NOT REPORTABLE

Case no: I 4126/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SIEGMAR PASCHEKA **PLAINTIFF**

and

LIESL ENGELBRECHT **1ST DEFENDANT**
INGE ENGELBRECHT **2ND DEFENDANT**

Neutral citation: Pascheka v Engelbrecht & Another (I 4126/2011) [2013] NAHCMD 268 (30 September 2013)

CORAM: **SMUTS, J**

Delivered on: 30 September 2013

JUDGMENT

SMUTS, J.:

[1] The first defendant's legal practitioner on 3 April 2013 filed a notice seeking to review a taxation of the Taxing Master of 19 March 2013. The notice purported to have been given in terms of Rule 48, requesting the taxing master to state a case decision by a judge. The full text of the notice stated the following:

‘The first defendant hereby requests the Taxing Master to state a case for decision of a judge in respect of the bill of costs of the plaintiff dated the 9th of February 1013 and in respect of which the Taxing Master signed an allocatur on the 19th of March 2013.

The issue to be determined by the judge is the following:

1. At the end of the taxation it came to light and it was admitted by the plaintiff that the attendances listed in the bill of costs related to both matters, the application for the rescission of the judgment for the first defendant and the “separate” application for rescission of judgment for the second defendant. That meant a number of items which the Taxing Master allowed on the basis that there was only one matter, should in fact be halved because the attendances related to the work done in respect of the application for rescission of judgment of the first defendant <u>and</u> the application for rescission of judgment for the second defendant. The parties had agreed that a memorandum would be furnished to the Taxing Master indicating which items in the bill would be effected by this provision. Such a memorandum were also admitted by the memorandum send to the Taxing Master on the 14th of March 2013. In fact, however, the Taxing Master did not take into account this issue at all.

2. A proper reading of the Heads of Argument and the opposing affidavit in respect of the matters for first and second defendants indicate that the work done was to a great extend merely a duplication, in other words the opposing affidavits were virtually identical. This fact should have been taken into account and the bill should have been dramatically by only allowing 50% of the fees allowed in respect of the items referred to in the memorandum. That has not been done by the Taxing Master and it is on that basis that the matter should be submitted to the judge for a review in terms of Rule 48.’

[2] The Taxing Master in his stated case submitted that the reviewing judge should not entertain the review because the first defendant’s notice was not in accordance with Rule 48. The Taxing Master pointed out that a dissatisfied party cannot be so bold as merely to call upon ‘the Taxing Master to state a case relating to certain specified items in a particular bill of costs.’ The Taxing Master submits that a notice should go further

and contain particulars necessary to assist the Taxing Master to state the case as is required by the rule.

[3] The Taxing Master further referred to the minimum requirements of Rule 48(1) and (2) in respect of such notices. These sub-rules provide:

> '48. (1) 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* require the taxing master to state a case for the decision of a judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall embody any finding of facts by the taxing master: Provided that, save 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 R250.
>
> (2) The taxing master shall supply a copy of the case to each of the parties, who may within 10 days after receipt thereof submit contentions in writing thereon, including grounds of objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed *mero motu* by the taxing master, and thereafter the taxing master shall frame his or her report and shall supply a copy thereof to each of the parties, who ma within 10 days after receipt thereof submit contentions in writing thereon to the taxing master, who shall forthwith lay the case together with the contentions thereon before a judge, who may then decide the matter upon the case and contentions so submitted, together with any further information which he or she may require from the taxing master, or may decide it after hearing, if he or she deems fit, the parties or their advocates or attorneys in his or her chambers, or he or she may refer the case for decision to the court, and any further information to be supplied by the taxing master to the judge shall be supplied by him or her to the parties who may within 15 days after the receipt thereof submit contentions in writing thereon to the taxing master, who shall forthwith lay such further information together with any contentions of the parties thereon before the judge.'

