicant/Defendant

and

MAVIS CHRISTIAAN

Respondent/Plaintiff

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 18 February 2021. The date and time for hand-down is deemed to be 18 February 2021 at 11:30

[1] The matter before me is an application under rule 48 of the Uniform Rules of Court for a review of taxation. This matter was brought by the applicant who was ordered to pay the costs. The respondent had approached court seeking relief in terms of rule 28 and 35 of the Court. The dispute relates to the consultation with counsel prior to issuing a notice of intention to amend. It is common cause that the two (2) applications were argued on the same day, before the same Judge by the same counsel. The main contention relates solely to the fees charged by counsel for appearance to argue the two (2)

applications. These are item number 3 and 26 of the Bill of Costs.

- [2] On the first point it is contended that the particulars of the consultation are not reflected on the counsel's account. On the main point, the submission of the applicant is that the applications were argued simultaneously as per direction of the court. It was pointed out that given the circumstances, the fee charged by counsel gives the impression that he attended court on two (2) separate occasions to argue the two (2) applications. Accordingly, the fees cannot be entirely allowed by the Taxing Mistress.
- [3] In response, the respondent submitted that a file note was presented indicating that a consultation took place as recorded in the bill of costs. In any event, the attorney, so the argument goes, is entitled to consult with counsel in preparation before drafting any application. Therefore, the amount cannot be said to be exorbitant or unjustified. Turning to the order of Daffue ADJP (as he then was) it was argued that the applicant was ordered to pay the costs in respect of both applications and it is not said that the successful party is entitled to only a receptive portion of said costs.[1]
- [4] In her stated case, the Taxing Mistress submitted that she allowed item 3 when she was shown the consultation notes confirming it. Convinced that all was in order, she deemed the consultation fee to be reasonable and allowed it. Turning to the main contended item, she stated that her decision was based on consideration of the following factors viz:- the costs incurred are reasonable, nature of the matter, amount of time spent on such matter, seriousness of the case(s) and seniority of counsel. On these bases she concluded that the daily fee was "extremely reasonable". The charged fee was already discounted and there was no reason to disallow any further amount.
- [5] It is trite law that the Taxing Mistress has a discretion that must be exercised judicially to allow or disallow or reduce any item(s) of a bill of cost. In the exercise of the discretion she must do so in the manner that is fair and reasonable in order to achieve the purpose of the costs order. That purpose is to ensure that the successful party is adequately indemnified. The court does not have a free hand to interfere with the exercise of her discretion. Such will be warranted if the court is of the view that she did not exercise her discretion judicially or properly.[2]
- [6] This brings me to the consideration whether the Taxing Mistress exercised her discretion properly in allowing one or both of the disputed items. The application for amendment that the respondent sought to effect was nothing complex. It was simply to amend the date and place "14 August 2009 and Bloemfontein" and substitute it with "15 August 2009 and Welkom". There is no reason why there should be consultation with counsel for that purpose. Any attorney is capable to handle these minor issues as and when they arise. There are no submissions why the consultation was even necessary. This mistake could have been committed either by the attorney when taking instructions or the respondent herself when she could no longer remember her facts in chronological order.

- [7] I am convinced that the Taxing Mistress was clearly wrong in not taking all the circumstances into consideration and intervention with her decision is justified. The fact that there was a note confirming consultation is inconsequential because it is not reasonable that the losing party should be made to pay for a step that was essentially unreasonably taken by the other side. The item should have been disallowed.
- [8] Turning to the main point, the general principle is that the quantum of counsel's fee is pre-eminently the discretion of the Taxing Mistress. In this matter she allowed counsel to charge appearance fee in the sum of R18 000.00 (calculated as follows:- R9 000.00 x 2). It appears that the original fee was R12 000.00 but counsel discounted the combined amount of R6 000.00. As per the account he charged seventy-five percent (75%) of each opposed application.
- [9] I have great difficulty in understanding the reasons advanced by the Taxing Mistress that counsel is entitled to the fees claimed. The fees claimed must be for work performed and be reasonable. Counsel on this matter made one appearance to argue two (2) applications which were considered by the court in one judgement. The account presupposes that counsel appeared in court twice not in one instalment in matters that were inextricably linked to each other. My take is that this is tantamount to arguing many points in one appearance.
- [10] The order of Daffue ADJP stipulated that the applicant must pay costs for both applications. Certainly each application had separate set of papers which had to be worked on. That is as far as I understand the order to be for the fees to be levied and be paid by the one ordered to pay them. The appearance which was one event cannot, for the purposes of taxation, suddenly be classified as two (2) events. There is uncertainty as to how the Taxing Mistress applied her mind to the enumerated factors that the fee was reasonable.
- [11] The applications can under no circumstances be classified as complex. They are simple. Argument in court was approximately two (2) hours. This surely did not involve much work which required intense research and preparation. The seniority of counsel is immaterial because the applicant does not dispute the quantum of the daily fee. Therefore, the enquiry whether the fee is reasonable or not does not arise. The issue is only taken against charging the appearance fee twice in the circumstances already explained. That I find unreasonable and clearly wrong on the part of the Taxing Mistress to have allowed.
- [12] There is no doubt that the successful party must not be left out of pocket. The court has warned that the award must be fair to both sides. Compensation must be just and the court should not "not pour our largesse from the horn of plenty at the defendant's expense".[3] This principle applies to the exercise of a discretion in allowing or disallowing or reducing an item claimed in the bill of costs. For the foregoing reasons, I am convinced that the Taxing Mistress was clearly wrong and my interference with her discretionary decision is justified.

[13] It will be appropriate that I fix costs because the applicant has substantially succeeded in this matter. Such amount will be fixed in the sum of R1 000.00 payable by the respondent.

[14] I make the following order:-

14.1. The review of taxation succeeds.

14.2. The amounts of R585.00 and R9 000.00 allowed by the Taxing Mistress for consultation with counsel and appearance fee on 12 March 2020 as reflected in counsel's account are set aside.

14.3. The respondent is directed to pay the applicant's costs of these proceedings fixed in the amount of R1 000.00.

M. A. MATHEBULA, J

On behalf of applicant: Mhlokonya Attorneys

On behalf of respondents: McIntyre van der Post

/roosthuizen

[1] Paragraph 4 of the order reads as follows:- 4. "Respondent shall pay applicant's costs in respect of both the application to compel and the application to the amendment"

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[2] Kloof v Interplan Inc and another 1994 (3) SA 236 (SE); W H Van Pletzen v Taxing Master of the High Court and others [2021] ZAFSHC 4 (15 January 2021)

[3] Pitt v Economic Insurance 1957 (3) 284 (D) at 287 E-F

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Prepared on 23 October 2026 · Esheria