



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (IN CHAMBERS)

Case no: I 2460/2012

In the matter between:

SMARTEC TECHNOLOGIES (PTY) LTD**PLAINTIFF/APPLICANT**

and

EPUPA INVESTMENT TECHNOLOGY (PTY) LTD**DEFENDANT/RESPONDENT**

Neutral citation: *Smartec Technologies (Pty) Ltd v Epupa Investment Technology (Pty) Ltd* (I 2460/2012) [2013] NAHCMD 258 (17 September 2013)

Coram: PARKER AJ

Delivered to the Registrar on: 17 September 2013

Flynote: Costs – Taxation of costs awarded to the plaintiff – On set down taxation date plaintiff did not appear in person or by counsel – Plaintiff's legal representatives of record had caused to be issued from the registrar's office a notice of withdrawal as legal practitioners of record barely one court day from the set down taxation date – Taxing master in exercise of his discretion under rule 70(4) of the rules of court removed the taxation from the roll and requested the defendant's legal practitioners to serve a notice of set down taxation date on the plaintiff whose last known postal address is in South Africa – The defendant's legal practitioner sought review and setting aside of the taxing master's decision not to proceed with the taxation – Court finding that the taxing master exercised his discretion wrongly and arbitrarily – Consequently the court reviewed, set aside and corrected taxing master's decision.

Summary: Costs – Taxation of costs awarded to the plaintiff – On set down taxation date the plaintiff did not appear in person or by counsel – Barely one court day before the taxation the plaintiff’s legal practitioner had caused to be issued from the registrar’s office a notice of his or her withdrawal as legal practitioner of record – Court found that the notice of withdrawal offended rule 16(4)(b) of the rules of court and para 38 of the Consolidated Practice Directions (CPD) – Court therefore concluded that the taxing master should have telephoned the plaintiff’s legal practitioner to appear at the taxation, as proposed by the defendant’s legal practitioner – The plaintiff’s legal practitioner would then have had to explain why he had issued a defective notice of withdrawal – On the facts the court found that the taxing master exercised wrongly and arbitrarily his discretion under rule 70(4) of the rules of court when he failed or refused to call the plaintiff’s legal practitioner, when he decided not to proceed with taxation and when he removed the taxation from the role – Consequently, taxing master’s decision reviewed, set aside and corrected.

ORDER

The decision of the taxing master is reviewed and set aside, and corrected as follows:

- (a) Taxation is postponed to a date to be arranged with the taxing master.
- (b) The defendant’s legal representatives shall set down the taxation on the date to be arranged with the taxing master, and the legal representatives shall do well to serve the notice of set down by registered mail on the plaintiff at his last known postal address.
- (c) The taxing master must allow any costs –
 - (i) reasonably incurred in connection with, or incidental to, service of process on the plaintiff, and

- (ii) wasted costs occasioned by the postponement of the taxation on 25 June 2013.

JUDGMENT

PARKER AJ:

[1] The applicant in the present proceeding (the defendant in an action) seeks the review and setting aside of the decision of the taxing master. The decision is this. The taxing master decided not to proceed with taxation which had been set down on account of the fact that the respondent (the plaintiff in the action) in whose favour costs had been awarded in the action proceeding did not appear in person or by counsel. I shall refer to the parties as the plaintiff and the defendant.

[2] The plaintiff's legal representatives and the plaintiff were aware of the set down time and date for taxation of 14h30 on 25 June 2013. Before the set down date arrived a notice of withdrawal of the plaintiff's legal practitioners as legal practitioners of record issued from the registrar's office on 21 June 2013, that is, barely one court day away from the set down taxation date. At the commencement of the taxation the defendant's legal practitioner requested the taxing master to telephone the plaintiff's legal representatives of record to appear at the taxation but the taxing master declined the invitation; whereupon the taxing master, apparently relying on rule 70(4) of the rules of court, took the decision not to proceed with the taxation. For reasons appearing in paras 3–5, I hold the view that the request by the defendant's legal practitioner was legitimate and reasonable.

