PINKSTER GEMEENTE VAN NAMIBIE vs

NAVOLGERS VAN CHRISTUS KERK SA AND ANOTHER

CASE NO. (P]A210/2000

2001/08/10

Maritz, J.

PRACTICE

Costs - taxation of - R48-review - purpose of taxation - duty of counsel in preparing bills of costs - approach of Taxing Master and criteria to be applied on taxation - taxation a court-annexed process - grounds on which the court will intervene on review with Taxing Master's ruling

Costs - taxation of - purpose of Taxing Master's report under R48(2) - Taxing Master required to set out reasons - reasons likely to overlap with those advanced by the one or the other party - such similarity of reasons no cause to allege bias or lack of objectivity

Costs - taxation of - *locus standi* of party to take ruling of the Taxing Master made *suo moto* on review.

CaseNo.(P)A210/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PINKSTER GEMEENTE VAN NAMIBIA

(PREVIOUSLY SOUTH WEST AFRICA)

APPLICANT

versus

NAVOLGERS VAN CHRISTUS KERK SA **1st RESPONDENT**

THE REGISTRAR OF DEEDS, WINDHOEK **2nd RESPONDENT**

HIGH COURT REVIEW IN TERMS OF COURT RULE 48 CORAM: MARITZ, J

Delivered on: 10/08/2001 (In Cambers)

JUDGMENT:

MARITZ, J: The applicant, aggrieved by a number of rulings made by the Assistant Taxing Master during taxation of a bill of costs, is seeking to have them reviewed under Rule 48 of the High Court Rules. Not content to simply challenge the reasonableness of the Assistant Taxing Master's rulings, the applicant also launched an attack on his impartiality. The attack followed upon the Assistant Taxing Master's

report under Rule 48(2). The ultimate paragraph of the applicant's

response to the report reads as follows:

"One cannot overlook the impression that the Assistant Taxing Master has lost his objectivity. What he has prepared is not a 'report'

as required by Rule 48, but an argument that he takes the side of the respondent and looses his sense of objectivity. That is regretted."

With both the fairness and the reasonableness of the taxation in issue, it is perhaps necessary to reflect briefly on the object of taxation, the role of counsel and the Taxing Master in the process and, in view thereof, to consider the grounds on which the applicant is seeking to set those rulings aside.

Generally, the objective of taxation is to award "the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded". (See: Rule 70(3).) If the costs has been awarded on a party-and-party basis, the Taxing Master is required to "allow all such costs, charges and expenses as appear to him or her 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 counsel, or special charges and expenses to witnesses or to other persons or by other unusual expenses".

It is with that objective in mind that counsel of a successful litigant should draft a bill of costs. The responsibility to include in a bill of costs

only those costs that are permissible under a court's costs order is borne, in the first instance, by counsel who submits the bill for taxation.

"The attorney is his client's master of costs, often deciding, either on his own or in conjunction with counsel, what steps to take, what evidence to obtain for and use in the litigation, evaluating the work and effort involved in the matter and what the charges therefor should be ... As officer of the Court the attorney is enjoined to act responsibly and to draw his party-and-party bill of costs so as to include therein only what is permissible to recover from the party condemned in such costs.

What is permissible is ...those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practise and the exigencies of litigation." (Per M. T. Steyn, J. in *Van Rooyen vs. Commercial Union Assurance Co of SA Ltd,* 1983(2) SA 465 (O) at 468C - E).

It is to ensure that only those costs and nothing in excess of it will ultimately be recovered from the party mulcted in costs by an adverse party-and-party costs order, that Rule 70 of the High Court Rules has created a mechanism for objections to cost items or to the quantum thereof in a bill of costs. Ultimately, it is for the Taxing Master to decide which costs to allow by bringing an objective evaluation on the basis of the stipulated criteria to bear on the bill. At every taxation, the Taxing Master is the functionary enjoined with the obligation to ensure that only the costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, are allowed.

