

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: I 2909/2006

In the matter between:

DIETMAR DANNECKER

PLAINTIFF

and

LEOPARD TOURS CAR & CAMPING HIRE CC

1st DEFENDANT

BARABARA HAUSENER

2nd DEFENDANT

MANFRED HAUSNER

3rd DEFENDANT

Neutral citation: *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006)
[2021] NAHCMD 496 (27 October 2021)

Coram: Schimming-Chase J

Heard: On the papers

Delivered: 27 October 2021

Flynote: Costs - Taxation - Review of taxation - Taxing master functionary in taxation -

Court reluctant to interfere in taxing master's ruling unless taxing master has exercised discretion improperly, has not brought her mind to bear upon the issue, or has based her decision on wrong principles.

Costs – Taxation – Review of taxation – Taxing master required to state a case for the decision of a judge. Rule 75(1) and (2) – The stated case must set out each item or part of an item together with the grounds of objection advanced at the taxation and must include any finding of fact by the taxing officer – Taxing master's stated case is in essence the reasons for the decision taken. It must comply with rule 75(2), and contain the items and the grounds of objection advanced at the taxation, to enable the court to determine how the discretion was exercised.

Summary: The plaintiff instituted action in this court during 2006, against the first to third defendants. The proceedings in the action came to finality ten years later when the court gave judgment on 5 December 2016. The plaintiff's claim against the second and third defendants was dismissed, and the court made an order that the plaintiff pay their costs. The matter went to taxation. The end result of the taxation was the taxing master's allocatur of 6 May 2020. On 8 May 2020, the plaintiff set in motion the procedure envisaged by rule 75(1), requesting the taxing master to state a case for the decision of a judge.

The taxing master did not act when the request was made by the plaintiff. After the plaintiff's legal practitioner followed up on the request, the taxing master informed that she had not responded because she assumed that the stated case was to be prepared by the plaintiff and served on all parties. She initially refused to state a case. This was followed by a further document from the taxing master titled "Stated case in terms of Rule 75(4)". In this document, all that the taxing master stated was that she reviewed all items in the bill of costs and taxed off where necessary and reasonable, as guided by the party and party tariffs in annexure D of the High Court Rules. No further information was provided by the taxing master to enable the court to understand the reasoning applied by the taxing master in her ruling on the taxation.

In the result, the taxing master has not complied with rule 75(1) and is directed to file a comprehensive stated case envisaged by rule 75.

The procedure for review of a taxation envisaged by rule 75 commences with a request to the taxing master to state a case for decision of a judge. The party requiring the statement of a case by the taxing master should adequately identify the items with regard to which he requests a case to be stated.

ORDER

1. The taxing master is directed to state a case for the decision of the judge in terms of the provisions of rule 75(1) read with rule 75(2) of the rules of court.
2. The taxing master is further directed to supply a copy of the stated case to the plaintiff and the second and third defendants on or before 25 November 2021.
3. The plaintiff and the second and third defendants are directed to submit their contentions in writing (if any) on or before 16 December 2021. Should they stand by their contentions dated 17 March 2021 and 25 March 2021, they are directed to inform the taxing master in writing.
4. The taxing master may compile a report in terms of rule 75(5) read with rule 75(8) on or before 27 January 2022 and serve the report on each of the parties.
5. In the event that the taxing master compiles a report in terms of rule 75(5), the parties may submit further contentions to the taxing master on or before 10 February 2022, after which the taxing master is directed to lay the case before the judge in terms of rule 75(6).

6. In the event that the taxing master does not compile a report, she is directed to refer the case for decision on or before 27 January 2021.
7. The case is postponed to 21 February 2022 at 15h30 for a status hearing.
8. The parties are directed to file a joint status report indicating whether they wish to present oral argument, or whether they wish to have the matter determined on the papers.

JUDGMENT

SCHIMMING-CHASE J:

[1] This is a review of taxation of costs in terms of rule 75 of the rules of court.

[2] The review stems from an action instituted in this court by the plaintiff during 2006, against the first to third defendants. The plaintiff's claim was for the repayment of moneys he had paid in respect of damage caused to a vehicle which he had hired from the first defendant's car rental business.

