



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

**CASE NO: A 293/2014**

In the matter between:

**IMMANUEL FILLEMON WISE**

**APPLICANT**

and

**IMMANUEL SHIKUAMBI N.O.  
HENRY POTE  
RESPONDENT**

**FIRST RESPONDENT  
SECOND**

**Neutral citation:** *Wise v Shikuambi N.O* (A 293/2014) [2017] NAHCMD 148 (24 May 2017)

**Coram:** **UEITELE J**

Heard: 4 August 2016

Delivered 24 May 2017

**Flynote:** Costs - Taxation - Review of taxation - Grounds for review based on common law grounds for judicial review - Such grounds, however, wider parameters than common law grounds - Taxing Master functionary in taxation - Court reluctant to

interfere unless Taxing Master has exercised discretion improperly, has not brought his mind to bear upon the issue, or has based his decision on wrong principles.

**Summary:** During October 2014 the, the plaintiff launched a review application for this court to review and set aside the *allocatur* issued on 9 September 2014. The defendant opposes the application whereas the Taxing Master does not oppose the application he indicated that he will abide by the decision of the court.

*Held that* the exception was an intermediate step in that litigation and the case would not be concluded until an appeal Court would finally pronounce itself upon the merits or the upholding of the exception. The ruling made on 1 August 2014 related to a matter incidental to the main dispute and would seem, therefore, to fall into the general category of 'interlocutory', in the wide sense. The court thus held that the exception raised by the defendant in this matter was an interlocutory proceeding as contemplated in Rule 32(11).

*Held that* the new Court Rules which, as an exception to the general rule, provide a ceiling in respect of the costs in interlocutory applications came into effect on 16 April 2014.

*Held further* that in terms of rule 138(a) it is clear that although the exception was raised before the new rules came into operation the exception is deemed to have been raised under the new rules and the case continued to proceed under the new Rules and Rule 32 applies to these proceedings with effect from 16 April 2014. In case there was any doubt Rule 138(b) makes it clear that the exception continued under the new rules.

*Held further* that the general legal principle that costs are awarded to a successful party in order to indemnify him or her for the expenses to which he or she has been put through having been unjustly compelled either to initiate or defend litigation, is not absolute.

*Held further* that a party's right to claim costs from his or her opponent which he or she has incurred in the process of litigation only arises upon the court ordering an

opponent to pay a successful party's costs. In this matter the Court, on 1 August 2014, ordered the plaintiff to pay the defendant's costs for the exception. The defendant's right to be paid costs which he incurred as a result of the exception which he raised only arose when the Court gave its ruling and that was on 1 August 2014. By that time (i.e. by 1 August 2014) Rule 32(11) had already been in operation since 16 April 2014.

*Held further that* the duty 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, in this matter it was the defendant. If the defendant wanted costs on a scale above the limit set in Rule 32(11) the *onus* was on the defendant to make out case for that want or need.

*Held further that* the power to determine whether or not a party is entitled to costs exceeding the upper limit set in Rule 32(11) is vested in the Court and not in the Taxing Master.

*Held furthermore that* in the circumstances, it is appropriate for the Court to interfere with the exercise of the Taxing Master's discretion since there is no indication that he exercised any discretion at all. In the court's view, by acting contrary to the provisions of Rule 32 (11); allowing costs on a scale higher than the upper limit set in Rule 32(11) the Taxing Master not only acted *ultra vires* his powers but he also usurped the Court's powers. The *allocatur* issued by the Taxing Master on 9 September 2014 is therefore reviewed and set aside.

---

### ORDER

---

1. The review proceedings are successful and the *allocatur* issued by the Taxing Master on 9 September 2014 in the amount of N\$ 32 259-75 is set aside.
2. The applicant (Plaintiff) must pay to the second respondent (the Defendant) the costs in respect of the exception upheld on 1 August 2014 the costs being the

amount of N\$ 20 000 exclusive of Value Added Tax.

3. There is no order as to the costs of this review.

---

## JUDGMENT

---

**UEITELE, J**

### Introduction and background

[1] This matter has its genesis in an action instituted by Mr Wise, as plaintiff, against Mr Pote, as defendant, in which action he claimed payment for an alleged breach of contract. For ease of reference I will refer to the parties as they were in the substantive action, in other words, I will refer to Mr Wise as the plaintiff and Mr Pote as the defendant. At the time when Mr Wise instituted the action the now repealed rules of this Court were still in operation.

