

HIGH COURT OF NAMIBIA, MAIN DIVISION,



JUDGMENT ON REVIEW OF TAXATION

CASE I 857/2014

In the matter between:

MULTI ENGINEERING CONTRACTORS (PTY) LTD

PLAINTIFF

and

DE VRIES COOLING SERVICES CC

1ST DEFENDANT

MR. B. ZAARUKE t/a BENZ BUILDING SUPPLIES

2ND DEFENDANT

Neutral Citation: *Multi Engineering Contractors CC v De Vries Cooling CC* (I 857/2014)
[2017] NAHCMD 147 (19 May 2017)

CORAM: MASUKU J

**Flynote: TAXATION – RULE 75 – Review of taxation by the court – PRACTICE –
RULE 32 (11) – Maximum amount for costs in relation to interlocutory proceedings –**

LAW OF CONTRACT – Whether an agreement by the parties to the amount of costs is subject to the powers of review in terms of rule 75.

Summary: The second defendant obtained an order against the plaintiff for rescission of a default judgment. Costs of the application were granted against the second defendant in favour of the plaintiff. The parties reached an agreement regarding the amount of the costs due to the plaintiff in this regard and this amount was endorsed by the Taxing Officer as the *allocatur*. Subsequently the second defendant issued a notice to the Taxing Officer requesting him to state a case for determination regarding the *allocatur*. The second defendant alleged that the provisions of rule 32(11) had not been observed and that there was no order for the second defendant to pay the plaintiff's costs.

Held – That in view of the agreement regarding the amount of costs payable, the Taxing Officer did not make a ruling in terms of rule 75 and for that reason, the provisions of rule 75 were not applicable.

ORDER

1. The application for the review of the Taxing Officer's ruling is dismissed.
 2. The second defendant is ordered to pay the costs of the review.
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JUDGMENT

MASUKU J.

Introduction

[1] Presently serving before court is an application for the review of a ruling alleged to be of the Taxing Officer in the above matter, which at the relevant time served before Mr. Justice Geier. It was subsequently transferred to me in 2015. The reason why I say the ruling is alleged to be that of the Taxing Officer will be clear as the judgment unfolds.

[2] On 19 November 2014, this court, per Geier J, granted an application for the rescission of a default judgment dated 15 April 2014 entered in favour of the plaintiff in this matter. As a result of the granting of the said application, the 2nd defendant was granted leave to defend the matter and it is for that reason that it remains pending before me. Central to the rescission of the judgment, and the bone of contention in this matter, is an order for costs captured in the court order dated 19 November 2014 to the effect that the 'applicant is to pay the costs occasioned by the rescission application'.

[3] By notice in terms of rule 75 dated 15 July 2015, the Taxing Officer was requested by the second defendant to state a case for decision by this court regarding the taxation of a bill of costs on 26 June 2016. The first issue raised in the said notice relates to the provisions of rule 32 (11) of this court's rules, which sets a ceiling amount in relation to costs in interlocutory proceedings. It is contended that the said ceiling was not observed by the Taxing Officer in this case.

[4] The second and last issue raised relates to the allegation that the court order rescinding the judgment did not grant any costs in favour of the second defendant in this matter, i.e. Mr. B. Zaaruke t/a Benz Building Supplies.

[5] The plaintiff was invited, as it was entitled, to file its contentions in terms of rule 75 (5) in response to the stated case. In the first instance, the plaintiff raised a preliminary point of law *in limine* and further proceeded to deal with the substance of the grounds for review. I will deal with these issues arising as necessary in due course.

Point In Limine

[6] The point raised in this regard is that the provisions of rule 75 do not apply to the present matter for the reason that the bill of costs in contention was not taxed but was the result of an agreement and the subject of consent between the parties. It is contended in this regard that same was therefor never argued or presented to the Taxing Officer for him or her to consider any individual item and to rule thereupon. It is alleged that the parties agreed to have taxed off an amount of N\$ 6 400, resulting in the amount due as costs being N\$ 75 715. It is also alleged that after the agreement, the Taxing Officer finalized the *allocatur* based on this understanding and agreement of the parties referred to herein.

[7] This position finds support in the Taxing Officer's report. The Taxing Officer, at para 3 of the report states the following:

'The bill of costs was never fully taxed. The legal practitioners, Mr. Vlieghe and Ms. Angula respectively, discussed the items of the bill of costs on 25 June 2016 and agreed that the amount of N\$ 6 400 should be taxed off.'

It does not appear that this position is contested. No papers have been filed on behalf of the defendant challenging the correctness of the version put up by both the plaintiff and the Taxing Officer. For that reason, in the absence of anything to the contrary, I am of the considered view that the only version presently before court must be accepted as the correct and an accurate version of the events that took place leading to the issuance of the *allocatur* by the Taxing Officer.

