



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (IN CHAMBERS)

Case no: A 101/2011

In the matter between:

ALEX MABUKU KAMWI

APPLICANT

and

STANDARD BANK NAMIBIA LIMITED

FIRST RESPONDENT

MANFRED H HENNES

SECOND RESPONDENT

BANK WINDHOEK NAMIBIA

THIRD RESPONDENT

Neutral citation: *Kamwi v Standard Bank Namibia Limited* (A 101/2011) [2018] NAHCMD 196 (29 June 2018)

Coram: ANGULA DJP

Delivered to the Registrar on: 29 June 2018

Flynote: Costs – Taxation – Taxing Officer’s disallowance of fees and certain items of disbursements charged by a lay litigant representing himself – Case stated by the Taxing Officer in terms of rule 75(1) of the rules of court – Principles on costs awarded to a lay litigant, enunciated in *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Limited* 2007 (2) NR 592 (HC) and *Nationwide Detectives CC v Standard Bank of Namibia Limited* 2008 (1) NR 290 (SC) followed.

Summary: Costs – Taxation – Case stated by the Taxing Officer in terms of rule 75(1) of the rules of court upon objection by a lay litigant and counter-objection by the legal practitioner for the first respondent – Such lay litigant not entitled to fees for his labour or for loss of earning opportunity – Principles in *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Limited* 2007 (2) NR 592 (HC) and in *Nationwide Detectives CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) followed – Court concluding that the Taxing Officer was not wrong in disallowing fees claimed by a lay litigant – Furthermore court disallowing certain disbursements – Court ordering the lay litigant to provide the Taxing Officer with quotations or pro-forma invoices from photocopying service providers to enable the Taxing Officer to assess the disbursements claimed by the lay litigant in respect of photocopies made by the lay litigant – Lay litigant to prove to the satisfaction of the Taxing Officer that the disbursements claimed were necessary and reasonably incurred.

ORDER

1. The Taxing Officer was correct in disallowing fees claimed by the lay litigant.
2. The applicant in relation to item 21, is directed to provide to the Taxing Officer three (3) pro-forma invoices or quotations from three (3) photocopying service providers indicating what each would have charged in respect of photocopies charged by the applicant at the time the order was made in favour of the lay litigant. The Taxing Officer is directed to calculate the disbursements charged by the applicant in his bill of costs in respect of photocopies for the court documents used in the case.

JUDGMENT

ANGULA DJP:

Introduction

[1] I have before me an application for review of a taxation of a bill of costs by the Taxing Officer. Mr Kamwi, the applicant, is not an admitted legal practitioner. He is, what is commonly referred to in the legal circles, a lay litigant. From Mr Kamwi's own perspective, however, he is a 'lawyer and a legal adviser' because he has some legal qualifications. There are a number of reported judgments of this court and the Supreme Court involving Mr Kamwi where he appeared in person. On the basis of those various appearances and some of the remarks made by the courts in the course of those appearances, he claims that he should be considered as an admitted legal practitioner.

[2] On one of those appearances on 13 May 2011, Mr Kamwi successfully brought an application in this court against the respondents and obtained *inter alia* an order against Standard Bank setting aside a warrant of execution issued against him, authorising the attachment of money held in his bank account held at Bank Windhoek and further interdicting Standard Bank and the Deputy Sheriff from attaching his salary, earning or emoluments in terms of the then old Rule 45(12) of the Rules of this Court. More importantly Standard Bank was ordered to pay Mr Kamwi's costs occasioned by the application, 'such costs to be limited to disbursements reasonably incurred'.

[3] Mr Kamwi duly prepared his bill of costs and presented it to the Taxing Officer for taxation. Items 1 to 17 and 23 were disallowed by the taxing master as in the Taxing Officer's opinion, they constituted fees and not disbursements. Furthermore, items 18,19,20,21 and 22 were objected to by the legal practitioner for Standard Bank. However the Taxing Officer allowed some charges in respect of those alleged disbursements, albeit at a reduced rate. In allowing such disbursements, the Taxing Officer reasoned that Mr Kamwi gave 'justifiable reasons' for such disbursements.

The Taxing Officer therefore ruled that the items were disbursements reasonably incurred. I will later set out in detail the particulars of the disbursements claim when considering such disbursements.