As Rosenow, J. pointed out in *Phiri vs. Northern Assurance Co. Ltd.*, 1962(4) SA 284 (C) at 285 E, the discretion to decide what costs have been necessarily or properly incurred is given in the first instance to the Taxing Master and not to the Court. Although Rule 48 contemplates that the Court shall ultimately be the final arbiter in relation to the taxation of costs, it is normally reluctant to interfere with the Taxing Master's rulings in the absence of good grounds to do so. (See: *Kock vs. S.K.F. Laboratories (Pty) Ltd.*, 1962(3) SA 764 at 765 E). Given the large number of variations in the complexity, causes of action, issues and other exigencies of cases, it is sometimes difficult for the Taxing Master "to steer his difficult course between the *Scylla* of liberality and the *Charybdis* of niggardliness" (to borrow the words of R.B.B. Davis, J. in *Bamett vs. Isemonger,* 1942 CPD 325 at 326). Hence, the Court will on review allow the Taxing Master a significant degree of appreciation in the exercise of his or her discretion.

There are, however, certain well known and oft repeated grounds, based on the Common Law grounds of judicial review, which will entitle a Court to interfere with the Taxing Master's rulings: "If (a) he has not exercised his discretion judicially, that is if he has exercised it improperly; (b) he has not brought his mind to bear upon the question; or (c) he has acted on a wrong principle." *(Per* Cloete, A.J. (as he then was) in *Kock vs. S.K.F. Laboratories (Pty.) Ltd, supra,* at 765. See also: *Preller vs. Jordaan and Another,* 1957(3) SA 201 (O) at 203 C to E, *General Leasing Corporation Ltd. vs. Louw,* 1974(4) SA 455 (C) at 461 to 462, *Noel Lancaster Sands (Pty.) Ltd. vs. Theron and Others,* 1975(2) SA 280 (T) at 282 F).

It should be borne in mind, however, that the review of the Taxing

Master's decision on taxation is one going beyond the rather narrow Common Law parameters of judicial review applicable to the acts or omissions of public bodies. It is by its nature a review denoting "a wider exercise of supervision and a greater scope of authority than those which the Court enjoyed" under either the review of the proceedings of lower courts or of public bodies acting irregularly, illegally or in disregard of important provisions of statute. As Potgieter, J.A. points out in *Legal and General Assurance Society Ltd. vs. Lieberum N.O. and Another,* 1968(1) SA 470 (A) at 478 G to H in connection with Appellate Division Rule 9(1) (citing with approval the remarks of Innes, C.J., in *Johannesburg Consolidated Investment Co. vs. Johannesburg Town Council,* 1903 T.S. Ill at 116) "the Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in Shidiack's case, but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point in issue".

I, with respect, associate myself with those remarks. The taxation of a bill of costs is a court-annexed process. As such it is an integral part of the judicial process and a Taxing Master presides on it not simply as an administrative official, but as an extension of the judiciary *(per* Schutz, J. in *Nedperm Bank Ltd. vs. Desbrie (Pty.) Ltd.,* 1995(2) 711 (W) at 712 G). It is an intrinsic part of the matter and normally follows upon an earlier ruling of the Court. Fairness, reasonableness and justice permeates the whole process of litigation before a court of law and, where it is left to the Registrar or the Taxing Master to

deal with aspects ancillary thereto, the Court retains a supervisory duty to see to it that they dispose of their duties in accordance with the Rules and with due regard to the same values.

It is with these remarks that I now turn, firstly, to the attack on the objectivity of the Assistant Taxing Master and, secondly, to his rulings disputed in this review.

The applicant's attack on the objectivity of the Assistant Taxing Master is premised on the fact that his report contains argumentative matter from which it is apparent that he was taking "the side of the respondent". The applicant's rather severe criticism seems to be based on an incorrect understanding of the purpose of a Taxing Master's report to the Court in a Rule 48-review. Whilst the stated case to be prepared by the Taxing Master under sub-rule (1) require of him or her to state objectively and concisely "each item or part of an item together with the grounds of objection advanced at the taxation ...and any finding of facts" (See: *Cordingley NO. vs. BP Southern Africa (Pty.) Ltd.*, 1971(3) SA 118 (O) at 112 B to C; *Nedperm Bank Ltd. vs. Desbie (Pty.) Ltd.*, 1995(2) SA 711 (W) at 713 A to C), his or her duties in preparing a report for the benefit of the Court under sub-rule (2) is different. The Taxing Master is required to set out in the report his or her reasons for the ruling made by him or her in full (See: *Nedperm Bank Ltd. vs. Desbie (Pty.) Ltd., supra,* at 713 C). In so doing, he or she is not only entitled to refer to the reasons given at the taxation, but may also include others, in particular the reasons for agreeing or disagreeing with grounds of objection and submissions not advanced during the taxation but put forward as part of a party's written contentions

under sub-rule (2).

