

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2018/02461

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

PLAINTIFF

and

JOSEA RUKORO

1<sup>ST</sup> DEFENDANT

MINISTER OF SAFETY AND SECURITY

2<sup>ND</sup> DEFENDANT

**Neutral citation:** *The Government of the Republic of Namibia v Rukoro* (HC-MD-CIV-ACT-OTH-2018/02461) [2020] NAHCMD 340 (7 August 2020)

**Coram:** SIBEYA AJ

**Delivered:** 7 August 2020

**Flynote:** Costs – Taxation – Review of taxation – Rule 75 – Grounds for review founded on common law that the taxing officer did not exercise her discretion judicially – Costs awarded should be reasonably incurred – Duplication of items and activities should not be awarded costs unless justified – The taxing officer did not exercise her discretion judicially – Rule 125(3) and (4) restated.

**Summary:** Costs – Taxation – Review of taxation – Application for review of taxation in terms of Rule 75 following the dismissal of the objections to items on the bill of costs – Grounds for review founded on common law – The decision of the

taxing officer is impugned on the basis that she failed to exercise her discretion judicially.

*Held*, that, Item number 1, 4 and 5 of the bill of costs is exactly the same in numbering, date, time and activities with the bill of costs in the matter of *The Government of the Republic of Namibia v IT Hamutumbangela*, Case no. HC-MD-CIV-ACT-OTH-2018/02481 (the *Hamutumbangela* case) and both matters are similar in material respects and were heard on the same day.

*Held*, further that, item number 1, 4 and 5 of the bill of costs amount to a duplication of item number 1, 4 and 5 of the *Hamutumbangela* case and should not be allowed, unless properly justified. *In casu*, there is no such justification.

*Held*, further that, costs are meant to indemnify a party who is awarded costs for all reasonable costs incurred in his or her claim or defence. Unreasonable costs should therefore not be entertained. Rule 125(3) and (4) restated.

*Held*, further that, the taxing officer did not exercise her discretion judicially and allowed items 1, 4 and 5 of the bill of costs which were not reasonably incurred. The application for review of the *allocatur* succeeds.

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### ORDER

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1. The application for review of the *allocatur* succeeds.
2. The decision of the taxing officer to disallow the objections to item number 1, 4 and 5 of the bill of costs is set aside and the matter is referred back to the taxing officer to treat item numbers 1, 4 and 5 as a duplication of the bill costs in the *Hamutumbangela* case.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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SIBEYA AJ:

[1] This is a rather unorthodox matter where a plaintiff on similar facts instituted action against two defendants in two different cases. Why this approach was adopted is a mystery, save to state that separation of actions breeds ground for unnecessary or inflated legal costs, which could have been avoided by consolidating similar actions. The question *in casu* is whether a party can be indemnified for similar costs incurred for identical services rendered in two different matters at the same time.

[2] The plaintiff instituted action against the defendants in this matter similar to the action instituted by the plaintiff against *Ingashikuka T Hamutumbangela* and another in the matter of *The Government of the Republic of Namibia v IT Hamutumbangela*, Case No. HC-MD-CIV-ACT-OTH-2018/02481 (*the Hamutumbangela case*).

[3] Expectedly, in both matters, the plaintiff, on the one hand and the first defendants, on the other, were represented by the same legal practitioners. The plaintiff intimated that it intended to apply for summary judgment against the first defendants in both matters, but as fate would have it, the plaintiff failed to file its said applications within the period of time ordered by the court on 29 October 2018. Undeterred by the non-compliance with the court order, the plaintiff filed applications for condoning such failure. The condonation applications were opposed by the first defendants. The court dismissed the applications for condonation with costs on a party-party scale awarded to the first defendants on 19 November 2019.

[4] *In casu*, the first defendant proceeded to draft the bill of costs. At the taxation conducted by the taxing officer on 11 March 2020, the plaintiff objected to items 1, 4 and 5 of the bill of costs on the basis that the activities listed therein were not carried out. The plaintiff stated that items number 1, 4 and 5 was a duplication of items 1, 4

and 5 of the bill of costs in the *Hamutumbangela* case. The taxing officer overruled the plaintiff's objections.