[2] As I have indicated above the plaintiff, during July 2012, instituted action against the defendant. During February 2014 the plaintiff amended his particulars of claim. During March 2014 the defendant gave notice that he is excepting to the plaintiff's amended particulars of claim on the ground that the amended particulars of claim do not disclose a cause of action against the defendant. The plaintiff opposed the exception and as a result the matter was placed on the opposed motion roll.

[3] The matter was set down for hearing the exception on 1 August 2014. On that day (i.e. on 1 August 2014) after hearing the exception I made the following ruling:

1. That the defendant's exception is upheld with costs (such costs to include the costs of one instructing and one instructed counsel).

2. That the particulars of claim are set aside and the plaintiff is afforded an opportunity to amend its particulars of claim on or before 15 August 2014.

3. The matter is postponed to 24 September 2014 at 08h30 for a status hearing.'

[4] I find it appropriate to pause here and observe that during January 2014 the Judge President promulgated new Rules to govern the proceedings in this Court. The Rules promulgated during January 2014, however, only came into operation on the 16<sup>th</sup> of April 2014.

[5] Pursuant to the costs order made in his favour the defendant, on 19 August 2014, served a notice of taxation (to be held on 09 September 2014) on the plaintiff. A bill of costs was attached to the notice of taxation. The taxation was, as scheduled, held on 9 September 2014. On that day (i.e. the 9<sup>th</sup> September 2014) Ms Lubbe, the defendant's legal practitioner of record and Ms Feris, the plaintiff's legal practitioner of record attended the Registrar's General Office to meet the Taxing Master who is the first respondent (I will refer to him simply as the Taxing Master) and discussed the bill of costs.

[6] Ms Feris, while with Ms Lubbe, went through the bill of costs, in the absence of the Taxing Master and had a few queries which were addressed by Ms Lubbe to Ms Feris' satisfaction. After Ms Feris had gone through the bill of costs and was satisfied with the bill, she and Ms Lubbe attended to the taxation with the Taxing Master who enquired whether there were any items in dispute or any objections to which Ms Feris responded in the line of 'no, the bills are actually up to scratch'. In view of the reply given by Ms Feris the Taxing Master confirmed that he would finalise the taxed *allocatur* and provide it to the parties' representatives. After the taxation the Taxing Master issued an *allocatur* in the amount of N\$ 32 259-75 in favour of the defendant.

[7] On 11 September 2014 Ms Lubbe addressed a letter to Ms Feris, in which letter Ms Lubbe requested that the amount of N\$ 32 259-75 contained in the *allocatur* be paid within a period of seven days. After receipt of the letter of 11 September 2014 Ms Feris contacted Ms Lubbe and discussed the amount of the costs contained in the *allocatur*. On 25 September 2014 Ms Feris replied to the letter of Ms Lubbe and in that reply informed Ms Lubbe that the costs of the exception

ought to, in terms of Rule 32 (11) of the new Rules of Court which came into operation on 16 April 2014, have been limited to N\$20 000 and on the instructions of the plaintiff made proposal to settle the defendant's cost of the exception but limited to the amount (i.e. N\$ 20 000) contemplated in Rule 32(11).

[8] On 30 September 2014, the defendant through her legal practitioner of record rejected the proposal and demanded the full amount (i.e. N\$ 32 259-75) contained in the *allocatur*. The defendant further threatened to issue a warrant of execution if the full amount contained in the *allocatur* was not paid. It is thereafter that the plaintiff instructed his legal practitioner to launch this application for the review and setting aside the *allocatur* issued on 9 September 2014. The application for review was launched during October 2014. The defendant opposes the application whereas the Taxing Master does not oppose the application he indicated that he will abide by the decision of the Court.

The grounds on which the plaintiff seeks the review and setting aside of the *allocatur* dated 9 September 2014

[9] The ground on which the plaintiff relies for the relief that he is seeking is that the *allocatur* is *ultra vires* Rule 32(11) of the Court Rules and is therefore a nullity.

[10] The defendant opposes the application for review on the ground that the plaintiff's legal practitioner did not, at the taxation hearing, object to the items contained in the Bill of Taxation and is therefore bound by the *allocatur*. The defendant further opposed the review application on the ground that Rule 32(11) is not applicable to the matter because the exception was raised prior to the new rules coming into operation.