[3] The proceedings in the main action were rather protracted, only coming to finality ten years later when the court gave its judgment on 5 December 2016.¹ The plaintiff was unsuccessful in his claim against the second and third defendants. Paragraph 1 of the order contained in the judgment reads as follows:

'1. The plaintiff's claim against second and third defendants in their personal capacities is dismissed with costs, such costs to include costs consequent upon the employment of one instructing and one instructed counsel.'

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016)

[4] Pursuant to the costs order made in their favour, the second and third defendants (“the defendants”) on 20 January 2020 served a notice of taxation on the plaintiff. The notice, to which was attached a bill of costs, set the taxation for hearing on 6 February 2020.

[5] The end result of the taxation process – which included both formal taxations before the taxing master as well as private taxations between the parties – was the taxing master’s issuance of an allocatur on 6 May 2020.

[6] Dissatisfied with the taxing master’s ruling, and on 8 May 2020, the plaintiff’s legal practitioner, Mr Andreas Vaatz, authored correspondence to the taxing master. The letter stated the following:

‘I would be grateful if you could prepare a stated case in respect of the bill of costs submitted by Hausner in the above matter. The items in respect of which a stated case should be prepared are Items 130, 160 (8)&(9), 166, 253, 317 (7-12 2), 357, 386, 416, 442, 523, 563, 570, 574, 575, 590(1)-(3), 632, 624, 664.’

[7] It is not in dispute that the above correspondence together with earlier correspondence that served before the taxing master, which outlined the plaintiff’s objections on certain items² was not served or otherwise brought to the attention of the defendants. It is also not in dispute that the defendants, represented by Mr Schalk Oosthuizen, only came to know of this correspondence during or about 12 January 2021, when Mr Vaatz wrote to him on the issue. In this correspondence, Mr Vaatz *inter alia*, annexed a copy of his request for a stated case dated 8 May 2020.

[8] After Mr Vaatz followed up on his request, the taxing master formally responded on 24 February 2021. She copied Mr Oosthuizen in the correspondence. The essence of her response was that the request for a stated case was denied because Mr Vaatz had not

² Dated 30 April 2020, and sent to the taxing Master by Mr Vaatz before the allocatur was issued.

complied with rule 75(1), read with rule 76(1)³, in that he had failed to file a proper notice to that effect, or to serve it on all interested parties. The taxing master accordingly adopted the stance that the correspondence was not received as a formal review proceeding because ‘...you failed to bring a notice and serve it on all parties concerned.’ The taxing master also advised that she received his request dated 8 May 2020 to in light of the aforementioned circumstances, to only be ‘mere correspondence’.

[9] This response was followed up by a further document authored by the taxing master dated 10 March 2021, titled “Stated Case in terms of Rule 75(4)”. The relevant portions of the taxing master’s stated case read as follows:

1. The Taxing Officer was requested by the Legal Practitioner of the Plaintiff to state the case for the decision of a Judge on the item(s) objected to or disallowed by the Taxing Officer at the taxation that was scheduled to be held on the 6 February 2020, the matter was later postponed as per request of legal practitioners who requested to meet privately and deal with the taxation on their own and only bring the items they are objecting to my attention. On the 6th of May 2020 we met and we dealt with the items that needed the Taxing Officer’s discretion which were mainly the instructed practitioner’s fees and Taxing Officer issued allocator.

2. On 30th April 2020 Mr Vaatz compiled objections he was going to raise during taxation and on the 5th May 2020, Mr Vaatz filed written objections on the Taxing Officer.

3. On the 6th of May 2020 we met for taxation and the two counsels presented a taxed bill as per their agreement and asked the Taxing Officer just to deal with the Objections. The main objection was on Item 130, 160, 166, 253, 317, 357, 386, 416, 442, 529, 557, 563, 570, 574, 575, 590, 632, 634 and 664 as per objections dated 30th April 2020 hereto attached.

4. Some of the items objected to were changed as per agreement of parties and the Taxing Officer overruled some of the objections based on Rule 124 (5) of the High Court Rules.

³ Reference was made in the correspondence to the procedure for common law reviews, contained in rule 76.

