

SOUTH AFRICA / JUDGMENT

Ras v Land en Landbou Ontwikkelingsbank van Suid Afrika (2360/2010) [2012] ZANWHC 63 (8 November 2012) [2012] ZANWHC 63

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

2360/2010

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 2360/2010

In the matter between:

LAMBERTUS NICOLAAS RAS PLAINTIFF

and

DIE LAND EN LANDBOU ONTWIKKELINGSBANK

VAN SUID AFRIKA DEFENDANT

TAXATION REVIEW

GUTTA J.

A.

INTRODUCTION

- [1] This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court (“the Rules”).
- [2] The plaintiff objects to the sum of R535 076.33, being disallowed by the taxing master at the taxation on 04 October 2011,

on the grounds that:

2.1. the taxing master failed to distinguish between, on the one hand, the expert's costs of formulating, drawing a report and work done for preparation of pleadings and on the other hand, the expert's fees charged for preparation to give evidence in Court;

2.2. the taxing master incorrectly found that items 104, 115, 264, 448, 616, 724 and 725 (or any part thereof) of the plaintiff's bill of costs were qualifying fees.

[3] It is common cause that:

3.1. an order for payment of qualifying fees was not awarded to the plaintiff nor had the parties agreed on payment of qualifying fees;

3.2. the taxing master does not exercise a discretion regarding the payment of qualifying fees.

[4] It is for this Court to determine whether the decision of the taxing master to disallow the items referred to in paragraph 2.2 supra falls to be reviewed.

B. REGISTRAR'S REPORT AND STATEMENT OF CASE

[5] The registrar stated that the reports were compiled for preparation of the pre-trial conference, and in terms of Rule 37:

"The reports were to be used for Pre-Trial and for trial meaning accountants were going to give evidence based on their reports. It is on that basis that I disallowed them as qualifying fees."

"It is my submission that the plaintiff made matters difficult by mentioning that not all charges can be said to have been for purpose

of preparation, it is not clear as to whether they admit that some items were for purpose of preparation therefore are qualified

expenses and others were to draft pleadings as a result not qualifying fees."

"Referring back to paragraph 2 of the plaintiff submission, all the report were filed after the first pre-trial. As a result I declined to exercise my discretion because I believe that the court order precluded me from considering the aforementioned items as there was neither an agreement nor court order which orders payments.

Further the report were not primarily for purpose of drawing pleadings as they were going to be used to qualify examination[six] see rule 36(9)(a) filed on the 9th March 2010."

C. PLAINTIFF'S SUBMISSIONS

[6] In the plaintiff's submission on the taxing master's statement of case, the plaintiff makes, inter alia, the following submissions:

"1.

The Taxing Master failed to take into consideration the extreme importance of the roles the accountant (P Whelpton) as well as economist (Efficient Group) who played an integral part in formulating Plaintiff's claim.

Plaintiff's claim against Defendant is based on the submission that the Defendant calculated interest charged on the loan accounts of the Plaintiff incorrectly and not according to the agreed terms of the loan agreements. It was furthermore based on the submission that the Defendant amended the terms of the loan agreement unilaterally and unreasonably. In order to investigate and conclude the foregoing it was necessary to engage the services of an accountant (interest calculations) and an economist (unreasonableness of amendment to the interest polity).

2.

The Taxing Master incorrectly finds that all work described in Annexures "F", "G", "J", "N",

"R", "U" and "V" were executed for the purpose of preparing for a pre trial conference. In view of the aforementioned it is necessary to refer to the time line of the matter:

2.1 summons has been issued during October 2008;

2.2 the first pre trial conference was only held on 29 March 2010;

2.3 The accountant's report was filed on 11 March 2010 and

2.4 The economist's report was filed on 7 March 2011.

.....

4.

The Taxing Master failed to consider the contents of the individual items displayed on the bills as reflected in Annexure "F", "G", "J", "N", "R", "U" and "V" when dismissing all items included in the statement of accounts as reports compiled for preparation for pre trial and/or trial.