The legal principles

[11] Rule 125 (1) of the Rules of court empowers a Taxing Master to tax any bill of costs presented to him or her for taxation. That Rule provides as follows:

'125. (1) The taxing officer is, subject to rule 124, competent to tax a bill of costs

for services actually rendered by a legal practitioner in connection with litigious work of the court and he or she must tax such bill, subject to sub rules (7), (8) and (11), in accordance with the provisions contained in Annexures D and E, except that the taxing officer may not tax costs in instances where some other officer is empowered to do so.'

[12] In the matter of *Texas Co (SA) Ltd v Cape Town Municipality*<sup>1</sup> it was held that:

'...costs are awarded to a successful party in order to indemnify him for the expenses to which he has been put through having been unjustly compelled either to initiate or defend litigation, as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity but that does not affect the principle on which it is based.'

[13] The objective of taxing a bill of costs was stated as follows in the matter of *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers Van Christus Kerk*.<sup>2</sup>

'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" ... If the costs have 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".'

[14] In the *Pinkster Gemeente van Namibia*<sup>3</sup> case the court explained that a legal practitioner who prepares a bill of costs on behalf of a successful litigant must do so keeping in mind the purpose of awarding a costs order and the objective of taxing a bill of costs. The learned judge said:

---

<sup>1</sup> 1926 AD 467 at 488.

<sup>2</sup> 2002 NR 14 (HC) at 15I-17E by Maritz AJ (as he then was).

<sup>3</sup> *Supra* at p 16.

'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 therefore 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."

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.' (Underlined for emphasis).

[15] As regards the duties of the Taxing Master at the taxation proceedings the learned judge said:

'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.' (Underlined for emphasis).

[16] The learned judge proceeded to explain that the taxation of a bill of costs is a court-annexed process and it is as such an integral part of the judicial process. The learned judge stated that a Taxing Master presides on the taxation of a bill of costs not simply as an administrative official, but as an extension of the judiciary. It is for that purposes, said the Judge, that the courts have recognised and reiterated that 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.

[17] Because the taxation of a bill of costs is a court-annexed process and is an integral part of the judicial process the courts, through the process of judicial review



exercise supervisory function over that process. The courts have reiterated the fact that although the discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master, a Court will, when a decision of a Taxing Master is sought to be reviewed, allow the Taxing Master a significant degree of appreciation in the exercise of his or her discretion.

[18] The Court in the performance of its supervisory function, is entitled to and will 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.<sup>4</sup> Justice Maritz expressed this principle as follows:

'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.'

[19] It is clear from the authority above that, this Court has the power to correct the Taxing Master's ruling not only if he has acted *mala fide* or from ulterior and improper motives, if he has not applied his mind to the matter or exercised his discretion at all, but also when he has disregarded the express provisions of a statute.<sup>5</sup> Having set out the legal principles I will now proceed to apply the law to the facts at hand.

### Discussion

[20] The authorities are clear that the general rule is that a successful party must be indemnified in respect of costs that he or she has incurred when he or she initiated or defended a matter. Implicit in that statement is that there are exceptions to the general rule that a party must be indemnified in respect of costs that he or she has incurred in the process of litigation. One of the exceptions is found in Rule 32

---

<sup>4</sup> *Kock v SKF Laboratories (Pty) Ltd* 1962 (3) SA 764 (E) at 765E. See also *Preller v Jordaan and Another* 1957 (3) SA 201 (O) at 203C-E.

<sup>5</sup> *Legal And General Assurance Society Ltd v Lieberum N.O. and Another* 1968 (1) SA 473 (A) at 478.

(11)<sup>6</sup> of this Court's rules which reads as follows:

'(11) Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N\$20 000.' (Italicised and underlined for emphasis).

[21] Rule 32 contemplates two types of proceedings, namely, first, applications for directions in respect of interlocutory applications (subrules (1), (4), (5), (6), (7) and (8)); and, second, interlocutory applications (subrules (2), (3) and (11)). The starting point is thus to answer the question whether an exception fits in in one or both the types of proceedings contemplated in that Rule. What is obvious is that an exception is not a proceeding in respect of which direction in respect of interlocutory proceedings is sought from the managing judge. Is it an interlocutory application?

[22] In *Herbstein and Van Winsen: Civil Practice of the Superior Courts of South Africa*<sup>7</sup>, the learned authors opine that an interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. In the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*<sup>8</sup> Corbett JA summarized the principles that are useful in determining whether a matter is an interlocutory one or not as follows:

'(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not...

(b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders...

<sup>6</sup> Rules of the High Court of Namibia: High Court Act, 1990 published in the Government Gazette No. 5392 of 17 January 2014, under Government Notice No. 4 of 2014.