5. The Taxing Officer seeks condonation from the court as the stated case was requested in the form of a letter dated 7 May 2020 hereto attached, as the letter was not served on all parties involved and it appeared non-compliant to Rule 75 (2) as it did not set out each item or part of an item together with the grounds of objections advanced at the taxation and it did not set out any finding of fact by the Taxing Officer, hence the Taxing Officer did not consider it as a rule compliant request for a stated case at the time until recently when Mr Vaatz came to enquire about the matter.'

[10] After receipt of the above document, Mr Vaatz filed the plaintiff's contentions, and Mr Oosthuizen filed the contentions of the defendants. Both documents set forth the objection submissions relating to the relevant items.

[11] The defendants' contentions raised three points in limine. The first point was that there was an unexplained and undue delay on the part of the plaintiff, as the allocatur was already issued on 6 May 2020. The second point raised was that the plaintiff's request for a stated case on 8 May 2020 was not compliant with rule 75 because:

- a) it was not served on the defendant or his representative and therefore did not constitute proper notice;
- b) the request for a stated case was required to be initiated on notice and must be served on the parties affected by the review;
- c) the plaintiff was required in terms of rule 75 in the notice to state the grounds of the objections advanced and any finding of fact by the taxing master; and
- d) the taxing master also did not provide the practitioners with a proper stated case based on the contents of her letter of 24 February 2021 or 10 March 2021.

[12] Mr Vaatz, in his contentions, also raised the fact that the taxing master in her stated case did not indicate what considerations and facts she took into account in arriving at the

fee allowed in respect of the items to which he objected.

[13] He denied non-compliance with rule 75. He submitted that the correspondence he addressed to the taxing master served together with a second letter specifying in detail all the items in respect of which he raised objections during the taxation.

[14] Mr Vaatz submitted that rule 75 placed the requirement to state a case for decision by a judge on the taxing master, and not the party dissatisfied with the ruling of the taxing master. He argued in addition that there was nothing in rule 75(1) setting out what should be contained in the requirement to state a case, as long as the contents were clear.

[15] Given the point raised by the defendants it is necessary to determine firstly, whether or not there is a proper review in terms of rule 75 before the court for determination, and whether the taxing master and/or the plaintiff has followed the procedures envisaged by the rule.

[16] Rule 75 deals with the procedure to be followed by a party who is dissatisfied with the ruling of a taxing officer. It reads as follows:

(1) A party dissatisfied with the ruling of the taxing officer as to any item or part of an item which was objected to or disallowed mero motu by the taxing officer may, within 15 days after the allocatur is issued, require the taxing officer to state a case for the decision of a judge.

(2) The case referred to in subrule (1) must set out each item or part of an item together with the grounds of objection advanced at the taxation and must include any finding of fact by the taxing officer.

(3) ...

(4) The taxing officer must apply a copy of the stated case to each of the parties who may, within 10 days after receipt thereof, submit their contentions in writing, including grounds of

objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing officer or disallowed mero motu by the taxing officer.

(5) On receipt of the contentions referred to in subrule (4), the taxing officer must compile his or her report and must supply a copy thereof to each of the parties who may, within 10 days after receipt of that report, submit their further contentions in writing to the taxing officer.

(6) On receipt of the parties' contentions in terms of subrule (5), the taxing officer must without delay lay the case together with the contentions of the parties and his or her report and any further contentions thereon before a judge.

(7) ...

(8) On receipt of the parties' submissions referred to in subrule (4), the taxing master may, instead of compiling a report as contemplated in subrule (5), refer the case for decision to the court and any further information to be supplied by the taxing officer to the judge must also be supplied by the taxing officer to the parties who may within 15 days after the receipt thereof submit contentions in writing thereon to the taxing officer.

(9) On receipt of the parties' contentions in terms of subrule (8), the taxing officer must without delay lay such further information together with any contentions of the parties before the judge.