It is the Plaintiff's submission that the various bills of the experts needs to be assessed item for item as it is clear from the contents that not all charges can be said to have been for the purposes of preparation. In view of the aforementioned the Plaintiff

emphasizes the following:

Annexures "F", "J", "R" & "U" refers to

Work done by Plaintiff's accountant with regards to perusal and verification of allegations regarding interest contained in

particulars of claim, Various meeting with Defendant's accountant in an attempt to produce a combined report in order to

limit legal questions; Recalculation of Plaintiff's accounts in accordance to principles agreed to with Defendant's accountant; Receive, assess and verify Defendant's interest policy; Preparing and drawing of documentation to illustrate variances with prime interest rate; Work done in relation to Defendant's request for further particulars; Work done in relation to new calculations received with Defendant's amended plea; drawing of answers on Defendant's request for further particulars;

Recalculation of 2 of Plaintiff's account without mora interest and assessing Defendant's recalculation of same on instructions of both Plaintiff's and Defendant's legal representatives, as mora interest would not be applicable where the date and amount of the instalment is not determinable.

Annexures "G", "N" & "V" refers to

Work done by Plaintiff's economist in order to gain information with regards to inter alia Defendant's interest policy and the variance thereof with the prime rate (or repo); perusal and study of annual reports, Auditor General's reports, Reserve Bank documentation and various other publications, in order to be able to assess same in view of public policy and drawing of report."

[7] In the plaintiff's submission on the taxing master's report, the plaintiff made the following submission:

"Plaintiff's submissions with regards to Taxing Master's refusal

It is clear from the Taxing Master's report that all charges incurred in items 104, 115, 264, 448, 616, 724 and 727 were regarded

by the Taxing Master as cost incurred by the expert witnesses in the process of preparing themselves to testify on behalf of the Plaintiff at trial.

It is the Plaintiff's submission that the aforementioned conclusion is incorrect as the taxing master failed to take into

consideration that:

1. Some cost incurred with regards to the aforementioned was for the purposes of drawing pleadings and
2. Some cost so incurred was for the procurement of evidence as opposed to the preparation of evidence.

Cost with regards to drawing of Pleadings

Julies v Cape Town Municipality 1976 (3) SA 138 CPD in accordance to which fees charged for work done by an expert may be recoverable as normal party and party cost where such work was done primarily for the purpose of drawing pleadings in this matter.

Cost with regards to procurement of evidence as opposed to preparation of evidence

The Plaintiff refers to the detailed discussion of the matter of Mokhethi v Road Accident Fund (Orange Free State Provincial Division) Case No 305/2006 (delivered on 12 October 2006 by Justice Rampai J) contained in Plaintiff's submissions to the Taxing Master's Statement of Case and submit that the taxing master failed to make use of her discretion with regards to those charges contained in the aforementioned annexure, relating to the procurement of evidence.

Conclusion

The Plaintiff concedes that charges which do amount to preparation fees are included in the aforementioned items and that these items should be disallowed on the basis that no special court order and/or agreement was reached for payment of preparation fees to expert witnesses.

It is furthermore the Plaintiff's case that the items were dismissed in totality as qualifying fees without taking into consideration the specific nature of each charge contained in the statement of accounts of Whelpton and the Efficient Group respectively and does the Plaintiff refer to the narration included on the various statement of account."

Defendant's

submissions

[8] The defendant submitted that the costs incurred by the plaintiff and reflected in the items under review should not be allowed by the taxing master as all the charges constitute qualifying fees. The defendant relied on the decision of High Court North Gauteng,

Pretoria, namely, Nutri-Flo CC; Nutri Fertiliser CC and Sasol Limited, Sasol Chemical Industries (Pty) Ltd, Kynoch (Pty) Ltd, Nitrochem (Pty) Ltd, The Competition Commission, case number 37553/2005.

D. THE LAW

[9] Rule 70(1)(a) of the Rules provides that:

"The taxing master shall be compelled to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigation work and such bill shall be taxed subject to the provisions of subrule (5) in accordance with the provisions of the appended tariff. . ."

[10] Item 5 of Section D of the Tariff of Fees of Attorneys allows for:

"Fair and reasonable charges which in the opinion of the taxing officer were duly incurred in the procurement of the evidence and the attendance of witnesses whose witness fees have been allowed on taxation. Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties."

(Own emphasis)

[11] Rule 70(3) provides that:

“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 or for defending the rights of any party, 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.”

[12] Previously the taxation of experts’ fees was governed by Item 6, Section E, under the heading ‘Bill of Costs, Rule 70, which used to read as follows:

“Evidence: Such just and reasonable charges and expenses as may, in the opinion of the taxing master, have been properly incurred in procuring evidence and the attendance of witnesses whose fees have been allowed on taxation provided that the qualifying expenses of a witness shall not be allowed without an order of the court or the consent of all interested

parties.”