[4] The Taxing Master further referred to *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd*[1] in support of his contention that the first defendant's notice did not comply with Rule 48 and that the review should not be entertained. The first defendant's legal practitioner, Mr Vaatz, subsequently filed contentions as envisaged under Rule 48(2). He contended that the stance adopted by the Taxing Master was inappropriate for two reasons. In the first place, he referred to the bill of costs included attendances in respect of both the first and second defendants' applications for rescission and pointed out that certain attendances were duplicated and the amounts for certain items allowed upon taxation should be divided by two as a consequence. Mr Vaatz pointed out that he had submitted a memorandum to the Taxing Master setting this out and that the plaintiff's legal practitioner had agreed with this approach.[2] In the second instance, Mr Vaatz submitted that the Taxing Master should have been guided by the memorandum but had, he submitted, ignored it. Mr Vaatz submitted that the stated case should have been prepared in the light of the two memorandums concerning that issue instead of avoiding to state a case entirely.

[5] I turn to the provisions of Rule 48(1) and (2) in order to determine whether the first defendant's notice had complied with these sub-rules. These sub-rules are set out above. After a very thorough and helpful discussion of the similarly structured rule[3] in South Africa in the *Brener* matter relied upon by the Taxing Master, that court concluded:

> 'In my judgment the suggestion contained in the passage quoted above from Jacobs and Ehlers at 239 para 317, that the notice to be given in terms of Rule 48(1) by the dissatisfied party to the Taxing Master must not be so bald as merely to call upon him to state a case relating to certain specified items in a particular bill of costs, is correct: the notice must go further and must contain particulars necessary to assist the Taxing Master to state the case as required by the Rule and the decisions which govern the manner of its application. In particular, the notice given by the dissatisfied party must:

[1] 1999 (4) SA 503 (W).
[2] It is correct that he had filed such a memorandum. But the plaintiff's legal practitioner had agreed with some and not all of the contentions in it.
[3] Albeit differently worded.

"(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 meromotu 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).

These appear to be the minimum requirements for a proper notice in terms of Rule 48(1) requiring a Taxing Master to state a case."

[6] In the *Brener* matter, the dissatisfied party had at least identified the items upon which a decision was sought. But that was found to be insufficient. Not only is a party required by the rule to specify each item or part thereof which had been objected to as disallowed, but the notice must also contain an allegation that each of the items sought to be reviewed was objected to. The grounds of the objection in respect of each item should also be set out.

[7] In the absence of properly complying with Rules 48(1) and (2) in identifying each item complained of and the grounds upon which the objection is made, a Taxing Master cannot be expected (and should not be required) to prepare the stated case contemplated by the rule as was made clear in the *Brener* matter.

[8] In this instance, the first defendant's notice does not even meet the very first peremptory requirement of the rule. The items upon which a decision is sought are not even specified or identified. There is a mere reference to 'a number of items' which the notice contends should have been resulted in the amounts allowed to be halved. They are not however listed or properly referred to. The notice states that a memorandum had been furnished setting them out and referred to. It is also stated that 'a number' of

those unspecified items were ‘admitted’ in a memorandum (sent by the plaintiff’s then legal practitioner). Neither the items contended for nor those which were ‘admitted’ are however specified. Nor is it stated that they were objected to although the grounds of dissatisfaction are stated as being a duplication.

[9] It is clear to me that the first defendant’s notice falls hopelessly short of what is required by Rule 48. The Taxing Master was thus entitled in his stated case to point this out. It is not for the Taxing Master to scrutinise the prior memorandum which is then to read with another to establish which items were admitted in an endeavour to possibly determine which may have given rise to dissatisfaction. Parties seeking to invoke Rule 48 must comply with its basic requisites before a review of a taxation can proceed under that rule.

[10] The first defendant’s notice plainly did not comply with Rule 48. It was not a proper notice for the purpose of the rule. The Taxing Master was thus not required to state a case for a decision by a judge. There is thus no review before me. The plaintiff did not file any contentions. His legal practitioners withdrew subsequent to the filing of the notice. The plaintiff’s costs are limited to receipt of the defect notice.

[11] The following order is made:

1. The first defendant’s notice to review the allocator of the Taxing Master of 19 March 2013 is dismissed with costs as being defective.

DF SMUTS

Judge