<sup>7</sup> By Cilliers, Loots and Nel, 5<sup>th</sup> ed Vol 2 at p 1204.

<sup>8</sup> 1977 (3) SA 534 (A). 549F-550A.

(c) The general test as to whether an order is a simple interlocutory one or not was stated by SCHREINER, J.A., in the Pretoria Garrison Institutes case, *supra*, as follows

"... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'."

(d) ...

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, *is res judicata* ..'

[23] It remains to apply these principles to the facts of this case. In this matter the defendant excepted to the plaintiff's particulars of claim. It seems clear that the litigation which resulted in a ruling being given against the plaintiff on 1 August 2014 (i.e., the upholding of the defendant's exception) did not cease with the upholding of the exception. The exception was an intermediate step in that litigation and the case would not be concluded until an appeal Court would finally pronounce itself upon the merits or the upholding of the exception. The ruling made on 1 August 2014 related to a matter incidental to the main dispute and would seem, therefore, to fall into the general category of 'interlocutory', in the wide sense. I have thus come to the conclusion that the exception raised by the defendant in this matter was an interlocutory proceeding as contemplated in Rule 32(11).<sup>9</sup>

[24] I have indicated above that one of the grounds on which the defendant opposed this review application was that Rule 32 (11) is not applicable to this matter. Mr van Vuuren who appeared for the defendant argued that:

'Since the exception was prepared and set down before the new rules came into operation (on 16 April 2014) the provisions of Rule 138 read with practice directive 64 is

<sup>9</sup> See the unreported judgment of this Court in the matter of *Old Mutual Life Assurance Company of Namibia Ltd v Hasheela* (I 2359-2014) [2015] NAHCMD 152 (26 June 2015) at para [12].

applicable. When the exception was drawn and set down, the second respondent did so while having the right to recover his full costs incurred (including the eventual costs of heads of argument and argument of the exception) without any limit to such costs, apart from the taxation of the costs on the scale of costs awarded (and on the then applicable legal principles).

Should the applicant have sought that the costs for the exception should be limited to N\$ 20,000.00, submissions should have been made in such respect in order for the court to have been presented with proper argument and a proper adjudication thereof. The applicant failed to do so.

By virtue of the aforesaid circumstances a right had vested for the second respondent to recover his full costs (subject to taxation on the scale allowed).

The Rules of Court are made by the Judge-President with the approval of the President. The Rules constitute subordinate legislation.

The Judge-President makes rules for regulating the conduct of the proceedings of the High Court. The Judge-President cannot make Rules that:

- a) change the common law;
- b) limit existing rights, including rights created by mutual agreement between parties;
- c) create and impose an excessive burden upon persons affected by the Rules; and
- d) have a retrospective effect.

It is respectfully submitted that the following is apposite in regard to the retrospective effect of legislation:

*“Observance of the presumption against retroactivity is a fundamental principle of the law-state and disregard of it reduces the law to an instrument of governmental anarchy”*

Two presumptions exist in this regard:

- a) one against retrospectivity; and
- b) the other against taking away a vested rights.

If the applicant's argument in this matter is to be accepted, it would entail the taking away the second respondent's vested right to recover his full costs in excess of the N\$ 20,000 provided for in Rule 32(11), the latter in any event serving no real purpose than to prevent litigants from properly ventilating the issues of their dispute. The effect of the amendment, should the applicant's argument be accepted, would be retrospective. The presumption is against retrospective effect on vested rights.

It is submitted that, in the unique circumstances of this matter, the rules should be interpreted not to have a retrospective effect that takes away the second respondent's vested right to costs ... There is no obligation on the second respondent's legal representative to have limited the costs set out in the bill to N\$ 20,000.00. The second respondent was and is entitled to recover the full amount for the costs incurred in the exception. The first respondent, in the circumstances, it is submitted, exercised his discretion properly, considering the prevailing facts, exercised such discretion judicially, applied his mind to the relevant facts and acted in the correct principles. In the circumstances it is submitted that the first respondent did not act *ultra vires* the rules of court and acted properly by taxing the bill in the manner he did.'

