

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:-

**NATE NDAUENDAPO & ASSOCIATES**

and

**AUSSENKEHR FARMS (PTY) Ltd**

**1<sup>ST</sup> DEFENDANT**

**NAGRAPEX (PTY) LTD**

**2<sup>ND</sup> DEFENDANT**

**EXOTIC INTERNATIONAL (PTY) LTD**

**3<sup>RD</sup> DEFENDANT**

**GRAPE VALLEY PACKERS (PTY) LTD**

**4<sup>TH</sup> DEFENDANT**

**NAMIBIA NURSERIES (PTY) Ltd**

**5<sup>th</sup> DEFENDANT**

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**CORAM: PARKER, J**  
**Heard on: 2007 February 8**  
**Delivered on: 2007 February .....**

**RULING**  
**PARKER, J**

[1] This is an application by the five dependants, i.e. applicants, represented by Ms. Engelbrecht. For the avoidance of confusion, I will continue to refer to them as defendants, and the respondent as the plaintiff, represented by Mr. Coleman. The application was brought by notice of motion, praying that it be heard on an urgent basis. It was agreed by both parties that it be heard in the ordinary course.

[2] The pith and marrow of the application is to seek an order of this Court that the hearing of the action brought by the plaintiff be postponed *sine die* to a date to be arranged with the Registrar. The plaintiff opposes the application. The action referred to was brought on simple summons by the plaintiff in which he claims the payment of N\$883,489.27, being the balance for legal professional services rendered by the plaintiff (a legal practitioner) to the defendants in 2000 and 2004 and interest *a tempora morae* thereon.

[3] The defendants do not dispute that the plaintiff rendered professional legal services in the period mentioned previously: they dispute the reasonableness of the fees. Put simply, there is a dispute between the plaintiff and the defendants respecting the plaintiff's bill of costs.

[4] I do not think I should burden this ruling with the efforts that have been made to resolve the dispute and which came to nought; hence the plaintiff's action. In my view, if this Court determined the action, it would be transforming itself into the taxing master and, more important, it will be usurping the functions of the taxing master. In short, I do not think there is a legal basis for the Court to act as a taxing master. That is also the view of Ms. Engelbrecht, and I do not think Mr. Coleman does not make common cause with Ms Engelbrecht on this issue.

[5] In my respectful view, the role of this Court, where there is a dispute on a bill of costs, is to review the decision of the taxing master in the matter, and the Court can only do so where it is presented with an *allocatur*. It is trite law that a bill of costs cannot be reviewed until the *allocatur* has been completed.<sup>1</sup> As matters stand, in this case, the plaintiff's bill of costs has not been taxed. That being the case I find that it is premature for this Court to hear the action.

<sup>1</sup> Cilliers, *Law of Costs*, 3<sup>rd</sup> ed., 1997: para. 13.46, and the case cited.

[6] The crucial question that arises is: who should tax the plaintiff's bill of costs? Both Ms. Engelbrecht and Mr. Coleman agree that the bill should be taxed by the Registrar *qua* taxing master of this Court. Counsel referred me to textual and case-law authorities, which I have duly consulted. Counsel argue that the legal basis of the taxing master's duty in this regard is Rule 70 (1) of the Rules of Court. I respectfully agree with them. The opening lines of Rule 70 (1) states: "The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his or her capacity as such in connection with litigious work ..." (My emphasis) The word "competent" simply means "legally qualified".<sup>2</sup> Considering the *ipssisima verba* of the above-quoted provision in Rule 70 (1), it is idle for one to contend that the competency of the taxing master under that rule is restricted to costs ordered by this Court. If that was the intention of the maker of the Rules, nothing would have prevented the maker from making such of his or her intention known by clear, express words. The provision in the Rule clearly says "any bill of costs" presented "by an attorney" for "litigious work".

[7] I, therefore, hold that there is no legal impediment preventing the taxing master from taxing the plaintiff's bill: indeed, Rule 70 (1) is an

<sup>2</sup> The Concise Oxford Dictionary, 10 Ed.

enabling provision in this regard. *A fortiori*, both parties agree the plaintiff bill of costs should be taxed by the taxing master.

[8] The next question is: what tariff should the taxing master apply? Rule 5 (a) of the Rules of Court gives the taxing master the discretion to depart from the tariff prescribed by the Rules “in extraordinary or exceptional” cases where it would be fair and equitable to do so. In any case, the parties are agreed that the bill may be taxed on the scale of the Law Society. In my opinion, this agreement will greatly assist the taxing master in the judicious exercise of the above-mentioned discretion.

[9] Although the taxing master is an officer of this Court and the function to tax bills of costs is statutory, I think it is fair and reasonable that this Court at this stage recommends that the taxing master taxes the plaintiff’s bill as soon as practicable.

[10] In the result, taking into account the consent of both counsel on the question of costs, I make the following recommendation and orders:

- (1) It is recommended to the Registrar to tax the plaintiff’s bill of costs as soon as practicable.
- (2) It is ordered that –
  - (a) the action be stayed pending completion of the taxation of the plaintiff’s bill of costs.
  - (b) Costs occasioned by the stay stand over for determination at some later date.

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Parker, J

**ON BEHALF OF THE PLAINTIFF** Adv. G. Coleman

**Instructed by:**

Nate Ndauendapo &  
Associates

**ON BEHALF OF THE DEFENDANTS** Adv. A. M. Engelbrecht

**Instructed by:**

Diekmann Associates