[8] The main question in need of an answer is the effect of the agreement alleged, whose existence I have found is not disputed. The pointed question is whether in view of the agreement in question, it is in order for the court to allow the review to still take place. Put differently, is the review procedure open to application in cases where the parties agree on the amounts to be confirmed and only request the Taxing Officer to endorse their agreement by entering the *allocatur* based on their agreement?

[9] The answer, in my view is to be found in rule 75 (1) which states as follows:

'A party dissatisfied with or the ruling of the taxing officer as to any item part of an item which was objected to or disallowed *mero motu* by the taxing officer may, within 15 days after the *allocatur* is issued, require the taxing officer to state a case for the decision of a judge.' (Emphasis added).

In my considered the view, a close reading of the above sub-rule is necessary and I proceed to do so below.

[10] I am of the considered view that the point of law *in limine* is well taken. I say so for the reason that it would appear to me that matters in respect of which the review powers of the court may be exercised is limited to those in which the itemised bill of

costs has been submitted to the Taxing Officer and certain items or parts of same are contested and debated and the Officer, after taking into account the contending views and submissions of the parties, makes a determination thereon.

[11] That this is the position, in my considered view, is the use of the word 'ruling' by the rule-maker in the text. That word is defined in the Oxford Advanced Learner's Dictionary as 'an official decision made by sb in a position of authority, especially a judge.' On the other hand, Black's Law Dictionary,¹ defines ruling as, 'The outcome of a court's decision either on some point of law or on the case as a whole'.

[12] What I consider of some importance in this regard is that the determination in a ruling is normally made subsequent to some argument or contentions having been made before the decision-maker makes the decision or ruling. This means that some dispute must have been submitted before the said official for determination and the said officer listens to and considers the submissions made on the issue in dispute, whether the arguments are written or oral, or even a combination of the two. It is after such a process that he or she will then make a ruling. That, in my view, is the full import of a ruling. I say without fear of contradiction that this is the process normally followed in cases where certain portions of an itemised bill of costs are contested during taxation.

[13] In the premises, it would appear to me that the inexorable conclusion that must be necessarily be reached in the instant matter, is that the bill of costs in the instant matter is not, regard had to the foregoing, amenable to review as there was no submission of any item or part thereof to the Taxing Officer for determination or for a ruling. As indicated, the parties agreed on the amount that was to be issued as the *allocatur* and this points to the fact that the Taxing Officer did not exercise any powers in making a decision, other than simply endorsing the agreement of the parties as presented to him.

¹ Third Pocket Edition, 2006 p 630.

[14] If authority for the conclusion reached above is required, one has to consider *Millman N.O. v Klein*,² where Rose Innes J stated the following lapidary remarks:

'The figure R2000 represents what the parties agreed would be the defendant's liability for costs in the event of the scheme not being sanctioned. The liability arises on the agreement to pay the agreed amount; it does not depend upon an ascertainment of what costs were actually incurred nor upon a debate of what portion of the actual costs should be recoverable from the defendant, nor upon a determination of his liability for costs by taxation. Agreed costs are not subject to taxation, or rather an agreed an agreed liability to pay an agreed amount as and contribution towards costs, is not subject to presentation of a bill of costs, nor to taxation.' (Emphasis added). See also *Malherbe Rigg & Ranwell Incorporated v Andrea Pretorius*.³

[14] In view of the foregoing, I am of the considered view that the point *in limine* is good and must be upheld. I do not, in the circumstances, find it necessary to deal with the other issues raised which I have otherwise captured above. They can only be properly considered if the point *in limine* were to be dismissed which is not the case in this matter.

[15] I should tender my apologies to the parties for the delay in delivering this judgment and this owes to two principal factors. First, it appears there was a delay in the matter being brought to the attention of the Taxing Master in the first place. This is plain from his stated case. This trend appears to have continued as this matter was also not timeously brought to my attention and with the heavy case load some matters, particularly those not managed in the normal judicial case management process, appear at times to slip through the cracks.

² 1986 (1) SA 465 at 474 A-B.

³ Case No: 19133/2014.

[16] In this regard, and to eliminate the incidence of such matters disappearing under the radar, I would propose that the Taxing Officer should personally bring the file with a stated case to the relevant Judge for his or her attention, particularly in the light of the stringent time limits for the determination of such disputes as recorded in the rules of court.

Order

[17] In view of the foregoing, I am of the view that the application for the review of the Taxing Officer's ruling in the circumstances is liable to be dismissed with costs. I accordingly make the following order:

1. The application for the review of the Taxing Officer's ruling is dismissed.
2. The second defendant is ordered to pay the costs of the review.

TS Masuku
Judge

PLAINTIFF: Koep & Partners

SECOND DEFENDANT: Dr. Weder, Kauta & Hoveka Inc