[4] Standard Bank, being aggrieved by the Taxing Officer's ruling, through its legal representative, requested the Taxing Officer to prepare a stated case as prescribed by Rule 75 of the rules of this Court. Similarly Mr Kamwi, also aggrieved by the Taxing Officer's decision not to allow him his 'fees', also requested the Taxing Officer to prepare a stated case in terms of the said rule. The Taxing Officer duly prepared such stated case and the parties filed their respective submissions as required by the rule.

Issues for determination

[5] The issues for determination are: first, whether items 1 to 17 constitute fees and not disbursements hence the Taxing Officer's decision to disallow such items. Second, whether items 18 to 22 as disbursements were necessary and were reasonably incurred, albeit at a reduced rate, as found by the Taxing Officer.

Applicable legal principles

[6] Rule 125(12) provides that a person who represented himself or herself and has been awarded costs, such costs shall be limited to disbursements 'necessarily and reasonably' incurred and they must be taxed by the taxing officer.

[7] The legal principles applied by the courts, over the years are that: the Taxing Officer has a discretion, to be judicially exercised, in allowing or disallowing items on a bill of costs. Such discretion must be exercised reasonably and justly on sound legal principles. In the exercise of such discretion, the Taxing Officer must ensure that the unsuccessful litigant is not unduly oppressed by having to pay excessive amount of costs. If the Taxing Officer fails to exercise his discretion correctly, the court has a duty to interfere¹.

¹ *Kloot v Interplan Inc and Another* 1994 (3) SA 236 at 238 H-J.

[8] A judge of this court has held, incidentally, in a matter involving Mr Kamwi (where he was similarly claiming, like in the present matter, fees and disbursements) that a lay litigant should not be allowed to make a 'profit' on disbursements; that the Taxing Officer should only allow the lay litigant to recoup his actual disbursements, reasonably incurred, and not to make a living, or profit, out of lay litigation². I agree with the learned judge's pronouncement and will apply it in this matter.

[9] With the foregoing principles in mind I proceed to consider the first issue, that is, whether the Taxing Officer was correct in his ruling that items 1 to 17 constitute fees and not disbursements.

[10] Mr Kamwi concedes in his written submissions that he is 'not (an) admitted legal practitioner and cannot therefore enjoy the rights the legal practitioners are entitled to'. Despite this concession, Mr Kamwi, stubbornly, I should say, attempts to argue that he is entitled to recover costs for the time he has spent performing the work in person 'because time is an expense'.

[11] As indicated earlier, this is not the first time that Mr Kamwi is advancing the same argument. He raised the same argument in a similar taxation review in *Standard Bank Namibia Limited v Nationwide Detectives and Professional Practitioners CC* (I 2051/2007) [2013] NAHCMD 200 (17 July 2013). The argument was considered and rejected by Parker AJ. The learned judge expressed himself as follows:

'[4] From the foregoing, the following conclusions emerge inevitably. A lay litigant who represents himself or herself is entitled to only actual disbursements that have been reasonably incurred. He or she 'is not entitled to claim any fees for his labour, or loss of earning opportunity, in a bill of costs. He cannot take instructions, charge for drafting, perusal of any item in Schedule 6 (of the rules of court). (Those items can only be charged by virtue of the fact that someone is an admitted legal practitioner.)' (*Nationwide Detectives v Standard Bank of Namibia Ltd (HC)* at 599E.) These are well-founded principles and so I accept them as a correct statement of law. I, therefore, adopt them in the instant proceeding. It follows irrefragably that fees charged for Mr Kamwi's labour or loss of earning opportunity in Mr Kamwi's bill of costs cannot be allowed by the taxing master. If the taxing master

² *Nationwide Detectives and Professionals v Standard Bank of Namibia Ltd* 2007 (2) NR 592 HC.

allowed them, the decision of the taxing master would fly in the face of the well-founded principles I have adverted to previously.'

[12] I fully agree with the legal position as set out by my Brother Parker in the passage quoted above. Significantly, Mr Kamwi, who was one of the respondents together with his wife and his company, in that matter, while well aware of that judgment, did not refer to it in his submissions in this matter. Instead, he referred to some other inapplicable judgments. I consider Mr Kamwi's deliberate decision not to refer the court to a case law which is on point for decision, rather disingenuous and not being open and transparent with the court. For a person who aspires to one day in the future, become an admitted legal practitioner, it leaves a question whether he would be worthy of being a member of what is commonly referred as an 'honourable profession'.