(10)'

[17] This rule contemplates a procedure designed to enable a judge to consider the taxing master's ruling and the reasons behind it, and to properly consider the parties' objections. Geier J described the procedure in detail in *Mapove v Kleinhans*⁴ as follows:

'a) Firstly - the rules set a number of preconditions which have to be met before the stated case can even get off the ground, ie:

⁴ *Mapove v Kleinhans* (I 2089/2016) [2019] NAHCMD 449 (31 October 2019) para 2.

ii) the request for the stated case must be made within 15 days after the *allocatur* is issued;

iii) the stated case must set out each item or part of an item together with the grounds of objection advanced at the taxation and must include any finding of fact by the taxing officer⁵; and

iv)

b) Secondly – and after the Taxing Master has supplied a copy of the stated case to the parties - the parties are afforded two opportunities to submit their contentions in respect of any item or part of an item, which was objected to, ie.:

i) on receipt of the first contentions the Taxing Master must compile a report, which is also to be made available to the parties;⁶

and

ii) in respect of which they are then afforded a second opportunity to submit their further contentions thereon.

c) Thirdly – and on receipt of the second set of contentions the Taxing Master must then lay the stated case and the taxing master's report – together with all contentions - before a judge, who may then deal with the matter as prescribed further by the rules.'

[18] It is apparent from the clear language expressed in rule 75(1) (formerly rule 48(1) of the repealed rules) that the dissatisfied party is the party that “requires” the taxing officer concerned to state a case for the judge’s decision. It is not the dissatisfied party that must state a case. Rule 75(2) also provides expressly that the case to be stated must set out each item or part of an item together with the grounds of objection advanced at the taxation, including any finding of fact by the taxing master. Again, this procedural responsibility is not

⁵ Emphasis supplied.

⁶ Emphasis supplied.

placed on the dissatisfied person, but on the person that took the decision and made the ruling that is sought to be reviewed in terms of rule 75.

[19] The learned Deputy Chief Justice and Judge President of the High Court, the Honourable PT Damaseb, in his work *Court-Managed Civil Procedure of the High Court*⁷ stated the following in his discussion on reviews of taxation.

‘The party who states a case⁸ must set out each item or part of an item together with the grounds of objection advanced at the taxation and must include any finding of fact by the taxing officer.’

[20] The fact that the taxing master commences the review process by stating the case for decision by a judge, is also apparent from the functions ascribed to the taxation process, as well as the judicial function performed by the taxing master. The taxation of a bill of costs is a court-annexed process. It is an integral part of the judicial process and a taxing master presides on it not simply as an administrative official, but as an extension of the judiciary.⁹

[21] The role of the taxing master was described thus by Maritz J (as he then was) in *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA*:¹⁰

‘Ultimately, it is for the Taxing Master to decide which costs to allow by bringing an objective evaluation on the basis of the stipulated criteria to bear on the bill. At every taxation, the Taxing Master is the functionary enjoined with the obligation 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 or for defending the rights of any party, are allowed. As Rosenow J pointed out in *Phiri v Northern*

⁷ Damaseb P *Court-Managed Civil Procedure of the High Court*. Juta (2020) at 363.

⁸ Emphasis supplied.

⁹ Per Schutz J in *Nedperm Bank Ltd v Desbie (Pty) Ltd* 1995 (2) SA 711 (W) at 712G approved in *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 17F-G; See also *Court-Managed Civil Procedure of the High Court supra* at 362-363.

¹⁰ *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 16D-I.

Assurance Co Ltd 1962 (4) SA 284 (C) at 285E, the discretion to decide what costs have been necessarily or properly incurred is given in the first instance to the Taxing Master and not to the Court. Although Rule 48¹¹ contemplates that the Court shall ultimately be the final arbiter in relation to the taxation of costs, it is normally reluctant to interfere with the Taxing Master's rulings in the absence of good grounds to do so. (See *Kock v SKF Laboratories (Pty) Ltd* 1962 (3) SA 764 (E) at 765E.) Given the large number of variations in the complexity, causes of action, issues and other exigencies of cases, it is sometimes difficult for the Taxing Master 'to steer his difficult course between the Scylla of liberality and the Charybdis of niggardliness' (to borrow the words of Davis J in *Barnett v Isemonger* 1942 CPD 325 at 326). Hence, the Court will on review allow the Taxing Master a significant degree of appreciation in the exercise of his or her discretion.'

