REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2018/01503

In the matter between:

JACOBUS NICOLAAS GROBLER **PLAINTIFF**

and

A.S.S INVESTMENTS 165 CC **FIRST DEFENDANT**

JOHANNES LE ROUX GEMISHUIZEN **SECOND DEFENDANT**

BLYDA GERMISHUIZEN **THIRD DEFENDANT**

SOSSUS INVESTMENTS (PTY) LTD **FOURTH DEFENDANT**

Neutral citation: *Grobler v A.S.S Investments 165 CC* (HC-MD-CIV-ACT-CON-2018/01503) [2022] NAHCMD 137 (25 March 2022)

Coram: UEITELE J

Heard: **DETERMINED ON THE PAPERS**

Delivered: **25 MARCH 2022**

Flynote: Review – Rule 75 - Taxation - the court is entitled to and will interfere with the taxing master's rulings, if he has not exercised his discretion judicially, if he has exercised it improperly, he has not brought his mind to bear upon the question or he has acted on a wrong principle.

Review – Taxation - Rule 125(7) - a taxing officer has to cumulatively evaluate the relevant factors and may depart from the tariffs in extraordinary or exceptional cases wherein strict adherence to the tariffs will be inequitable. This does not mean that the tariffs and the principle of reasonable and necessary costs are taken out of the equation. The taxing officer has to strive towards a balance between indemnifying the successful party and remaining within reasonable boundaries, whilst being mindful that if rule 125(7) finds application, he or she has latitude to permit fees over the tariff.

Summary: The defendants in this matter brought on review the decision by the taxing master, to allow costs for senior counsel to the amount of N$ 3000.00, and 50% thereof for junior counsel, for an interlocutory application for leave to amend its plea and counterclaim, with costs not capped in terms of rule 32(11).

The defendants contend the matter was not of such a complex and extraordinary nature to trigger the discretion of the taxing master to deviate from the set tariffs. In reliance on the order of the court granting such costs and its reasoning therefor, the plaintiff argues to the contrary.

In the absence of the defendants making and proving the taxing master was clearly wrong, or accounted for or failed to account for certain factors in her decision, the decision of the taxing master is allowed to stand. The review application is dismissed with costs.

ORDER

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1. The review is dismissed, with costs.

2. The matter is regarded as finalized and removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] This is a review of a taxation by the taxing officer of this court in terms of rule 75 of the rules of the High Court.

[2] The issue before me concerns the regularity of the taxing officer's decision to deviate from the party and party scale of tariffs as set out in Annexures D and E to the rules of this Court and allow the instructed counsels' tariff at a scale that is higher than what is prescribed in Annexures D and E. Judgment in this matter is decided on the papers; being the taxing master's stated case and the parties' written contentions submitted to court in terms of rule 75.[1]

Background

[3] The plaintiff instituted action against the defendants (the first defendant is a close corporation while the second and third defendants are persons who hold members' interest in that close corporation) in terms of which he sought the nullification of a lease agreement in respect of a farm known as Witwater and an agreement granting the first to third defendants the option to purchase the leased farm. The first to third defendants, who I will in this judgment, refer to as the defendants defended the plaintiff's claim and also instituted a counterclaim.

[4] After the parties exchanged pleadings and at the stage when the matter was ready for trial dates to be allocated, the defendants sought to amend their plea and counterclaim. The application for leave to amend the plea and counterclaim was opposed by the plaintiff. The application for leave to amend the plea and counterclaim was ultimately set down for hearing and after hearing arguments the Court on 04 June 2021 handed down its judgment granting the defendants leave to amend their plea and counterclaim[2].

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1 Particularly rule 75 (7)(a) of the Rules of the High Court.

2 *Grobler v A. S. S. Investments 165 CC* (HC-MD-CIV-ACT-CON-208/01503) [2021] NAHCMD

[5] As regards the cost of the application for leave to amend the plea and counterclaim the Court ordered the defendants to pay the plaintiff's wasted which included the taxed costs 'of opposing the application to amend and such costs to include costs of one instructing and two instructed counsels'. The Court explained its reasoning behind the order with respect to costs in the following terms:

'[44] The court has a discretion to grant costs or not and to limit such costs in interlocutory proceedings in accordance with the provisions of rule 32 (11) or not. A number of factors should guide the court in the exercise of its judicial discretion. In this regard I take into consideration the fact that Mr Heathcote [counsel for the defendants] agreed to a question from the court that the amendment sought creates a paradigm shift from the initial plea and counterclaim filed by the defendants. This in my view calls for a whole new approach to be engaged by the plaintiff in the prosecution of his case and putting up his defence to the defendants' counterclaim. This approach includes revising his plea to the counterclaim, the replication to plea to the particulars of claim, the proposed pre-trial memorandum and his witness statements. Literally, the work carried out by the plaintiff in this matter is due to be duplicated on account of the amendment sought.

[45] The substantiveness and implication of the amendment sought justifies the stance that the plaintiff resorted to in attempt to extinguish the wrath of such intended amendment at its infancy stage. The substantiveness and complexity of intended amendment and considering that the parties went all out in advancing their case for and against the application for leave to amend, favours an award of costs to the plaintiff beyond the cap stipulated in rule 32 (11).'

[6] On 12 August 2021, the parties appeared before the taxing officer who issued an *allocatur* on the same day. The defendants are aggrieved by the fact that the taxing officer allowed the fees of instructed counsel on a scale that is higher than the scale prescribed in the Annexures to the rules. On 21 August 2021 the defendants issued a notice in terms of rule 75, calling upon the taxing officer to state her case for the decision of a judge.