[13] Items 1 to 17 are listed as follows: draft and type Notice of Motion in terms of rule 6; peruse Warrant of Execution; drafting and preparing affidavit; drafting and preparing certificate of urgency; peruse respondent's opposing affidavit and notice; draft and type replying affidavit; peruse Taxing Master's Allocatur; draft and type heads of argument; appearance in court; draft and type notice service to the Taxing Officer; draft and type request for set down; draft and type supplementary notice; peruse Taxing Mater's report, draft and type affidavit in terms of order of court, draft and type replying affidavit to the Taxing Master's report, draft and type notice of set down; and appearance in court.

[14] In my view the items 1 to 17 constitute charges for time, knowledge and labour expended on such items. It is aimed at remunerating the doer for professional skill recognized by the Legislature. Only persons who have been qualified and admitted in terms of the Legal Practitioners Act, Act No. 15 of 1995 are allowed by law to charge such fees in respect of their professional work. Mr Kamwi, is not an admitted legal practitioner. For that reasons he is not entitled to charge fees for such work. My conclusion with regard to the items 1 to 17 that they constitute fees and therefore the Taxing Officer was correct in disallowing such items which constitutes fees to which Mr Kamwi, as a lay litigant, is not entitled.

[15] I next move to consider whether items 18 to 22 as disbursements were necessary and were reasonably incurred as found by the Taxing Officer.

[16] Mr Kamwi attached a document to his papers purporting to be an extract from a resolution of his company, *Alex Kamwi and Company Incorporated*, adopted on 26 January 2008, whereby the tariff of fees were determined to be charged by the company against its director whenever Mr Kamwi is litigating in person and in the process he utilises the company's equipment like office space, computer, printer, chairs and the company's library. The liabilities of the director to the company are said to be based on the provisions of section 92(5) of the Companies Act, 2004. The charges for disbursements in the bill of costs presented to the Taxing Officer were based on the said tariffs as determined in the said company's resolution.

[17] I should point out that the reliance on section 92(5) is misplaced. The liability envisaged by the section in question is the one arising from the act of the director(s) by allowing a person to acquire that company shares, with the financial assistance of the company and thereafter such person is unable to repay or refund the company the money utilised to purchase its own shares. In such event the director would be liable to compensate the company for the loss. It therefore follows the report on the basis upon which Mr Kamwi's company purports to charge its director and consequently opposing litigants, is wrong in law.

[18] In any event, even if the basis on which the charges were made was correct in law, I have doubt whether the agreement between Mr Kamwi and his company to charge such tariffs would, in law, be binding on a third party such as Standard Bank in this matter. Mr Kamwi seems to simply assume that third parties are bound by the agreement between him and his company. For a third party to be bound by such tariff the third party must have consented to such tariff otherwise there is no legal basis for Mr Kamwi's company to enforce its tariff on third parties. I am, however, not called upon to decide that question. All I need to decide is whether the disbursements were necessary and reasonably incurred.

[19] I propose to consider the necessity of the disbursements in conjunction with the arguments advanced by Mr Vaatz, for Standard Bank, who in main submitted that such disbursements were not necessary. Mr Kamwi did not advance much

argument in support of the reason and the decision by the Taxing Officer to allow these disbursements. He simply submitted that the Taxing Officer did properly exercise his discretion albeit reducing the disbursement amounts.

[20] The court has a duty to ensure that an unsuccessful litigant is not unduly oppressed by burdening him or her with unfair and unnecessary disbursements. In the present matter the court's vigilance is even higher given the pre-arranged agreement between Mr Kamwi and his company to charge specified rates for the usage of the company's office and equipment. The vigilance is further called for given the opaque relationship between Mr Kamwi and his company. The tariffs appear to have been determined by Mr Kamwi himself in his capacity as director of the company. There is no indication as to what factors were taken into account to determine these tariffs. The usual 'at arm's length' dealing between a company and its director is thus blurred if it exists at all. If the corporate veil is pierced, what would be revealed would be an agreement whereby Mr Kamwi, has for all practical purpose agreed with himself to charge opposing litigants the rate of disbursements indicated in the company's resolution. There is a real incentive for him and his company not only to make a profit out of litigation but to also maximize such profit as high as possible.