It follows that the reasons of the Taxing Master are likely to be similar with those advanced by either the one or the other of the parties: If the reasons are in defence of the earlier ruling, it is likely that they will accord with those of the respondent in the review or, if the Taxing Master concedes that he was wrong in his earlier ruling, it is likely that his reasons will be supportive of those advanced by the applicant in the review. The similarity between the Taxing Master's reasons in his report and the written contentions of any of the parties to the review does not justify an inference of bias.

I find nothing in the report of the Assistant Taxing Master that justifies the critical remarks by counsel for the applicant or, for that matter, which is supportive of any unfairness in the process. Counsel will do well to remind himself of the remarks of M T Steyn, J (as he then was) in *Van Rooyen vs. Commercial Union Assurance, supra,* at 468 H that "in essence the process of taxation is a joint undertaking by attorney and Taxing Master, aimed at justice being properly done in the matter of costs and each making his contribution for that purpose" instead of resorting to baseless criticism of an official of this Court.

Next, I shall deal with the rulings on a number of items of the bill of costs taken on review. The first ruling relates to items 8 to 146. These items are all claimed for perusal of 133 letters and 8 documents (altogether about 215 folios) that formed annexures to a previous action between the applicant and first respondent in the Supreme Court of the Republic of South Africa. The applicant's

counsel objected to the

inclusion of those items on the ground of relevancy. The respondent's counsel submitted that those documents were relevant because they formed the basis of an important *in limine* objection raised by the first respondent in the main application in this Court. Having heard argument by both counsel, the Assistant Taxing Master ruled that a composite fee on a time-basis will be allowed in respect of those items. He determined three hours as reasonably necessary for perusal of the documents and allocated a fee of N$420.00, in the process taxing off some N$303.75. The ruling, therefore, raises three questions: firstly, that of the relevancy of the perused documents; secondly, whether a composite fee on a time-basis should have been allowed and, thirdly, the time allowed as reasonable or proper for the perusal of those documents.

In the main application, the applicant sought to set aside an endorsement by the Registrar of Deeds substituting the name of the applicant for that of the first respondent on the title deed of a certain property. The first respondent opposed the application and, aside from the merits, raised two points *in limine*, i.e., the applicant's *locus standi* and the applicant's abuse of the process of court by proceeding on motion well knowing that there were material disputes between the parties not capable of resolution on affidavit. In support of the latter objection it referred to the previous litigation between the parties in the South African Supreme Court and annexed documents from the papers and pleadings filed in that Court to corroborate the allegation that the applicant had been aware of the disputes, the scope and substance thereof and how material they were to the

issues in the proceedings before this Court.

When he decided on the relevancy of those documents, the Assistant Taxing Master bore in mind that this Court dismissed the application (and subsequently its Full Bench dismissed the appeal) on the basis of the second *in limine* objection. As part of the *ratio* Teek, J. (as he then was) remarked that the "applicant knew that there were serious disputes of facts involved in this matter by the very nature of it and especially having regard to the history of the matter and in particular the previous litigation between the applicant and the first respondent". It is evident from this remark that the first respondent was entitled to consider the papers filed of record in the Supreme Court of South Africa and to annex documents in support of its second objection. The Court regarded those documents and the disputes of fact apparent from them as persuasive when it dismissed the application.

The contention by applicant's counsel that the litigation in the Republic of South Africa had nothing to do with the registration of a change of name in the Deeds Office does not take the point any further. It matters not what the relief prayed for in that Court was, fact is, that some of the disputes in that case were also pertinent to the disputes in the main application. On the basis of the applicant's prior knowledge of the substance and relevance of those disputes, the Court, in the exercise of its discretion, dismissed the application as an abuse of its procedure.