[25] I do not agree with the submissions made by Mr Van Vuuren. My disagreement is based on the following reasons. The transitional period from the old Rules to the new Rules which came into effect on 16 April 2014 is provided for in Rule 138 of the new rules. That Rule in material terms provides as follows:

**'138 Savings and transitional provisions**

Despite the repeal of the Rules of the High Court by these rules-

(a) anything done under a provision of the repealed rules and which could have been done under a corresponding provision of these rules, *is deemed to have been done under such corresponding provision of these rules*;

(b) a case that has been registered with the registrar or has been allocated to a managing judge under the repealed rules *continues under these rules*, but if there

is any uncertainty in this regard the managing judge must direct the appropriate procedure to be followed after considering representations from the parties; and ...' (Italicised and under lined for emphasis)

[26] The facts which are not in dispute in this matter are that the plaintiff amended his particulars of claim during February 2014, the defendant excepted to the amended particulars of claim during March 2014 and the exception was heard on 1 August 2014 and the ruling ordering the plaintiff to pay the defendant's costs of the exception was made on 1 August 2014. The bill of costs was taxed on 09 September 2014 and the *allocatur* was issued on that date.

[27] The new Court Rules which, as an exception to the general rule, provide a ceiling in respect of the costs in interlocutory applications came into effect on 16 April 2014. In my view, in terms of rule 138(a) it is clear that although the exception was raised before the new rules came into operation the exception is deemed to have been raised under the new rules and the case continued to proceed under the new Rules and Rule 32 applies to these proceedings with effect from 16 April 2014. In case there was any doubt Rule 138(b) makes it clear that the exception continued under the new rules. I have thus no doubt that Rule 32(11) applies to the exception which was argued and heard on 1 August 2014.

[28] Mr Van Vuuren's argument with respect to the retrospectivity, changing the existing common law and taking away vested rights is flawed. I say the argument is flawed for the following reasons. Firstly, the general legal principle that costs are awarded to a successful party in order to indemnify him or her for the expenses to which he or she has been put through having been unjustly compelled either to initiate or defend litigation, is not absolute. In the matter of *South African Poultry Association and Others v Ministry of Trade and Industry and Others*<sup>10</sup> Damaseb JP made it clear that the rationale behind Rule 32 (11) is to discourage a multiplicity of interlocutory motions which often increase costs. In the South African case of *Payen components South Africa Ltd v Bovic Gaskets CC*<sup>11</sup> the Court at 417 said:

---

<sup>10</sup> 2015 (1) NR 260 (HC) at 281.

<sup>11</sup> 1999 (2) SA 409 (W).

'While one of the purposes of a costs award to a successful party is "to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be" it is of equal importance that taxation 'ensures that the party who is condemned to pay the costs does not pay excessive ... costs in respect of the litigation which resulted in the order for costs'.

Secondly Rule 32(11) does not apply to the proceedings as a whole but to applications or proceedings which are incidental to the main proceedings. To that extent Rule 32(11) does not change the common law.

[29] Thirdly, a party's right to claim costs from his or her opponent which he or she has incurred in the process of litigation only arises upon the court ordering an opponent to pay a successful party's costs. In this matter the Court, on 1 August 2014, ordered the plaintiff to pay the defendant's costs for the exception. The defendant's right to be paid costs which he incurred as a result of the exception which he raised only arose when the Court gave its ruling and that was on 1 August 2014. By that time (i.e. by 1 August 2014) Rule 32(11) had already been in operation since 16 April 2014. The question of retrospectivity or taking away a vesting right does therefore not come into play.

[30] Mr Van Vuuren's argument to the effect that '[s]hould the applicant have sought that the costs for the exception should be limited to N\$ 20,000 submissions should have been made in such respect in order for the court to have been presented with proper argument and a proper adjudication thereof' is also misplaced. I say so for the reason that in the *Pinkster Gemeente van Namibia*<sup>12</sup> case this Court made it clear that '[t]he 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.'

[31] In the matter of *South African Poultry Association and Others v Ministry of Trade and Industry and Others*<sup>13</sup> this Court (Per Damaseb JP) said:

---

<sup>12</sup> *Supra* at p 16.

<sup>13</sup> 2015 (1) NR 260 (HC) at 281.

'The rationale of the rule [i.e. Rule 32 (11)] is clear: to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case. A clear case must be made out if the court is to allow a scale of costs above the upper limit allowed in the rules. ... The *onus* rests on the party who seeks a higher scale.'

[32] It is thus clear that on the authority of both the *Pinkster Gemeente van Namibia* and the *South African Poultry Association* matters the duty 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, in this matter it was the defendant. If the defendant wanted costs on a scale above the limit set in Rule 32(11) the onus was on the defendant to make out case for that want or need.