[21] With the foregoing considerations in mind, I now proceed to consider the disbursements allowed by the Taxing Officer.

[22] Item 18 is in respect of 'usage of office for Preparing Documents' at the rate of N\$1 900 per day for 22 days which is equal to N\$41 800. The Taxing Officer allowed a sum of N\$20 900. There is no indication what factors or considerations the Taxing Officer took into account to arrive at the reduced amount. It would appear that the figure allowed has been arrived at arbitrarily.

[23] Mr Vaatz argued against this disbursement being allowed. He submits that one does not need to hire an office for 22 days merely to prepare a court document; that such a document can be prepared at home at the dining table. I agree with counsel's submission in this regard. The applicant could have prepared his documents in the comfort of his house. It is difficult to imagine that being a businessman and a 'legal adviser' the applicant would not have a small 'office' in his

house where he can read and do some writings. Even if he did not have such an 'office', in my view the suggestion by Mr Vaatz is not unreasonable. The applicant could have prepared those documents at home, at a public library such as the Supreme Court's library, which is open to public and which, I am sure the applicant as a 'legal adviser' would or should be aware of.

[24] For the foregoing reasons, I am of the view that this disbursement was unnecessary and is accordingly disallowed in its entirety.

[25] I move to consider item 19. This disbursement is claimed for 'Usage of Computer for Typing Documents'. The charge out rate is N\$1 600 for a period of 22 days which translates in the sum of N\$35 200. The Taxing Officer allowed a sum of N\$17 600. Like with the previous reduced disbursement amount, there is no indication what factors the Taxing Officer took into consideration in arriving at the reduced amount.

[26] Mr Vaatz for the respondent objects to this charge. He argues in his heads of argument that the applicant cannot necessarily use the computer (by which I understand to be a desk top) and that an ordinary laptop which costs between N\$4000 and N\$5000 would have avoided these costs. In my view, the world has moved on to the extent that it is almost a given that every household of a middle income person such as the applicant, particularly one who claims to be a legal adviser, has a desk top of some sort and every businessman especially, a legal adviser, carries a personal laptop apart from using the desk top at work.

[27] In my view, the applicant could have used his house desk top or his laptop. It was unnecessary for him to use the company's computer and then charge the unsuccessful party for that exercise. The disbursement is accordingly disallowed. It follows that the sum of N\$17 600 allowed by the Taxing Officer stands to be set aside in its entirety.

[28] The next disbursement claimed is item 20 – 'Usage of Company's Chairs'. The charge out rate is N\$1 200 for a period of 22 days which translates in total sum of N\$26 400. The Taxing Officer allowed a sum of N\$13 200. Again there is no

indication what factors the Taxing Officer took into account in determining the reduced amount. It appears to have been arbitrarily determined.

[29] Before I deal with Mr Vaatz's submission, I feel, I should mention that I wonder what type of 'chairs' were used by the applicant and for what purpose. From the papers placed before me, it appears that Mr Kamwi was acting in person and for that reason he would have used only one chair of the company. It is also not clear how many chairs were used. I must confess that I am unable to imagine the necessity of usage of 'chairs' by Mr Kamwi in this case, especially given the fact that it was an application and Mr Kamwi was the only deponent. It is not apparent from the papers before me that he consulted other persons who could be deponents to some additional affidavits and thus use the other chairs during the consultation.

[30] Mr Vaatz once again reiterates his previous argument that it was not necessary for Mr Kamwi to use or hire the company chairs for the purpose of drawing court documents; that a dining room chair would have sufficed. Counsel further decried what he considered to be an exorbitant rate at which the chairs were allegedly hired out and urged that the disbursement should not be allowed.

[31] I cannot see the necessity why this disbursement was incurred neither can I imagine on what ground it can be contended that it was reasonably incurred. I cannot see the reason why the respondent should be burdened with this alleged disbursement. I am of the considered view that it would be fair and reasonable that this disbursement be disallowed in its entirety. It follows therefore that the amount of N\$13 200 allowed by the Taxing Officer in respect of this item should be set aside.