[13] Rampai J in the unreported decision of Mokhethi v Road Accident Fund OFS supra, case number 305/2006, commented on the difference in the two rules and at paragraph

[37] stated that:

“[37] The two taxation rules are almost identical. The difference is that the words ‘the qualifying expenses’ have now been replaced with the words ‘the preparation fees’. The change is to be welcome. Such change is not without significance. The new rule draws a distinction between the witness costs incurred in connection with the procurement of evidence on the one hand and the witness costs incurred in connection with preparation of evidence on the other hand. The evidence so procured and prepared is intended to be produced during the hearing. These are the three progressive steps of one process, the witness qualifying process.”

[14] In the matter of Mokhethi v Road Accident Fund OFS supra, Rampai J considered the meaning of qualifying fees and found that it has three dimensions, namely, inspecting, reading and presenting. He stated that the first dimension is the investigative phase, where the taxing master has a discretion to determine whether the witness costs incurred in order to gather factual information was fair and reasonable. He held that the first dimension was concerned with the procurement phase of the witness qualifying process. The second dimension entails reading up by an expert witness, which are qualifying expenses as they relate to reading of relevant authorities and scientific journals so that an expert can express a well-founded opinion. The third dimension entails the presentation of evidence by an expert witness. The second dimension is the preparatory phase, where the taxing master exercises no discretion.

[15] Rampai J at paragraphs [45] and [49] of his judgment stated the following:

“[45] I am not persuaded by the respondent’s contention that the costs incurred in respect of the procurement segment of the rule and the costs incurred in respect of the preparation segment of the rule are one and the same thing, namely the so-called qualifying fees and that, as such, required a special court order or special agreement. This contention of the respondent is one which I cannot uphold on review. No narrow view should be taken of the fundamental distinction between the first dimension and the second dimension of the rule. To do so would virtually erode the discretion entrusted to the taxing master in respect of the witness costs relating to the procurement dimension of the rule. Like an attorney a professional like an engineer will have witness qualifying expenses relating to the procurement segment on the one hand and on the other hand witness qualifying fees pertaining to the preparation segment. However, whether we talk about ‘witness qualifying expenses’ or ‘witness qualifying fees’ as far as the victoriously litigant is concerned both are costs which are recoverable from the unsuccessful litigant.

[49] The important thing is that the qualifying expenses incurred in connection with the procurement dimension of the qualifying process fall to be taxed within the taxing master’s discretionary competence whereas the qualifying fees earned in connection with the preparation dimension fall outside the discretionary province of the taxing master.”

[16] Although I agree in principle with the different dimensions of work undertaken by an expert, I, however, respectfully disagree with Rampai J that all three phases fall under the heading of qualifying fees or qualifying expenses.

[17] In the matter of Transnet Ltd t/a Metrorail & Another v Witter [2008] ZASCA 95; 2008

(6) SA 549 (SCA), the Supreme Court of Appeal at paragraph [15] page 558 stated:

“An expert witness’s qualifying fees (now more appropriately termed ‘preparation fees’ in the Uniform Rules) will only be allowed on taxation if authorised by the court or with the consent of all interested parties.”

[18] Hence, the Supreme Court of Appeal did not distinguish between ‘qualifying fees’ and ‘preparation fees’ and interpreted them to be one and the same. It should, however, be noted that the old Tariff referred to qualifying expenses and not qualifying fees.

[19] Historically, several Courts have considered the meaning of the words ‘qualifying fees’ or ‘qualifying expenses’.

[20] Harcourt J in Kohne & Another v Union & National Insurance Co Ltd 1968

(2) 2002 SA 499 (N) held that:

“In general it may be said that an expert witness ‘qualifies’ when he reads up or otherwise masters the details of the particular case on which he is to give evidence.”

at 505D:

“In particular the propriety of including a compensation for absence from his practice, opposed to payment for time employed in study and preparation, would be highly suspect.”

