

SOUTH AFRICA / JUDGMENT

Tywini obo Tywini v Road Accident Fund (616/2016) [2016] ZAE CGHC 83 (1 September 2016) [2016] ZAE CGHC 83

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen

CASE / FILE NUMBER

616/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 616/2016

Made available: 1 September 2016

In the matter between

SAKHELE TYWINI

o.b.o SANDLAKAZI TYWINI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

REVIEW OF TAXATION

GOOSEN, J.

1. This is a review of taxation pursuant to Rule 48. The plaintiff instituted a claim for damages arising out of a motor vehicle collision which occurred on 27 April 2006 at King Williams Town. The action was instituted at the seat of the court at Grahamstown. The action was settled on 14 August 2013. The defendant was, in accordance with the terms of the settlement, ordered to pay the plaintiff's party and party costs of suit.

2. Subsequent to the order being made the plaintiff presented two bills of costs for taxation, namely that in respect of work done by I C Clark Attorneys of East London and that in respect of work done by Neville Borman and Botha at Grahamstown. The bills were initially taxed on an unopposed basis and allocated on 1 September 2014. Thereafter the defendant's attorneys filed a notice of objection, on 26 November 2014, objecting to individual items included in the bills. The plaintiff replied to the objections

on 17 February 2015 and on 18 February the defendant filed a further objection relating to the presentation of two bills for taxation.

3. The matter was set down for taxation on 24 March 2015 and on 31 March 2015 the taxing master ruled that the plaintiff was not entitled to present two bills for taxation and that a single consolidated bill was to be taxed. The parties then settled the bills and the allocatur was issued on 11 June 2015.
4. The plaintiff filed a notice in terms of Rule 48
 - (1) requiring the taxing master to state a case relating to the taxing master's ruling in respect of the two bills of costs. The taxing master has filed a stated case raising the question whether the taxing master "erred in ruling that the costs of two sets of attorneys are not allowed...."
5. The taxing master has, however, taken the view that the review is outside of the ambit of Rule 48 and has only stated a case in the alternative. The basis for doing so is founded in the history of the taxation. As indicated above, the taxing master ruled that a consolidated bill be presented for taxation on the basis that the costs of two sets of attorneys was not necessary in the

circumstances of the case. No individual items were either objected to or disallowed on the day of the taxation. Following the ruling, the bills were then settled between the parties and an allocation was made on 11 June 2005. The taxing master points out that no items were disallowed by her either by way of an objection or mero motu.

6. In the plaintiff's submissions it is stated that following the taxing master's ruling "the parties then taxed the bill by agreement by applying the taxing master's ruling that only [one] bill would be allowed". Parties, of course, do not "tax" a bill. The taxation is undertaken by the taxing master who exercises a discretion to either allow, reduce or reject items included in a bill of costs. Based upon the exercise of that discretion the taxing master makes an allocation of the total costs due thereby quantifying a party's liability for costs.
7. The plaintiff further states that "it is clear from the bills that they were taxed as if one bill was allowed. All correspondence between the two attorneys and the

duplicate perusals and telephonic attendances were taxed off by agreement.” What is clear from this is that the parties reached an agreement in relation to the items to be allowed in the two bills that were presented. The taxing master, accordingly, was not called upon to deal with any objections to items and did not, so she clearly states, disallow any items *mero motu*. It is this factual situation which founds the basis upon which the taxing master asserts that Rule 48 is not of application.

8. Rule 48 (1) states that:

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 allocatur by notice require the taxing master to state a case for the decision of the judge.

9. The procedure established by Rule 48 has been designed to resolve only a limited class of disputes and not every dispute which may arise in the course of a taxation of a bill of costs (Brener N.O v Sonnenberg; Murphy, Leo Burnett (Pty) Ltd (formerly D’Arcy Masins Benton & Bowless SA (Pty) Ltd 1999 (4) SA 503 (W) at 518 J – 519 A).

10. In the Brener matter (*supra* at 519C) it was held that the limited class,

“... consists exclusively of items which were brought up in the bill of costs for taxation, which were objected to and nevertheless allowed or which were disallowed mero motu, and in respect of which one or other of the parties is dissatisfied.”

11. The notice of taxation given by the plaintiff in terms of Rule 48 (1) does not set out the particular items which were disallowed in respect of which the plaintiff is dissatisfied. It states merely that the taxing master “is called upon to state a case for decision of a Judge in terms of rule 48 (1), in respect of her decision that the Plaintiff was not entitled to recover the costs of her East London Attorneys and Grahamstown attorneys and that only one consolidated bill would be allowed for taxation.” This notice does not meet the minimum requirements set out in Brener (at 512 E – H), where it was held that the notice given by the dissatisfied party must:

- (a) Identify each item (or part of an item) in respect of which the Taxing master’s decision is to be reviewed;
- (b) Contain the allegation that each such item (or part) was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the Taxing Master;
- (c) Record the ground of objection relied upon at the taxation by the dissatisfied party (but not argument in support of the ground);
- (d) Record any finding of fact which the dissatisfied party may consider the Taxing Master to have made and which the dissatisfied party may intend to challenge, stating also the ground of such challenge (but not argument in support of the ground).

