



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2009/2015

In the matter between:

**AFRICAN DYNASTY INVESTMENTS CC**

**APPLICANT**

and

**XAVIER GOMES**

**FIRST RESPONDENT**

**TAXING MASTER OF THE HIGH COURT**

**SECOND RESPONDENT**

**Neutral citation:** *African Dynasty Investment CC v Gomes* (I 2009/2015) [2019]  
NAHCMD 235 (8 July 2019)

**Coram:** KANGUEEHI AJ

**Delivered:** 8 July 2019

**Flynote:** Costs – Taxation – Review of taxation – Grounds for review based primarily on common law grounds and on grounds wider than common law grounds – Whether the taxing officer exercised its discretion judicially – Application of rules 124(1) and 124(2).

**Summary:** Costs – Taxation – Review of taxation – Grounds for review based primarily on common law grounds and on grounds wider than common law grounds – Court held that court ought to interfere with taxing officer's exercise of discretion

where the taxing officer did not exercise its discretion judicially – Court also found that the taxing officer erred in invoking rule 124(1) instead of rule 124(2). In the instant case applicant avers it was dissatisfied with the ruling of the taxing officer in disallowing all the costs of the instructed legal practitioner – Applicant requested taxing officer to state a case for decision of a judge – Court found that the taxing officer did not exercise its discretion judicially – Court also found that the taxing officer erred in invoking rule 124(1) instead of rule 124(2). Consequently, application was granted.

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### ORDER

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- (a) The application for review is allowed.
- (b) The ruling by the taxing officer, disallowing the fees of the instructed legal practitioner, is overturned. The taxing master is ordered to allow 60 per cent of the said costs.
- (c) There is no order as to costs.

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### JUDGMENT

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KANGUEEHI AJ:

[1] This is a review of taxation brought in terms of rule 75 of the rules of the High Court. The bill of costs was taxed before the taxing officer and an *allocatur* issued on the 08 August 2018. The bill was that of the applicant in a matter brought against the first respondent.

[2] At the taxation, the applicant was represented by its legal representatives, and the respondent by his legal representatives. The applicant, being dissatisfied with the taxation, delivered a notice on 30 August 2018, calling on the taxing officer

to state a case for the decision of a judge on matters mentioned in the notice. I hasten to add that this notice was timeous.

[3] In her stated case, the taxing officer replied two-fold: First she replied that the court order did not specifically provide for the payment of fees of an instructed counsel. Second, she applied rule 124(1) of the rules of this Honourable Court and only allowed the fees of the instructing counsel. By so doing, she disallowed all the fees of the instructed counsel to the tune of N\$87 565.

[4] In its turn, the applicant says that the court order also provided for the costs of the instructed legal practitioner. The applicant further submits that the taxing officer applied the wrong rule and should rather have used rule 124(2) of the rules of the Honourable Court.

[5] The legal issues for decision are hence the following:

(a) Did the Court order also provide for the costs of the instructed counsel?

(b) Did the taxing officer err in applying rule 124(1) instead of rule 124(2)?

[6] The stated case was placed before the court for decision. The starting points to a consideration and determination of the review of the taxation are the following important principles.

[7] If the costs have been awarded on a party-and-party basis, the taxing officer 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 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.<sup>1</sup>

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<sup>1</sup> *Pinkster Gemeente van Namibia v Navolgers van Christus Kerk* SA 2002 NR 14 at 15G-H.

[8] At every taxation the taxing officer is the officer of the court who has the power to decide which costs to allow by bringing an objective evaluation on the basis of the stipulated criteria to bear on the bill; and so, during taxation the taxing officer ought 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 and fairness are allowed<sup>2</sup>.

[9] Thus, in taxation of costs, the taxing master exercises a discretion. In that regard the court may interfere with the taxing officer's decision if he or she has not exercised his or her discretion judicially; if he or she has not brought his or her mind to bear upon the question; or he or she has disregarded important matters and taken into account extraneous matters, or he or she has acted on the basis of a wrong principle. These are common law grounds of review so succinctly enunciated in the landmark case of *Johannesburg Consolidated Investment Co (JCI) v Johannesburg Town Council* 1903 TS 111 at 116. In addition thereto, as Maritz J stated in *Pinkster Gemeente van Namibia v Navolgers van Christus Kerk* SA 2002 NR 14 at 17B-C:

'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.'

[10] The court further stated that -

'The court, therefore, has the power to correct the taxing master's ruling not only on the grounds stated in *Shidiack's* case, but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the taxing master to determine the point in issue.'

[11] The issue *in casu* is the fact that the Taxing Officer disallowed all the costs of the instructed legal practitioner on the basis that the court did not specifically

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<sup>2</sup> *Kaura v The Taxing master of the High Court* (A 121/2015) [2016] NAHCMD 138 (10 May 2019) at para 2.

mention same. Further and in so doing, the Taxing Officer relied on the provisions of rule 124(1).

Did the court also grant the fees of the instructed counsel?

[12] In his ruling of 6 October 2017 in this case, Parker AJ merely ordered that 'the Plaintiff is awarded 60 per cent only of her costs'. The court made no mention of the costs of an instructed counsel. This is what prompted the taxing officer to disallow all the costs of the instructed counsel for, in her view, these were not provided for.

[13] The award of only 60 per cent of the costs is premised on the fact that the plaintiff did not persist in its claim 1 and its claim 2 was dismissed.