[5] Dissatisfied with the ruling, the plaintiff requested the taxing officer to state a case for the decision of a judge.<sup>1</sup> The request sets out the grounds of objection advanced at taxation as well as the findings of fact by the taxing officer.<sup>2</sup> The request was made within the prescribed period of 15 days after the *allocatur* was issued. It is further worth mentioning that a case may not be stated where the amount or the total amount which the taxing officer disallowed or allowed and which the disgruntled party seeks to have allowed or disallowed is less than N\$2,500, unless if the taxing officer consents to stating a case.<sup>3</sup> In the present matter, the discontentment of the plaintiff with the mentioned items on the *allocatur* is in excess of N\$2,500.

[6] In accordance with Rule 75(4), the taxing officer supplied a copy of the stated case to the parties. The said sub-rule further provides that the parties may, within 10 days after receipt of the stated case, submit their contentions in writing, including grounds of objections not advanced at taxation regarding any item or part of an item, which was objected to before the taxing officer or disallowed by the taxing officer. The parties did not make written contentions in terms of Rule 75(4). The review of the taxation therefore has to be determined on the papers as they stood at the time that the taxing officer stated a case. The stated case was thus placed before court for decision.

[7] At centre stage is the review of the decision of the taxing officer to overrule the objections of the plaintiff and allow the following items:

'1, 17 May 2019 Attend on drafting (sic) of notice of intention to oppose the applicant's condonation application; peruse and consider applicant's founding affidavit and confirmatory affidavits in support of application; draft in name of client; discuss content of affidavit with principal and attend on suggestions by principal on opposing affidavit; attend on correspondence with client regarding signing and commissioning of opposing affidavit; attend on filing notice of intention to oppose and affidavit in support thereof on ejustice platform. 3hrs NAD3 600,00 ...

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<sup>1</sup> Rule 75(1).

<sup>2</sup> Rule 75(2).

<sup>3</sup> Rule 75(3).

4, 23 Aug 2019 Attend on research (sic) on case law for purposes of drafting heads of argument opposing condonation application. 1hr NAD1 200,00

5, 27 Aug 2019 Drafting heads of argument opposing condonation application - entail perusing and considering case law, applicable legal principles, high court rules, occurrence of events, merits of matter and drafting of heads of argument for principal's consideration and input into heads of argument; attend on filing of heads of argument on ejustice platform. 4 hrs NAD 4 800,00.'

[8] Rule 125 regulates taxation of costs. Angula DJP in *Kamwi v Standard Bank of Namibia Limited*<sup>4</sup> at para 7 stated that:

'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 in costs. If the taxing officer fails to exercise his discretion correctly, the court has a duty to interfere.'

[9] When regard is had to the bill of costs filed in the *Hamutumbangela* case, the similarities in the items on the bill of costs compared to the bill of costs in the present matter are astonishingly striking. The two bills of costs contain the same item numbers, with similar dates, similar activities alleged to have been carried out. They are written word for word, for the same amount of time spent and similar fees charged.

[10] In respect of item 1, the plaintiff objects thereto on the basis that the notice of intention to oppose and the opposing affidavit were not drafted, but 1<sup>st</sup> defendant merely copied and pasted the content of similar documents from the *Hamutumbangela* case. Save for changing the names and the reference to annexures, the 1<sup>st</sup> defendant utilised the exact same words not only in the bill of costs but also in the notice to oppose and most importantly in the opposing affidavit. I may add that, the opposing affidavit in the present matter constitutes a replica of the opposing affidavit in the *Hamutumbangela* case both in its form and content.

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<sup>4</sup> (A 101/2011) [2018] NAHCMD 196 (29 June 2018).

[11] The objection by the plaintiff therefor has merit. It is highly improbable if not impossible that the 1<sup>st</sup> defendant would spend the same amount of time, on the same date to draft a detailed opposing affidavit similar to the other opposing affidavit drafted in a similar matter word for word. This narrative points to one only, the direction of 'copy and paste'.

[12] In respect of item number 4, it is equally highly improbable that the 1<sup>st</sup> defendant spent an hour (over and above the hour, similar in time spent on the same activity in the *Hamutumbangela* case) to carry out research on case law in order to draft heads of argument in opposition to the condonation application. This finds support in the fact that the outcome of such research (if carried out) is on all fours in content with the heads of argument drafted in the *Hamutumbangela* case. This item demonstrates a duplication of the same item in the *Hamutumbangela* case. If, however the research on the same content in two different matters was carried out in the same hour, then the first defendant is in a worse off position as such activity can only be charged for one single hour already charged in the *Hamutumbangela* case.