In the alternative to his main submission and in the event of this

court finding that some of those documents were relevant, applicant's counsel contended that only those documents from the previous litigation that were actually used as annexures to the first respondent's Opposing Affidavit in the main application should be allowed. He argues that a litigant cannot simply dump all his papers on his counsel's desk and expect of counsel to go through hundreds of irrelevant documents at the costs of the other side. Whereas the argument, taken by itself, may be persuasive in certain instances, it is not helpful in the circumstances of this case. The respondents' counsel received the documents of the previous RSA litigation as a single file. He perused those documents and, instead of annexing the whole court file as an annexure, prudently perused the court file and extracted from it only those documents most supportive and illustrative of the objection *in limine* that he was instructed to raise on behalf of the first respondent. Although other documents might also have been of some relevance, there was no need to annex all of them.

To determine whether it was necessary and proper to read all of the documents, the Taxing Master had to place himself in the position of the respondents' counsel and, from that perspective, he had to determine what steps were reasonably taken to obtain evidence for and use in the litigation. None of those documents were considered by the Assistant Taxing Master as being individually important. In fact, some of them are clearly irrelevant. In taxing the account, the Assistant Taxing Master had to bear in mind that the respondent was entitled to a full indemnity for all costs reasonably incurred by it in relation to its defence. In my view, it was not unreasonable to read

the court file of previous litigation in order to decide which material to extract from it for use in the main application.

The sum of the fees for perusing the individual documents in the bill of costs would have amounted to N$723.75. In deciding not to allow perusal fees in relation to each and every relevant document but rather, to deal with the documents in the court file as a collection and allow a single fee on a time-basis in respect of their perusal under Rule 70(5)(a), the Assistant Taxing Master cannot be faulted. Moreover, if regard is being had to the number of documents the time-based composite fee of N$420.00 appears to be reasonable, if not conservative.

The next objection relates to an amount of N$ 1,929.00 allowed under item 250 for air tickets issued to one Pastor Poole when he came to Namibia for a consultation during August 1996. Pastor Poole was duly authorised by the first respondent to depose to an affidavit in opposition to the main application. To that end a return air ticket was issued to him between Cape Town and Windhoek. The applicant's objection to this item is twofold: firstly, the first respondent's legal representatives in Cape Town were better positioned to draft the affidavit of Pastor Poole and, secondly, Pastor Poole had nothing to do with the application because he was not "a member of the Grootfontein Group".

The last of the two grounds is clearly untenable: Pastor Poole was the National Moderator of the first respondent. Given his knowledge of the relationship between the two church groups and the earlier

litigation between them, he was apparently identified as most knowledgeable about the issues and therefore authorised by the first respondent to make an affidavit in opposition to the application. He had everything to do with the application as the duly authorised representative of the first respondent. Counsel for the applicant further contends that he was not a member of the "Grootfontein Group", which, as I understand, was apparently a local branch of the first respondent who initiated the change of name on the Title Deed. For good reason, the Grootfontein Group was never cited as a party to the proceedings. There is no indication on the papers in this review application that a member of the Grootfontein Group was more knowledgeable than Pastor Poole about the affairs of the first respondent, its relationship with the applicant, its control over local branches and of its overall supervisory role and responsibilities for the acts of local church branches.

The suggestion that the first respondent's attorneys in Cape Town could have drafted the affidavit is equally without merit. Although the Cape Town attorneys of the first respondent might have had more intimate knowledge of the matters that were raised in the Supreme Court of South Africa, the main application extended to disputes much wider than those. The relief prayed for in those proceedings were dissimilar to the relief prayed for in the main application. In addition, the conduct of the first respondent objected to by the applicant related to that of members of one of its branches. Members of the Grootfontein Group had to be consulted and for them to have travelled to Cape Town would have been more expensive than the costs of Pastor Poole's air ticket from Cape Town

to Windhoek.

Furthermore, the main application was instituted in Namibia. The respondent had to appoint legal practitioners either directly or as correspondents within an 8 km radius from the High Court's seat. The first respondent cannot be faulted for having chosen to appoint only one firm of legal practitioners to represent its interests. Given the importance of Pastor Poole's affidavit and the fact that it related to matters beyond the scope of the issues in the RSA litigation it could not have reasonably been expected of the first respondent to require of Pastor Poole to make an affidavit in Cape Town. The Windhoek counsel was the one fully informed of the issues and they had the duty and responsibility to research matters relating to those issues and to gather and present evidence in a manner best serving the first respondent's opposition to the application. Under those circumstances it was not unreasonable of them to arrange a consultation with Pastor Poole in Windhoek.