[14] I have carefully reviewed the first reason given by the taxing officer in an attempt to marry it the common law position on the taxation of costs.

[15] At no point did the taxing officer apply her mind to the question whether or not the instructed counsel's fees were reasonable and/or necessary in the present case. I therefore conclude that the taxing officer has not exercised her discretion judicially and this therefore calls on the court to interfere in the exercise of such discretion.

Did the taxing officer err in applying rule 124(1) instead of rule 124(2)?

[16] Primary to the decision of the taxing officer was rule 124(1) as can be seen from her stated case dated 20 September 2018. I now turn to the said rule 124.

[17] Rule 124, in the main, deals with the fees of instructing and instructed legal practitioners. It draws a dichotomy between those cases in which the court will grant costs of only one legal practitioner and those where it will grant the costs of (an) additional (instructed) legal practitioner(s).

[18] Evidently, the distinction is based on the complexity of and the type of case. A cursory look at rule 124(1) educates that it applies to those less convoluted cases which, by their very nature, would not ordinarily require the employment of an additional legal practitioner.

[19] Rule 124(1)<sup>3</sup> provides as follows:

'The fees set out in Section A of Annexure D are, unless the court Authorises fees consequent on the employment of an instructed legal practitioner, allowed as between party and party for one legal practitioner only in the following matters

- (a) an undefended action for divorce or claim under rule 90, whether opposed or unopposed;
- (b) an application for judgment by default granted by the court or an unopposed summary judgment;
- (c) an unopposed application for leave to sue by way of edict or for substituted service;
- (d) an unopposed application for admission to practise and to be enrolled as a legal practitioner or to be enrolled as a sworn translator;
- (e) an unopposed application for the postponement or adjournment of proceedings, the removal of any matter from the roll, the confirmation, discharge or extension of a restitution order, in the event of a defended divorce, or discharge or extension of a return date of a rule *nisi*;
- (f) an unopposed application for sequestration or voluntary surrender of an estate, liquidation of a company or corporation, the rehabilitation of a person's estate or an application for curatorship;
- (g) an unopposed application for rescission of judgment;
- (h) a claim falling within themagistrates' courts' jurisdiction; or
- (i) an appeal or review from magistrates' courts.'

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<sup>3</sup> Rules of the High Court.

[20] In the cases mentioned in rule 124(1) the costs allowed are only those of one legal practitioner unless the court authorizes the costs of an instructed legal practitioner. (Emphasis added).

[21] This is the rule that the taxing officer relied on when it disallowed all the costs of the instructed legal practitioner.

[22] It is common cause that the present matter went to a hearing and the judgment results from that hearing.

[23] One does not require Solomonic wisdom to realize that this case does not fit into any of the categories of cases described in this rule. It follows that the taxing officer erroneously applied this rule to a case to which it clearly does not apply.

[24] It follows that the taxing officer used the wrong principle in arriving at its decision and this calls on the court to interfere with the exercise of such discretion along the lines of the *ratio decidendi* in the *Pinkster Gemeente van Namibia* matter.

[25] I am in agreement with the applicant that the taxing master relied wrongly on rule 124(1) and should have rather relied on rule 124(2). That latter rule provides as follows:

'(2) In matters other than those contemplated in sub rule (1) only such fees as are consequent on the employment of one instructed legal practitioner are allowed as between party and party, unless the court authorises the fees of two or more instructed legal practitioners to be included in a party and party bill of costs.'

[26] For the sake of completeness, rule 124(3) provides that:

'In order for the court to make an award of costs against the opposing party to include the costs of an instructing legal practitioner and an instructed legal practitioner it must be satisfied that (a) the employment of the instructed legal practitioner is reasonable and necessary because of that instructed legal practitioner's special skill or the complexity of the matter; or (b) in the particular circumstances of the case it is reasonable or possible for the instructing legal practitioner, although admitted and enjoying the right of audience, to

personally perform the task in respect of which the instructed legal practitioner's costs are sought'.

[27] Rule 124(2) permits the granting of costs of one instructing and one instructed legal practitioner. (Emphasis added). What requires the court's sanction, is the allowance of costs of a second (or subsequent) instructed legal practitioner.

[28] Of note is the fact that this rule is made to apply to matters other than those provided for in rule 124(1). In other words, these are the more complex matters. Clearly, this is the rule that the taxing officer should have applied.

[29] In his contentions in terms of rule 75(4) filed on behalf of the applicant on 3 October 2018, Mr Strauss contented that the employment of an instructed legal practitioner was reasonable and necessary because he (Mr Strauss) was engaged in another matter and could not personally attend to this present matter. There is no evidence to the contrary.

[29] I am satisfied that this latter contention meets the provisions of rule 124(3).

[30] Based on the foregoing reasoning and conclusions, I make the following order:

- (a) The application for review is allowed.
- (b) The ruling by the taxing officer, disallowing the fees of the instructed legal practitioner, is overturned. The taxing master is ordered to allow 60 per cent of the said costs.
- (c) There is no order as to costs.

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K N G KANGUEEHI  
Acting Judge



APPLICANT: R B STRAUSS  
Of Dr. Weder, Kauta & Hoveka, Windhoek

FIRST RESPONDENT: E SHIFOTOKA  
Of Conradie & Damaseb Inc., Windhoek

SECOND RESPONDENT: The Taxing master (E CHUKWUNWEOLU)  
Of High Court, Main Division, Windhoek