

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2019/00411

In the matter between:

HERITAGE HEALTH MEDICAL AID FUND

APPLICANT

and

REGISTRAR OF MEDICAL AIDS

1st RESPONDENT

MINISTER OF HEALTH AND SOCIAL SERVICES

2nd RESPONDENT

NAMFISA BOARD OF APPEAL

3rd RESPONDENT

Neutral citation: *Heritage Health Medical Aid Fund vs Registrar of Medical Aids* (HC-MD-CIV-MOT-REV-2019/00411) [2021] NAHCMD 314 (02 July 2021)

Coram: SIBEYA J

Delivered: 02 July 2021

Flynote: Costs – Taxation – Review of taxation – Rule 75 – Grounds for review founded on the basis that the taxing officer allowed items not entitled to –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.

Held, that, it often occurs that parties to an urgent application will not solely focus their preparation and arguments to urgency only and not venture into the merits.

Held further that it is not clear what the taxing officer meant in her stated case and the bill of costs contains items which amount to a duplication, therefore the *allocatur* is set aside and the matter is referred back to the taxing officer to tax the bill on what is necessary and guard against duplication of items.

ORDER

1. The application for review of the *allocatur* of the taxing officer succeeds.
 2. The decision of the taxing officer to accept the bill of costs containing whatever was necessary for the urgent application to occur and to disallow the objections thereto is set aside and the matter is referred back to the taxing officer to tax the bill of costs on what was necessary and guard against duplication of items.
 3. There is no order as to costs.
 4. The matter is removed from the roll and is regarded as finalised.
-

JUDGMENT

SIBEYA J:

[1] Before me is a taxation review wherein there is a dispute between the parties regarding the costs awarded in an urgent application. The application comprised of Part A regarding the interim relief and Part B covering the review relief. This court (differently constituted) subsequent to hearing the urgent application, struck the application with costs in a ruling delivered on 05 December 2019. The costs included costs of one instructing and two instructed counsel.

[2] Part B of the relief sought was referred for judicial case management and to be adjudicated at a later stage.

[3] The applicant, in essence, argued that the costs order granted as indicated above was limited to the costs of the urgent application or the issue of urgency only and not to the merits of the matter. The first respondent disagrees, stating that not only was the applicant expected to address the issue of urgency before court but also to prove why it was entitled to the relief sought. Conversely, the first respondent, in attempt to meet the applicant's case, not only sought to address the court on urgency but also to establish that the application lacks merit.

[4] There is credence in the position held by the first respondent that it is highly unlikely that parties to an urgent application will solely limit their preparation and arguments to urgency. Often the merits are canvassed even to a lesser degree, if the circumstances so provide. Part of the determination of urgency is the aspect of whether the applicant can be afforded substantial redress in due course which may require that the merits be traversed. In any event, when the court forms the view that urgency is established, the parties will be required to deal with the merits of the application therefore it is only prudent that lawyers are not caught off guard.

[5] In *Kaura v Taxing Master of the High Court* (A 121/2015) [2016] NAHCMD 138 (10 May 2016), the following principles were applied in a review of taxation:

[3] 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.

[*Pinkster Gemeente van Namibia v Navolgers van Christus Kerk SA* 2002 NR 14 at 15G-H]

[4] At every taxation the taxing officer is the officer of the court having 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.'

[6] The taxing officer stated the following decision in the stated case:

'4. The Taxing Officer after hearing both arguments and objections raised decided to accept the bill as long as whatever is on this bill must be in relation to the urgent application, it must have made it possible for you to have an urgent application that was struck from the roll. But whatever item which is here which was not necessary for the urgent application that I am ready to may be tax it off. But whatever was necessary for the urgent application to take place that I will accept.'

[7] The above decision of the taxing officer is very difficult to understand. It can be said to mean that the taxing officer accepted every item of the bill applicable to the urgency of the application, but it remains unclear what these items are. Parties should not be left second guessing the decision of the taxing officer. The decision of the taxing officer should be accompanied by clear reason to inform the parties of items of the bill of costs which are allowed and disallowed. I therefore agree with the applicant that it is not clear from the stated case what the taxing officer took into account and meant in the stated case.

[8] The taxing officer is required, in the analysis of the bill of costs, to set clearly the items allowed and disallowed. The taxing officer exercises a discretion during taxation.

[9] The applicant contends that in allowing items on the bill of costs which did not concern the urgency of the application, the taxing officer allowed unnecessary items. The applicant lists, *inter alia*, the following complaints:

- a) That items number 10, 17, 36 and 43 of the bill of costs amounts to duplication (these relate to indexing the bundle of pleadings for the instructed counsel;
- b) That item number 42 relates to making copies of the pleadings for office records while all pleadings were charged individually for printing and thus amounting to a duplication.

[10] Item 10 of the bill of costs provides for preparation of the brief for the instructed counsel and sorting out papers for two hours charged at N\$ 2 400. Item 17 provides for preparation of the brief for instructed counsel and sorting papers for two hours charged at N\$ 2 400 (taxed off N\$1 200). Item 36 provides for sorting papers, paginating and arranging bundles for instructed counsel for five hours charged at N\$ 6 000. Item 43 provides for sorting papers, paginating bundles for instructed counsel for three hours charged at N\$ 3 600. Item number 42 on the other hand demonstrates that photocopying charges were for 3684 pages made for office records, while all pleadings were already individually charged for photocopies. The said items reveal duplication of charges and fees and the taxing officer did not pay attention to, *inter alia*, these items.

[11] Angula DJP in *Kamwi v Standard Bank of Namibia Limited*¹ 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.’

[12] This court in *The Government of the Republic of Namibia v Rukoro*² at para [17] stated the following regarding the duty of the taxing officers to analyse bills of costs:

‘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.’

¹ *Kamwi v Standard Bank of Namibia Limited* (A 101/2011) [2018] NAHCMD 196 (29 June 2018).

²² *The Government of the Republic of Namibia v Rukoro* (HC-MD-CIV-ACT-OTH-2018/02461) [2020] NAHCMD 340 (7 August 2020).

[13] In exercising the discretion, the taxing officer must scrutinise the bill of costs to ensure that a party is not unjustifiably enriched and the other is not unjustifiably impoverished. Taxing officers should ensure that parties are allowed costs which are reasonably incurred.

[14] Having found that the decision of the taxing officer in her stated case lacks clarity and further that items number 10, 17, 36 and 43 together with item 42 amounts to a duplication, the bill of costs and the items mentioned cannot be allowed to stand. In the premises, it becomes apparent that the taxing officer did not exercise her discretion properly.

[15] In the result:

1. The application for review of the *allocatur* of the taxing officer succeeds.
2. The decision of the taxing officer to accept the bill of costs containing whatever was necessary for the urgent application to occur and to disallow the objections thereto is set aside and the matter is referred back to the taxing officer to tax the bill of costs on what was necessary and guard against duplication of items.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

O S SIBEYA
Judge

APPEARANCES:

APPLICANT: VAN DER MERWE-GREEFF ANDIMA INC.
WINDHOEK

FIRST RESPONDENT: SISA NAMANDJE & CO INC.
WINDHOEK

THE TAXATION OFFICER: M CHUKWUNWEOLU.
WINDHOEK HIGH COURT