12. There is of course good reason why the notice does not comply with these minimum requirements. That reason is to be found in the fact that the bill as presented for taxation did not include items relating to the duplication of costs, as was agreed between the parties. There was therefore no objection taken to any item nor any item which was disallowed. The exercise of the taxing master's discretion is accordingly not reviewable by the plaintiff.
13. The only question which arises is whether the taxing master's prior ruling that only one set of attorneys' costs be allowed in a consolidated bill of costs is subject to review pursuant to Rule 48 in the light of the subsequent agreement concluded between the parties.
14. A party may be barred from seeking to review a taxation where that party has demanded and/or accepted payment of the amount in which the bill of costs has been taxed, or where the party's conduct is tantamount to an acceptance of the ruling and is inconsistent with the idea of bringing the taxation in review (see *Michaelis v Weston and Company* (1884 – 1885) 4 EDC 306; *Gordon and Another v The Master and Others* 1924 CPD 443; *Bayview (Pty) Ltd v Director of Valuations and Another* 1989 (1) SA 999 (C) at 1003D). It was submitted that the procedure adopted by the parties in treating the two bills as a consolidated bill and, by agreement, deleting such items as constituted duplication and thereafter proceeding by way of Rule 48 is a permissible procedure sanctioned by the Rule. Reference in this regard was made to an unreported judgment of Eksteen J in *Snyman NO and others v Haupt and others* (ECG, case no 2222/2009, delivered on 13 December 2010). In that matter the court was also concerned with a decision by the

taxing master to disallow the costs of two sets of attorneys, where the “local” attorney was one instructed at a place where the party was neither resident nor employed.

15. It is clear from the judgment, however, that the case came before the learned judge on review in wholly different circumstances. In that matter the parties had presented two bills of costs in respect of each of the sets of attorneys for taxation. The taxing master treated the two bills as a single consolidated bill, having come to the decision that two sets of attorneys were unnecessary, and on taxation excluded all items which, in her opinion, constituted an unnecessary duplication of costs. It is clear from the judgment therefore that the taxing master exercised her discretion and disallowed items either *mero motu* or to which objection had been taken. The facts of that case, therefore, placed the matter squarely within the ambit of Rule 48 (1), unlike the facts of this matter where it is clear that no such discretion was exercised.
16. Accordingly, the *Snyman* judgment is not authority for the proposition advanced on behalf of the plaintiff. I am not aware of any decided case involving Rule 48(1) where a court has exercised its review jurisdiction in circumstances such as the present. On the contrary, the authorities all reflect circumstances where the taxing master has pertinently exercised a discretion in relation to items included in a bill of costs to either allow or disallow such item (see *Sonnenburg v Moima* 1987 (1) SA 571 (T); *The Master v Gerber and Another, Thomas v The Minister of Law and Order and Others* 1989 (2) SA 659 (E); *Schoeman v Schoeman*

1990(2) SA 37 (E); Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk 1993

- (2) SA 144 (O); Zeelie v General Accident Insurance Co Ltd 1993 (2) SA 776 (E))
17. In *Olgar v Minister of Safety and Security* 2012 (2) SA 127 (E) at 132J-133A Pickering J held, with reference to *Daywine Properties (Pty) Ltd v Murphy and Another* 1991 (3) SA 216 (D) at 218E-F, that a failure to object when before the taxing master at taxation precludes the subsequent use of the review procedure.
18. In the present matter the agreed exclusion of duplicated costs by the parties had the effect that the taxing master did not exercise a discretion which was subject to review. The prior ruling to the effect that a single consolidated bill be presented would only be reviewable if, in giving effect to that ruling, the taxing master disallowed items to which objection had been taken or did so *mero motu*.
19. It is suggested in the submissions filed on behalf the plaintiff that the taxing master's approach is 'misguided' since the underlying objection is to the ruling made that a single consolidated bill be taxed. I cannot agree. In giving effect to the ruling that a single consolidated bill be presented for taxation, the plaintiff could have presented such a bill including the costs associated with the employment of two sets of attorneys, on the basis that such employment of two sets of attorneys was necessary in the circumstances. The taxing master would then have been required to exercise the discretion vested in her to allow, reduce or disallow the particular items so included. Upon allocatur in respect of such consolidated bill the plaintiff would then have been entitled to seek to review the exercise of that discretion in accordance with the provisions of Rule 48 (1). Plainly the plaintiff did not do so and instead entered into an agreement with the defendant in relation to the items to be allowed in the bill of costs, subject obviously to the discretion of the taxing master. In exercising that discretion in accordance with the agreed submission of the bills the taxing master took no decision to the dissatisfaction of the plaintiff.
20. It follows from this that the taxing master's stance, that the request for a stated case falls outside of the ambit of Rule 48, is correct. In these circumstances it is unnecessary to consider the question whether the costs of two sets of attorneys ought to have been allowed.
21. The defendant did not file any opposition to the review and took no part in the proceedings. There is accordingly no need to make any costs order.
22. Accordingly I make the following order:

The application is dismissed.

G. GOOSEN

JUDGE OF THE HIGH COURT

For the Plaintiff: Neville Borman & Botha, Grahamstown

For the Defendant: N N Dullabh & Co, Grahamstown

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