[22] In *Fourie v The Taxing Master and Another*¹² the court dealt with the principles governing the repealed rule 48 of the high court rules, which essentially remain substantially similar to the provisions contained in rule 75. It was held that rule 48(1) in clear and explicit terms requires the taxing master to state a case for the decision of the judge, and that the purpose of the rule is to give the reviewing judge a brief record of the taxation proceedings in which the issues between the parties are clearly defined and the findings of fact by the taxing master are briefly set out.

[23] On the above authorities, I hold the view that both the defendants and the taxing master are wrong, insofar as they separately contended that the responsibility to prepare a stated case with the particulars called for in rule 75(2) falls on the dissatisfied party. This is not so, and the arguments of both parties fail on this point.

[24] In this regard, the delay argument also fails, given that the stated case was requested two days after the allocatur was issued by the taxing master. The contentions were also filed shortly after the taxing master stated the case for decision of the judge. The delay was not of the plaintiff's making.

[25] I also disagree with the contention advanced by Mr Oosthuizen for the defendants,

¹¹ The repealed version of rule 75.

¹² *Fourie v The Taxing Master and another* 1983 (4) SA 210 (O).

that the proceedings in terms of rule 75 should have been brought on notice and served on the parties affected by the review.

[26] I believe that Mr Oosthuizen (and the taxing master, it seems), is relying on the procedure for review of taxation contained in the high court rules of South Africa. Those rules were amended in 2000 to require the party aggrieved by the taxing master's decision to on notice¹³, require the taxing master to state a case. Those rules further require the notice to include the identification of each item sought to be reviewed, as well as to contain inter alia the grounds of objection and contain any fact which the dissatisfied party contends the taxing master to have made, and intends to challenge.¹⁴

[27] The position in rule 75 is different, and no requirement of notice is contemplated. In *Fourie*¹⁵ it was also held that the party requiring the taxing master to state a case must adequately identify the items with regard to which he or she requests a case to be stated¹⁶. I hold the view that the notice filed by the plaintiff contained sufficient information (on its own and together with the written objections submitted to the taxing master before she issued her allocatur) to enable the taxing master to glean, from her own notes, recordings and documents, on what aspects a stated case would be need to be prepared and justified. It was the taxing master's responsibility to prepare the stated case in compliance with rule 75.

[28] In this regard, both Messrs Vaatz and Oosthuizen were *ad idem* that the stated case supplied by the taxing master in this matter fell short of the requirements of rule 75(2).

[29] The court agrees with the above contentions. It was unfortunately not provided with a proper stated case by the taxing master containing any factual findings, together with what was required to be included in the stated case as set out in rule 75(2). This would be necessary to enable the court to make a considered decision. The taxing master is the decision maker for purposes of this rule and how her decision was reached on the items

¹³ Emphasis supplied.

¹⁴ LTC Harms *Civil procedure in the Supreme Court*, Service Issue 35, September 2007 at B-342-B343.

¹⁵ *Fourie v The Taxing Master and another* 1983 (4) SA 210 (O).

¹⁶ *Fourie* at 212E.

must be properly recorded, so as to comply with the judicial nature of the taxation process.

[30] In the light of the foregoing, the following order is made:

1. The taxing master is directed to state a case for the decision of the judge in terms of the provisions of rule 75(1) read with rule 75(2) of the rules of court.
2. The taxing master is further directed to supply a copy of the stated case to the plaintiff and the second and third defendants on or before 25 November 2021.
3. The plaintiff and the second and third defendants are directed to submit their contentions in writing (if any) on or before 16 December 2021. Should they stand by their contentions dated 17 March 2021 and 25 March 2021, they are directed to inform the taxing master in writing.
4. The taxing master may compile a report in terms of rule 75(5) read with rule 75(8) on or before 27 January 2022 and serve the report on each of the parties.
5. In the event that the taxing master compiles a report in terms of rule 75(5), the parties may submit further contentions to the taxing master on or before 10 February 2022, after which the taxing master is directed to lay the case before the judge in terms of rule 75(6).
6. In the event that the taxing master does not compile a report, she is directed to refer the case for decision on or before 27 January 2021.
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EM SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF

Mr Vaatz

Andreas Vaatz & Partners

2nd AND 3rd DEFENDANTS

Mr Oosthuizen

Erasmus & Associates