

SOUTH AFRICA / JUDGMENT

VKB Landbou (Pty) Ltd v Van Deventer (6115/2017) [2020] ZAFSHC 57 (23 January 2020) [2020] ZAFSHC 57

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser

CASE / FILE NUMBER

6115/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 6115/2017

In

the matter between:

VKB
LANDBOU (PTY)
LTD Applicant
and
HERMANUS CHRISTIAAN
JOHANNES VAN
DEVENTER Respondent

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 23 JANUARY 2020

- [1] This is an application by the Applicant in terms of Rule 48 for a review of the taxation held on 10 July 2019. The taxation followed an order made by Van Rhyn, AJ at the end of application proceedings between the parties. As to the costs of the application, she directed that “Respondent is ordered to pay the Applicant’s costs on an attorney and own client scale”.
- [2] It appears from the papers placed before me in terms of Rule 48 that the taxation process became troubled with many problems before it even started. The Notice of Taxation was filed by the Applicant on 24 May 2019, requiring the Respondent to deliver a written notice of opposition within 20 days in terms of Rule 48(3B)(b). This sub-rule requires the party to whom such notice is given, to specify in the notice of opposition all the items on the bill of costs objected to, and to provide a brief summary of the reason for such objection. No such written notice of opposition was filed by the Respondent with the Registrar.
- [3] The reason for this failure seems to have been some behind the scenes efforts by the Respondent to settle the bill of costs before the date of taxation. When no agreement could be reached by the parties, the attorneys for the Respondent filed a Notice to Oppose Taxation with the attorneys for the Applicant only two days before the taxation, that is on 8 July 2019. This Notice was couched in general terms only, and no reference was made to specific items as contemplated by the rule in question. The Notice only informed that the Respondent reserves the right to argue the bills of the Applicant’s attorneys on the grounds that the agreement between the Applicant and his attorneys is not attached to the Notice of Taxation, which in fact prevents the Respondent to determine whether the items are in fact reasonable. Furthermore, should such agreement be made available, it would be argued that the Respondent cannot be bound by it, the Notice says. Lastly, it is submitted in the notice that the fee tariff used by the Applicant attorneys is incorrect or excessive, and that the items charged for are incorrect or excessive in nature. The Notice then informs that the Respondent reserves his right to address these items or fees amounts during the taxation.
- [4] Obviously, the attorneys for the Applicant were entitled to object to this Notice of Opposition, in that it did not comply with the provisions of rule 48(3B)(b) and because it was not even filed with the Registrar at all. The attorneys for the Applicant, however, did not object at the time, and at the taxation, Mrs. L. Van Greunen appeared on behalf of the Applicant and Mr. R. Oosthuizen for the Respondent. According to an affidavit by Mrs. Van Greunen, she did object to the presence of Mr. Oosthuizen on the grounds mentioned above before the actual taxation began, but that she was overruled by the Taxing Master. In her report in terms of Rule 48(5)(b), the Taxing Master disputes these allegations and states that there never was any objection to the presence of Mr. Oosthuizen, or to the fact that he acted on behalf of the Respondent. At least it is common cause between the parties that the Taxing Master then allowed the taxation to proceed with Mr. Oosthuizen present and appearing for the Respondent.

- [5] The problems did not end there, unfortunately. It is common cause on the papers before me that Mrs. Van Greunen then requested a ruling by the Taxing Master whether the taxation would proceed on the basis of the implementation of a higher tariff in view of the attorney and own client costs order, and on the basis of disregarding the so-called 250 word principle. It is further common cause that the Taxing Master then made a ruling that she would tax the bill in terms of Rule 70 tariffs, and not on a higher scale, despite the cost order. She further ruled that the 250 word principle would not be disregarded. According to Mrs. Van Greunen, she then requested the Taxing Master to note a general objection with regards to her ruling to tax according to the provisions of Rule 70. Thereafter, and throughout the taxation, the Taxing Master was reminded of the general objection with regards to the effect of the attorney and own client costs order, Mrs. Van Greunen says.
- [6] These allegations are also placed in dispute by the Taxing Master. According to her, she was never requested to note a general objection based on her ruling. Such a general objection only came right at the end of the proceedings, when the taxation was already done. At that point, Mrs. Van Greunen wrote her objection in her own handwriting on a checklist provided by the Taxing Master. This written objection is attached to the papers and reads as follows:

“Objection: L. Van Greunen - to all the items taxed off.”

It is submitted that this bill of costs was to be taxed on an attorney and own client scale. A higher scale should have been permitted as the attorneys have 17 and 27 years experience respectively. With regards to correspondence, perusal of documents, it is submitted that all documentation was necessary to peruse and there were no duplications. All disbursements with regards to correspondence was necessary as all parties and client are entitled to copies of pleadings. Drafting fee should be allowed as attorney and own client bill was drafted and should be allowed.”