[32] A further disbursement claimed was item 21 being 'Usage of Printer to Print Documents'. The charge out rate is N\$1 900 for a period of 22 days which translates in the total sum of N\$41 800. The Taxing Officer reduced the amount to a sum of N\$20 900. Once again, the Taxing Officer did not indicate what factors he took into account to arrive at the reduced amount. In the absence of the factors which he had taken into account, the amount appears to be arbitrarily determined.

[33] Mr Vaatz objected to this disbursement and argued that if Mr Kamwi had gone to a copy shop available around town, the charge would have been much lower than the amount allowed by the Taxing Officer. Counsel submits that the charged should not be more than N\$1 500.

[34] The difficulty posed by this disbursement is the fact that it is not calculated in the conventional manner used in the industry by the likes of Nashua, Canon, Xerox when they rent out their copy machines by charging for rental amount per month plus a charge of some cents per page. Nowadays, most business would rather hire a photocopy machine then owning one. It is a widely and commonly use practice in the business world, so much that I think it is fair to say it is a notorious fact for a court to take judicial notice.

[35] In the instant matter the number of copies made is for instance not stated and which would have given an indication of the extent of utilization of the printer. It is improbable that the printer was used to print documents every day of the 22 days, on which it was allegedly hired out. It is also not reasonable to charge a sum of N\$1 900 per month for a printer which is not being used every day, apart from the fact that the rate of N\$1 900 in itself is exorbitant and amounts to overreaching on behalf of Mr Kamwi and his company.

[36] In my view, it was unnecessary for the applicant to have hired a printer for 22 days. In addition I consider the rate at which the printer was hired out to be unreasonable and exorbitant.

[37] It cannot be denied Mr Kamwi incurred expenses in printing the necessary court documents and annexures for which he should be fairly compensated as ordered by the court. In my view, a fair and just manner to compensate Mr Kamwi in this regard, would be directing that he obtains three quotations or pro-forma invoices from three different photocopy service providers in Windhoek indicating how much each would have charged per page at the time of the litigation that is at 13 May 2011 when the order was made in his favour. Mr Kamwi would then appear before the Taxing Officer (not necessarily the same Taxing Officer who initially taxed his bill of costs) and the Taxing Officer would be directed to use the average rate of the three

quotations or pro-forma invoices and determine the disbursement for the photo copies by applying the average rate per page printed by Mr Kamwi.

[38] In the result the amount of N\$20 900 allowed by the taxing master is set aside and the Taxing Officer would be ordered to determine the disbursement in respect of the photo copies of the court documents made by Mr Kamwi, using the formula indicated in the preceding paragraph.

[39] The last disbursement claimed is item 22 being – ‘Usage of Company’s Library to Research Case Laws’. The charge out rate is N\$2 500 for a period of 22 days which translates in the total sum of N\$55 000. The Taxing Officer allowed a sum of N\$27 500. My earlier finding with regard to the reduction of the amount by the Taxing Officer without any indication of factors taken into account in doing so equally applies in this regard. That is to say in the absence of an indication what factors were taken into account to arrive at, the reduced amount was made arbitrarily.

[40] In objecting to this disbursement, Mr Vaatz submits that there are various libraries such the Supreme Court and the Law Society, University of Namibia and other public libraries which can be used for research at no cost. I agree with counsel’s submission. To the number of libraries available at no costs, one should add the libraries of the University of Namibia and the Namibia University of Science and Technology.

[41] I should mention in passing that it is not apparent to me why a non-legal company would have a legal library to hire our legal books, particularly at a fee.

[42] Having regard to availability of free libraries as mentioned in the preceding paragraph, I am of the considered view that it was both unnecessary and unreasonable under the circumstances, for the applicant to have hired his own company library at a cost. In other words, this disbursement of N\$27 500 was not necessary and is accordingly disallowed.

[43] In the result, I make the following order:

1. The Taxing Officer was correct in disallowing fees claimed by the lay litigant.

2. The applicant in relation to item 21, is directed to provide to the Taxing Officer three (3) pro-forma invoices or quotations from three (3) photocopying service providers indicating what each would have charged in respect of photocopies charged by the applicant at the time the order was made in favour of the lay litigant. The Taxing Officer is directed to calculate the disbursements charged by the applicant in his bill of costs in respect of photocopies for the court documents used in the case.

H Angula
Deputy-Judge President

APPEARANCES

APPLICANT : In person

RESPONDENTS: Vaatz
of Andreas Vaatz & Partners, Windhoek