In Barratt v Barratt & Another 1966

(3) SA 364D at 366A–B, Shearer AJ held:

“... it seems to me that a qualifying fee carries with it the necessary implication that the witness has qualified himself in some way or another to give evidence. In other words, he must have brought some special skill, knowledge or experience to bear on his observations and such special skill, knowledge or experience must be a material element in making the evidence of such witness of value to the Court.”

also in Champion v Morkel 1971

(2) SA 121 (R) at 128, the Court held that:

“It is of the essence of qualifying expenses that they represent the reasonable charges to be allowed to an expert witness for so

preparing himself with regard to the specific matter upon which his testimony is required that his evidence may be properly impressed

with that measure of authority which may be attributed to it by reason of his specialised knowledge and training in the particular

field to which his evidence relates.”

Also see Lily Deep Ltd v Johannesburg City Council 1973 (2) SA 109 (W) at 118D–E.

[21] In KöHne & Another v Union & National Insurance Co, Ltd supra, Harcourt J observed that the scope of the phase was not precisely defined.

[22] The amendment of the rules supra signifies a distinction between charges and expenses incurred in procuring evidence and costs and expenses incurred in preparation of evidence for trial.

[23] A qualifying fee is a fee of a witness who by virtue of his or her expert knowledge in a particular field, prepares to give evidence. Qualifying expenses relate only to expenses incurred by an expert in preparing him to give evidence to matters within his expertise. An order of court or agreement between the parties is required for either a qualifying fee or expense. See BEF (Pty) Ltd v Cape Town Municipality & Others 1990

(2) SA 337 (C) at 350.

[24] I agree with Rampai J that in the first dimension, namely, the investigative phase or the phase for procuring evidence, the taxing master has a discretion to determine whether the costs incurred to gather factual information was fair and reasonable.

- [25] In the case of *Nutri-Flo CC & Others v Sasol Limited & Others supra*, I find favour with Prinsloo J's findings at paragraph [20] and
- [27] that qualifying or preparation fees of a witness include the drafting of an expert report to be used by the expert at the main hearing.
- [26] The taxing master should, in my view, not have found that all the costs incurred by the experts constitute qualifying fees for which an order of court or agreement between the parties is required. It was necessary for the taxing master to distinguish the costs for procurement and costs for preparation for trial.
- [27] Although the plaintiff has conceded that there are items that constitute qualifying fees in terms of Rule 70(D)(5) that should not be allowed by the taxing master, as they were charges raised by experts for work done in order to draft the expert opinions and their preparation for giving evidence in Court, I am of the view that there are other items that are not qualifying fees but procurement fees, which includes the reports used to formulate pleadings, and in procuring evidence of the accountant and the economist, for which the registrar exercises a discretion.
- [28] In *Groenewald v Setford Motors (Edms) Bpk* 1971
- (3) SA 677 (CPD) at 678, the Court held that:
- "A court will in a review of a taxation of a bill of costs . . . interfere with the decision of the Taxing Master if he has disregarded relevant factors or has regard to improper factors or has given a decision which no reasonable man could have given or if the court is satisfied that the Taxing Master is clearly wrong."*
- [29] On review, the Court will not highly disturb the taxing master's discretion unless he did not exercise a proper discretion. See *Wellworths Bazaar Ltd v Chandlers Ltd & Others* 1947 (4) SA 453 (TPD) at 457.
- [30] I am of the view that the taxing master did not exercise a proper discretion in declining to exercise his discretion with regard to items 104, 115, 264, 448, 616, 724, and 727.
- [31] The taxing master erroneously considered all the items as qualified expenses. She will now be required to consider each and every item and exercise her discretion thereon as it is clear that not all the items can be classified as preparation fees.
- [32] The taxing master in taking each item must distinguish whether the expense was incurred for the procurement of evidence and drafting of pleadings as opposed to the preparation of evidence for trial.
- [33] For this reason, the only appropriate remedy is to refer the matter back to the taxing master for reconsideration and retaxation of the disputed items.

E. ORDER

[34] Accordingly, I make the following order:

- a) The application for review is granted.
- b) The matter is referred back to the taxing master for reconsideration and re-taxation of the disputed items.
- c) The taxing master is directed to take each disputed item and consider whether the expense was incurred at the procurement/investigation phase or whether in preparation of evidence for trial.
- d) The defendant is ordered to pay the plaintiff a fixed amount of R6 000.00 in respect of the cost of the review.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF JUDGMENT : 08 NOVEMBER 2012

ATTORNEYS FOR PLAINTIFF : BOTHA COETZER SMITH

ATTORNEYS FOR DEFENDANT : KGOMO MOKHETLE & TLOU

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