- [7] The Taxing Master further denies that she was reminded of the objections throughout the taxation process. In her Stated Case, she mentioned that the parties indicated to her prior to the taxation that they have settled most of the items in the bill, and that they only needed guidance on some of the items. During the taxation, she stated, no objection was made or any argument offered pertaining to the taxation of the items in the bill. It was only at the end of the whole process that Mrs. Van Greunen noted the blanket objection to all items that were taxed off.
- [8] It speaks for itself that it would normally be extremely difficult to determine who is speaking the truth in all these respects. However, Mrs. Van Greunen provides a clear indication in the opening words of her written objection referred to above, where she stated “Objection.... To all the items taxed off.” These words convey the message that the objection was only made after the items were already taxed off, as the Taxing Master has indicated. Also, in her Reply to the Taxing Master’s Report, she confirms that no objection was raised to any of the items during the course of the taxation. The question is then whether the Applicant is entitled to

take all the relevant items on review in terms of Rule 48. Rule 48(2)(b) requires the Applicant to state in his Notice of Review of Taxation that every item or part thereof that requires the decision of the Judge was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the Taxing Master. In the present Notice, it is merely stated that the Applicant is dissatisfied with the ruling of the Taxing Master by disallowing (after objection by defendant) part of items as mentioned thereunder. Here I accept that the Notice meant to say “after objection by the Applicant”.

- [9] On the papers before me, however, it is clear that no objection was raised to the taxation of each item as they were dealt with by the Taxing Master. There was only an objection in general terms when the taxation was already done. The result thereof is that the Applicant cannot now seek a review of the Taxing Master’s ruling on each and every item that is objected to. This is so because Rule 48(1) provides that a party may only seek the decision of a judge to any item which was objected to. In *Taxation of Illegal Costs in South Africa*, 1st Edition, Rochelle Francis-Subbiah states that the taxing master must observe the *audi alteram partem* maxim and allow each party an opportunity to present contentions in respect of each and every item. It is expected of the taxing master to adjudicate upon each item without fear or favour and with unfettered discretion (Page 55). See also in this respect *it’s Daywine Properties (Pty) Ltd v Murphy and Another* 1991
- (3) SA 216 (D) and *Kruger v Secretary for Inland Revenue* 1972 (1) SA 749 (C). Therefore, on this score alone, the application for review must fail.
- [10] In the Notice of Review of Taxation, objection is made to a total of 148 items on the basis that they were disallowed, “even though the court order makes provision for an attorney and own client costs order”. Objection is also made to 3 items where the fee for perusal of documents were disallowed, again on the basis that the cost order was one for attorney and own client. Furthermore, objection is raised against 6 items where a higher fee was not allowed, also on the same basis. In general, because of the cost order, it is alleged that higher tariffs than those provided for in Rule 70 should have been allowed, and that the 250 word principle should also not have been allowed.
- [11] I do not agree with these contentions of the Applicant’s. The authorities^[1] clearly indicate that an award of costs on the attorney and own client basis is in reality no more than an indication to the taxing master that he should attempt to be more generous to the winning party than would otherwise be the case when applying the relevant tariff. Such a costs order is taxed on a more liberal scale, but does not sanction exorbitant or unreasonable costs. The taxing master must scrutinize the attorney and own client bill to ensure that it does not exceed the bounds of reasonableness. Where the losing party is to pay the successful party on the scale, it means all reasonable costs incurred on behalf of the client although not strictly necessary or proper. In practice this means that these costs are taxed according to the tariff (Rule 70), but generously where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on a party and party basis. The limited scope of this taxation follows from the fact that Rule 70 also governs

taxation between attorney and client.

[12] Some authorities[2] have added a further dimension to these principles, namely that an agreement between an attorney and his own client cannot bind an opponent. Costs emanating from such an agreement can therefore not be recovered from the opposing party. In the present case, there is no indication whether such an agreement existed between the Applicant and his attorneys. Be it as it may, the most important principle in the taxation of attorney and own client costs is without any doubt the principle that the taxing master must be satisfied that each item claimed is reasonably claimed. In her Stated Case, the Taxing Master in the present case stated that when she decided on the reasonableness of the fees charged, she took various factors into consideration, such as the nature of the matter, the complexity, the time and effort spent, the skills and competence that was required, the ability of the party to pay, and so forth. On the other hand, the Applicant merely alleges that all the fees were reasonable because they were based on the attorney and own client scale. The fact that the Applicant does not deal with every item to illustrate the reasonableness of the fees charged, in my view underlines the danger of merely raising a blanket objection to all the items disallowed or taxed off. The danger lies in the fact that it is simply impossible for courts to consider whether the taxing master exercised his discretion wrongfully when any of the items were found unreasonable.

[13] In such circumstances, the established rule[3] that a court will not interfere with the exercise of the taxing master's discretion unless the taxing master had acted upon a wrong principle or exercised his discretion in a wrong manner, is decisive. Where reasonableness is the criterion, the general

reluctance to interfere on review becomes even more pronounced[4] .

[14] Consequently, the application for a review is dismissed and the taxation is confirmed. No order of costs is made.

P.J. LOUBSER, J

[1] Albert Kruger and Wilma Mostert: Taxation of Costs in the Higher and the Lower Court - A Practical Guide (Lexis Nexis); Sentrachem Ltd v Prinsloo 1997 (2) SA (A) 22 C-D; Ben McDonald Inc. and Another v Rudolph and Another 1997 (4) SA 252 (T) 257H-258E

[2] Aircraft Completions Centre (Pty) Ltd v Rossouw and Others 2004 (1) SA 123 (W); Muller v The Master and Others 1992 (4) SA 277 (T)

[3] Lander v O'Meara 2011 (1) SA 204 (KZN); Duvos (Pty) Ltd v Newcastle Town Council and Others 1965 (4) SA 553 (N)

[4] Lander, supra, at 210G

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