The next objection relates to item 251 which, again, is for the cost of an air ticket issued to Pastor Poole, this time, to attend the hearing in Windhoek. According to the applicant's counsel, there was no justification for him to come to Windhoek. He objected to the expenses incurred as being "unusual". It is further contended that Pastor Poole "was not even a party" to the proceedings. I have already dealt with the latter submission. Pastor Poole was the duly authorised representative of the first respondent mandated as such because of his extensive knowledge about matters relevant to the main application. As to the justification for his presence in Windhoek,

the Assisting Taxing Master accepted that it was required for the first respondent to be in a position where it could issue instructions to counsel prior to and during the hearing or argument. The presence of a litigant in court during argument is justified. The principle equally applies, in my view, to natural and legal persons.

The last objection is against the Assistant Taxing Master's ruling on item 253. This item relates to transport to and accommodation for one Pastor Van Wyk at Windhoek during August 1996. The first respondent claimed accommodation for two nights. At the taxation the applicant's counsel did not object to this item, but the Assistant Taxing Master raised the reasonableness of the costs of accommodation for two nights. He eventually disallowed the costs of one night, ruling that Pastor Van Wyk could have travelled from Walvis Bay to Windhoek earlier the day on which the consultation was scheduled. Given the time at which the consultation finished, he allowed for one night's accommodation.

On review, both the Taxing Master and counsel for the first respondent took the view that, having failed to object to this item during the taxation, the applicant was precluded from taking the Assistant Taxing Master's ruling, made *mero moto* against the first respondent in respect of that item, on review. Whilst conceding that he did not object to that item during the taxation, counsel for the applicant argues that "the ruling of the Taxing Master as to any item or part of an item which was ... disallowed *mero moto* by the Taxing Master" may also be taken on review. The Taxing Master disallowed part of the item and, therefore, so he argues, applicant was entitled

to take his ruling on review.

The applicant's reliance on the quoted words of Rule 48(1) is, in my view, misplaced. The relevant portion of the sub-rule reads as follows:

"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 moto* by the Taxing Master may ... require the Taxing Master to state a case for the decision of a Judge ... : Provided that, safe with the consent of the Taxing Master, no case shall be stated where the amount or the total of the amounts, which the Taxing Master has disallowed or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed, respectively, is less than N$250.00".

The Rule, therefore, contemplates dissatisfaction with the ruling of the Taxing Master in relation to any item or part of an item which was (a) objected to or, (b) which was disallowed *mero moto* by the Taxing Master. Under category (a), the party presenting the bill of costs for taxation or the one objecting to it, or both of them, may, depending on the ruling of the Taxing Master, be a "dissatisfied" party and have *locus standi* to take the ruling on review: The party presenting the bill for taxation in relation to an item taxed down; the party who objects to an item when the whole or the part of the objection has not been not allowed, or both parties if the Taxing Master disallows part of an item upon an objection. In that instance the one party may be dissatisfied that a part of the fee has been taxed down and the other may be dissatisfied that only part of the objection has been allowed. Under category (b), only the party who

submitted the bill of costs has *locus standi* to take a *suo moto* ruling of the Taxing Master disallowing any item of that bill wholly or in part on review. It is difficult to comprehend that a party who has failed to object to a particular item in a bill of costs, can be "dissatisfied" with such a ruling made by the Taxing Master against the presenter of that account.

I am fortified in this view by the proviso to sub-rule (1). For example, if the Taxing Master, acting *suo moto* and in the absence of any objection, taxed down a bill of costs with less than N$250.00, the person who presented the bill of costs for taxation will not be allowed, save with the consent of the Taxing Master, to take the matter on review. Why then will the other party then be entitled to do so if he or she has also unsuccessfully objected to other items in the bill?

In the premises I decline to interfere with the Taxing Master's decision on the first three items taken on review and hold, in relation to the fourth, that, in the absence of an objection during the taxation, the applicant lacks standing to take it on review. In the result the following order is made:

1. The review of the Taxing Master's rulings in respect of items 8 to 146, 250, 251 and 252 of the first respondent's bill of costs fails.
2. An amount of N$450.00 is awarded to the first respondent for its costs in this review.

Counsel for the Applicant: A. Vaatz & Partners

Counsel for the Defendant: Dr. Weder Kruger 86 Hartmann