[13] The plaintiff further objected to item number 5 in that the 1<sup>st</sup> defendant did not draft heads of argument but rather copied and pasted the heads of argument in the *Hamutumbangela* case. The heads of argument in the present matter followed the same pattern and are not any different compared to the heads of argument in the *Hamutumbangela* case. It is apparent that save for the names of the 1<sup>st</sup> defendant, the whole content of the heads of argument including the annexures thereto amount to copy and paste of the heads of argument in the *Hamutumbangela* case.

[14] When confronted with the aforesaid objections to item number 1, 4 and 5 of the 1<sup>st</sup> defendant's bill of costs, the taxing officer overruled the objections. She stated that notwithstanding the similarities in the above-mentioned cases, necessary steps needed to be taken to complete processes in this matter.

[15] In order to fully appreciate the objections, it is critical to have regard to rule 125(3) and (4) which provides that:

'(3) With a view to awarding 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 are borne by the party against whom such order has been awarded the taxing officer must on every taxation allow 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.

(4) The taxing officer may not, except as against the party who incurred those costs, allow costs which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake or by payment of a special fee to an instructed legal practitioner or special charges and expenses to witnesses or to other persons or through other unusual expenses.<sup>5</sup> (My underlining).

[16] Maritz JA in *Afshani and Another v Vaatz*<sup>6</sup>, stated the following while discussing the purpose of taxation on a party-party scale:

'Costs are not awarded on a party and party basis as punishment to the litigant whose cause or defence has been defeated or as an added bonus to the spoils of the victor: the purpose thereof is to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings as a result of another litigant's unjust actions or omissions in the dispute (compare *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488). It is intended to restore the disturbed balance in the scale of litigation expenses.'

[17] The reading of rule 125(3) and (4) reveals the need for the taxing officer to carefully and reasonably analyse the bill of costs. The main purpose of awarding costs is to indemnify the party who is awarded costs reasonably incurred in his or her claim or defence. It follows that the costs should be reasonably and justifiably incurred in the claim or defence for a party to be restored with such costs. Costs arising from being over-cautious or negligence should not be allowed by the taxing officer.

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<sup>5</sup> See also: *Pinkster Gemeente Van Namibia v Navolgers van Christus Kerk* SA 2002 NR 14 (HC) 15G-H.

<sup>6</sup> 2007 (2) NR 381 (SC) para 27.

[18] I hasten to add that this is for good reason as litigants should not claim or defend processes in the hope of making profit therefrom. Litigants should draft bill of costs faithfully. Courts will diminish their esteemed role if they allow litigants to be awarded costs more than what they reasonably incurred. Indemnification for costs incurred should not be converted to a money-making scheme, lest society may be encouraged to litigate for ulterior motives on meagre claims in the hope scoring very handsomely on costs. This is a situation that our courts can ill-afford and which should be guarded against by any means necessary.

[19] Taxing officers perform critical functions in the judicial system. They carry out judicial functions and are called upon to be vigilant, exercise knowledge and skill in the analysis of bills of costs and decision-making, while upholding the law. An error in the *allocatur* has the capacity of causing injustice to a party and may financially ruin such party, hence careful analysis to determine reasonable costs incurred should be the order of the day.

[20] Having found that items number 1, 4 and 5 of the bill of costs constitute duplications of similar items of the *Hamutumbangela* case, such items cannot be said to be costs reasonably incurred by the 1<sup>st</sup> defendant and worthy of being reimbursed. It follows therefor that the taxing officer did not exercise her discretion properly and erred when she overruled the objections of the plaintiff regarding item number 1, 4 and 5 of the bill of costs. Duplications should not be reimbursed as same are covered in the original bill of costs. A double claim for the same activity is prohibited.

[21] In view of the foregoing, it follows that the decision of the taxing officer to overrule the objections of the plaintiff on items 1, 4 and 5 falls to be set aside.

[22] In the result, it is ordered that:

1. The application for review of the *allocatur* succeeds.
2. The decision of the taxing officer to disallow the objections to item number 1, 4 and 5 of the bill of costs is set aside and the matter is referred back to the



taxing officer to treat item numbers 1, 4 and 5 as a duplication of the bill costs in the *Hamutumbangela* case.

3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

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O S SIBEYA  
Acting Judge

## APPEARANCES:

PLAINTIFF: J S Van Der Byl-Hinda  
Of the Government Attorney  
Windhoek

FIRST RESPONDENT: R Rukoro  
Of LorentzAngula Inc  
Windhoek

SECOND RESPONDENT: The Government Attorney  
Windhoek

THE TAXATION OFFICER: M Chukwunweolu  
Windhoek