

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

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| Case Title: <i>FRANCOIS ERASMUS AND PARTNERS V GERSHON BEN-TOVIM</i> | Case No: HC-MD-CIV-ACT-CON-2017/04481 Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE | Date of hearing: 20 JANUARY 2020 |
| | Date of order: 20 JANUARY 2020 Reasons delivered on: 21 JANUARY 2020 |
| Neutral citation: <i>Francois Erasmus and Partners v Gershon Ben-Tovim</i> (HC-MD-CIV-ACT-CON-2017/04481) [2020] NAHCMD 7 (20 January 2020) | |
| Results on merits: Rule 75 Review. | |
| The order: Having heard MS MARITZ , for the Plaintiff and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The review application of the <i>allocatur</i> that was issued by the taxing officer is hereby dismissed. 2. The said <i>allocatur</i> is upheld. 3. The Defendant is ordered to pay the costs of the review. | |
| Reasons for orders: <u>Introduction and brief background</u> [1] Before me is an application for review by the defendant, Mr Ben-Tovim, in terms of Rule 75 of the High Court Rules of a taxation of a bill of costs by the taxing officer. Mr Ben-Tovim, is not a legal practitioner. He is, what is commonly referred to in the legal fraternity, a lay litigant. An <i>allocatur</i> was issued on 12 March 2019 wherein the defendant had to pay the plaintiff's bill of costs in respect of fees and disbursements occasioned by an interlocutory application as per court order dates 6 February 2019 on a party and party scale. The defendant, dissatisfied with the <i>allocatur</i> requested a stated case from the taxing officer, which | |

was provided on 5 April 2019.

[2] The basis of Mr Ben-Tovim's review is that the plaintiff, awarded costs in the interlocutory application, is the firm of attorney Francois Erasmus and Partners, which was represented by Mr Francois Erasmus himself and he is the owner of the firm and the director thereof, consequently acting as a litigant in person. He based his argument on rule 125 (12) which states that: ' . . . , where costs are awarded in favour of a litigant who represents himself or herself, such litigant's costs are limited to disbursements necessarily and reasonably incurred and they must be taxed by the taxing officer and in that case the rules governing taxation of costs in these rules apply with the necessary modifications required by the context'.

Issues for determination

[3] The issues for determination are: firstly, whether Mr Francois Erasmus, being the owner of the law firm, acted as a litigant in person and secondly, whether, should the former question be in the affirmative, rule 125 (12) finds application in that the plaintiff is only entitled to disbursements.

Applicable legal principles

[4] Taxation of costs is governed by rule 125 of the High Court Rules. Angula DJP in the case of *Kamwi v Standard Bank Namibia Limited*¹ had this to say:

'[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 interfere².'

[5] Further to this, Kanguuehi AJ held in the case of *African Dynasty Investment CC v Gomes*³ that:

'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

¹ (A 101/2011) [2018] NAHCMD 196 (29 June 2018).

² *Kloot v Interplan Inc and Another* 1994 (3) SA 236 at 238 H-J.

³ (I 2009/2015) [2019] NAHCMD 235 (8 July 2019).

succinctly enunciated in the landmark case of *Johannesburg Consolidated Investment Co (JCI) v Johannesburg Town Council* 1903 TS 111 at 116.'

Application of the principles to the facts

[6] With the aforesaid principles in mind I will proceed to consider the issues at hand: whether Mr Francois Erasmus, being the owner of the law firm, acted as a litigant in person and whether the taxing officer was correct in her ruling that rule 125 (12) does not find application.

[7] Mr Francois Erasmus, an admitted legal practitioner, is a director of the law firm Francois Erasmus and Partners. In civil procedure, a partnership is often treated as an entity in that it may sue and be sued in its own name. In the present matter, the plaintiff (a law firm and as a partnership), instituted actions against the defendant for legal costs incurred by it while representing the defendant. The firm therefore sued in its own name. Mr Erasmus merely acts on behalf of the firm and does not sue in his own name nor does he sue the defendant in his personal capacity.

[8] The costs awarded to the plaintiff are therefore those of the firm and not those of Mr Erasmus as the firm sued in its own name. Mr Erasmus is not a party to these proceedings and cannot be regarded a litigant representing himself. The defendant's reliance on rule 125 (12) in that it finds application herein is misplaced and stands to be dismissed.

[9] My conclusion is that the above enunciated principles are well-founded principles and I accept them as a correct statement of law. I, therefore, adopt them in the instant proceeding and hold that the taxing officer exercised her discretion judicially.

[10] The court can only interfere with taxing officer's exercise of discretion where the taxing officer did not exercise its discretion judicially. However, in the present I am satisfied that the taxing officer applied her mind and exercised her discretion judicially.

[11] My order is therefore as set out above.

| Judge's signature | Note to the parties: |
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| | Not applicable. |

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| Counsel: | |
| Applicant | Respondent |
| <i>Mr Ben-Tovim</i> <i>In person</i> | <i>Mr Francois Erasmus</i> <i>Of</i> <i>Francois Erasmus & Partners</i> |