[3] The plaintiff's legal representative knew and was aware that the information he had given to the plaintiff in terms of rule 16(4)(b) of the rules of court concerning the time limit of 10 days within which the plaintiff was to notify the other party of a new address of service as contemplated in rule 16(2) was worthless information because only one court day separated the issuance of the notice from the registrar's

office and the set down taxation date, as aforesaid. The taxing master should have acceded to the defendant's legal practitioner's request and called the plaintiff's legal practitioner of record in virtue of the interpretation and application of rule 16(4)(b) of the rules of court and para 38 of the CPD. And if the plaintiff's legal practitioner had responded to the phone call and appeared at the taxation, the taxing master would then have had the opportunity to request the legal representative to explain the issuance of his (or her) withdrawal notice which clearly offends rule 16(4)(b) of the rules of court and para 38 of the CPD. In this regard, I do not see any good reason, pace the taxing master, why para 38 of the CPD should not apply to taxation. For instance, para 38(a) of the CPD refers to 'hearing of a case'. Does it mean that para 38 of the CPD applies to applications only and not to trials? I do not think so. One should not lose sight of the fact that the practice directions are issued for the proper administration of justice and not to hamper it, and when the CPD is deficient in a particular aspect, the court is entitled to go as far as is reasonable so to do in order to pursue an interpretation and application of a practice direction that would conduce to proper administration of justice. Accordingly, I hold that para 38 of the CPD applies with equal force to taxation, as it does to applications and actions. Accordingly, I find that the taxing master failed or refused to bring his mind to bear on the interpretation and application of rule 16(4)(b) of the rules of court and para 38 of the Consolidated Practice Directions (CPD).

[4] I accept the taxing master's submission that the taxing master is vested with discretionary power by rule 70(4) of the rules of court. But the taxing master misses the point, that is, the point that the law expects the taxing master to exercise that discretionary power fairly and reasonably so as to do justice to all the parties. For instance, the taxing master failed or refused to bring his mind to bear on the interpretation and application of rule 16(4)(b) of the rules of court and para 38 of the CPD against the backdrop of the issuance of the notice of withdrawal as legal practitioners of record which, I have said more than once, offends rule 16(4)(b) of the rules of court and para 38 of the CPD. I, therefore, find that the taxing master exercised wrongly and arbitrarily his discretion under rule 70(4) of the rules of court. It follows that his discretion falls to be reviewed and set aside; and I so review and set it aside.

[5] Be that as it may, as matters stand, the taxing master did not conduct taxation on the set down date of 25 June 2013. The taxing master should not have removed the taxation from the roll; he should have postponed it to a date certain to enable service of process on the plaintiff because the very reason why the taxing master did not proceed with the taxation was non-service of process on the plaintiff, that is, according to the taxing master.

[6] It is the contention of the defendant's legal practitioner that the taxing master's decision not to proceed with the taxation 'has caused great prejudice to the respondent (the defendant) in the following respects:

- (a) Respondent risks incurring further legal costs which cost might not be allowed at taxation.
- (b) Respondent delayed in being placed into funds already incurred in defending this matter.
- (c) Respondent now incurs further costs to serve the notice of taxation on the plaintiff at the new address as the notice has to be served on plaintiff at an address in South Africa.'

[7] In my opinion, all this should not stand in the way of giving the plaintiff the opportunity to be heard on another date in person or by counsel on the taxation of costs that were awarded to it. I think the following order is, therefore, fair and reasonable in the circumstances of the case:

The decision of the taxing master is reviewed and set aside, and corrected as follows:

- (a) Taxation is postponed to a date to be arranged with the taxing master.
- (b) The defendant's legal representatives shall set down the taxation on the date to be arranged with the taxing master, and the legal representatives shall do

well to serve the notice of set down by registered mail on the plaintiff at his last known postal address.

- (c) The taxing master must allow any costs –
- (i) reasonably incurred in connection with, or incidental to, service of process on the plaintiff, and
 - (ii) wasted costs occasioned by the postponement of the taxation on 25 June 2013.

C Parker
Acting Judge

APPEARANCES

PLAINTIFF/APPLICANT: No appearance
LorentzAngula Inc., Windhoek

DEFENDANT/RESPONDENT: S Nambinga
Of AngulaColeman, Windhoek