[33] Another argument advanced by Mr Van Vuuren in opposition to the relief sought by the plaintiff is to the effect that, since not one item was objected to or in dispute, at the taxation hearing the applicant is bound to the conduct of his matter by his legal representative, including any agreement concluded or failure to object. He cites as authority for that proposition the matter of *Kruger v Secretary for Inland Revenue*<sup>14</sup> where the Court said:

'I do not deal with the belated objection to item 16, since no objection was made to the Taxing Master's allowance of this at the time of taxation. It is accordingly not subject to review. (Rule 48 (1)).'

[34] My reading of the case of *Kruger*<sup>15</sup> is that the Court there dealt with a matter where part of the Taxing Master's decision was being reviewed under Rule 48 (1) of the South African Rules of Court. The equivalent of Rule 48 (1) in our current Rules of the High Court is Rule 75(1) which provide as follows:

'75. (1) A party dissatisfied with the ruling of the taxing officer as to any item or 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.'

---

<sup>14</sup> 1972 (1) SA 749 (C) at 750.

<sup>15</sup> *Ibid.*



[35] The plaintiff instituted this review application not in terms of Rule 75 (1) that is that he was dissatisfied with the ruling of the taxing Master as to an item or part of an item to which he objected or which was disallowed by the Taxing Master. In this matter, the applicant has approached court by way of a review in terms of Rule 76. The attack in this matter relate to the whole *allocatur* on the basis that it is *ultra virus* Rule 32(11). I am therefore of the view that the *Kruger* and the *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia*<sup>16</sup> matters are not applicable.

[36] I have indicated above that in the exercise of its supervisory functions a Court has limited power to interfere with the Taxing Master's decision. It will only do so on limited grounds and where it can be shown that the Taxing Master has improperly exercised that discretion, or not exercised it at all.<sup>17</sup> An example of such a ground would be a case where the Taxing Master has had regard to factors to which he ought not to have had regard, or where he has failed to consider matters which he should properly have taken into consideration.

[37] I have indicated in this judgment that the main basis on which the plaintiff impugns the *allocatur* is the fact that it exceeds the amount limited by Rule 32 (11). In the present instance I can find no indication whatsoever on the evidence that was placed before me that the Taxing Master gave any consideration at all to the provisions of Rule 32(11). Indeed, as I have already indicated, the Taxing Master simply acted on the dictates of Ms Lubbe and Ms Feris. The affidavits placed before me contain no discussion or reasoning or explanation for how or why the Taxing Master exercised his discretion in the manner he did. The basis of the decision of the Taxing Master to grant costs beyond the limits set by Rule 32 (11) is not revealed. After all the power to determine whether or not a party is entitled to costs exceeding the upper limit set in Rule 32(11) is vested in the Court and not in the Taxing Master.

[38] In the circumstances, I believe this is an appropriate case for the Court to interfere with the exercise of the Taxing Master's discretion since there is no indication that he exercised any discretion at all. In my view, by acting contrary to the

<sup>16</sup> 2014 (2) NR 464 (SC).

<sup>17</sup> *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers Van Christus Kerk* (supra).

provisions of Rule 32 (11); allowing costs on a scale higher than the upper limit set in Rule 32(11) the Taxing Master not only acted *ultra vires* his powers but he also usurped the Court's powers. The *allocatur* issued by the Taxing Master on 9 September 2014 is therefore reviewed and set aside.

[39] Mr Jones in his submission requested me to order Taxing Master to re-tax the Bill of costs and that he must, in that process, bear in mind Rule 32(11). In the alternative that the court exercises its inherent power and correct the *allocatur*. With the lengthy delays to which the parties have been subjected through no fault of their own I am of the view that I am in as good a position as the Taxing Master is to make an order I believe will 'best meet the justice of the case.'

[40] In the result I make the following order:

1. The review proceedings are successful and the *allocatur* issued by the Taxing Master on 9 September 2014 in the amount of N\$ 32 259-75 is set aside.
2. The applicant (Plaintiff) must pay to the second respondent (the Defendant) the costs in respect of the exception upheld on 1 August 2014 the costs being the amount of N\$ 20 000 exclusive of Value Added Tax.
3. There is no order as to the costs of this review.

-----  
SFI Ueitele  
Judge

**APPEARANCES:**

**APPLICANT**

**JPR JONES**

Instructed by Sisa Namandje & Co  
Windhoek.

**2<sup>nd</sup> RESPONDENT**

**A VAN VUUREN**

Instructed by Du Pisani Legal  
Practitioners, Windhoek.