<u>The parties' contentions</u>.

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276 (04 June 2021).

[7] In their Notice of Motion the defendants stated that:

'The first to third defendants object to the determination and ruling made by the taxing master at the taxation on 12 August 2021 in which she determined that:

1 The interlocutory application judgment delivered on 4 June 2021, which had already been exempted from the limitations of rule 32(11), was an exceptional and extraordinary matter as defined by rule 125(7) and justified the deviation from the party and party scale tariffs as set out in Annexure D and E, more particularly in respect of Annexure E which prescribes the party and party scale tariffs of instructed legal practitioners.

2. Allowed a rate of N$ 3 000.00 per hour (as opposed to the maximum prescribed rate of N$ 1 800.00 per hour) for plaintiff's senior instructed legal practitioner and half of the rate for plaintiff's junior instructed legal practitioner in terms of point 5 of Section B, Annexure E to the Rules of Court.

3. More particularly the items objected to in respect of plaintiff's senior instructed legal practitioner on the bill of costs are:

3.1. Item 108;
3.2. Item 164;
3.3. Item 229;
3.4. Item 230;
3.5. Item 257;
3.6. Item 343;
3.7. Item 349.

4. More particularly the items objected to in respect of plaintiff's junior instructed legal practitioner on the bill of costs are:

4.1. Item 111;
4.2. Item 167;
4.3. Item 235;
4.4 Item 260;
4.5 Item 346;
4.6. Item 352.

5 First to third defendants contend that:

5.1. Their application for leave to amend (the interlocutory application) was not an exceptional and extraordinary matter which justifies the taxing master going beyond the fixed tariffs for instructed legal practitioners as set out in Annexure E.

5.2 The managing judge already exempted the interlocutory application limitations set by Rule 32(11).

5.3. Sight should not be lost of the fact that most of the legal work done by the parties' respective legal teams are not wasted and will be used at the eventual Trial Hearing of the matter.'

[8] What is clear from the above is the fact that the defendants are aggrieved by the fact that Taxing Officer allowed the cost of the first instructed (senior) legal practitioner at the rate of N$3 000.00 per hour, and N$1 500.00 per hour for the second instructed (junior) legal practitioner.

[9] The defendants ground their review on their contentions that, firstly, the tariffs allowed for the plaintiff's instructed counsels' party and party costs are prescribed in Section B, Annexure E of the Rules of Court and permit a maximum of N$ 18 000.00 per day and N$ 1 800.00 per hour for senior counsel; and that secondly, the taxing master applied her discretion incorrectly in finding that the defendants' application for leave to amend (the interlocutory application), was comparable with the authority[3] relied upon in her stated case.

[10] The defendants further aver that the high costs charged by the plaintiff's instructed counsel compared to the allowed party and party rate does not automatically make a matter exceptional or extraordinary and does not by itself justify a departure from set tariffs in terms of rule 125(7).[4]

[11] On 08 September 2021 the taxing officer, Ms. Meriam Chukwunweolu, in terms of Rule 75(4) filed a stated case. In her stated case the taxing officer stated the following (I quote verbatim):

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3 That is the matter of *Hollard v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00002) [2020] NAHCMD 32 (31 January 2020).

4 Paragraph 5 of the first to third defendants' written contentions.

‘1 …

2 The defendants objected to the Ruling by the Taxing Officer that paragraph 5 of Section A and the maximum tariffs in section B of Annexure E “Tariff of Fees for instructed Legal Practitioner on a scale as between Party And Party” must be applied in respect of the Bill of Cost.

3. The taxing officer applied discretion and reviewed all objected items in the bill of costs and taxed off where necessary and reasonable as guided by the party and party tariffs as per paragraph 5 of Section A and the maximum tariffs in Section B of Annexure E and considering a judgment by Judge Claasen in the matter of Hollard v Minister of Finance (31 January 2020), wherein the Court ordered that the Taxing Officer has a discretion in terms of rule 125(7) to allow an amount higher than the prescribed fees of N$ 1 800 in deserving cases.

4. Therefore the Taxing Master rule that the maximum rate for the instructed legal practitioner shall be N$ 3 000. 00 per hour and N$ 1 500.00 per hour for the second instructed legal practitioner as per party-party scale.’

[12] The plaintiff starts off his submissions by stating the discretion to grant an order of costs vests in the Court, and not the taxing master; and that the taxing master must follow out the order and cannot vary it. The plaintiff submits the taxing master must be alive to the fact that litigants who lose must pay the costs, and that lawyers are entitled to proper remuneration for services rendered.

[13] The plaintiff further contended that the cost order by the court does not take away the taxing master’s authority to exercise her discretion in terms of rule 125(7). He furthermore contended that because the court granted the costs of two instructed counsel it shows that the interlocutory application was not only extraordinary and exceptional but complex as well. The plaintiff by the wayside remarked that the defendants themselves had instructed senior and junior counsel, for which costs were incurred and had to be paid.

[14] Before I deal with the issue which I am called upon to determine in this matter I will briefly set out the purpose of taxation; the discretion of the taxing master; and the proper approach to the review of a taxing officer’s decision.

The purpose of taxation

[15] A C Cilliers[5] opines that taxation of costs *'has always been regarded as an integral part of the judicial process'* and that the rights and obligations of parties to litigation *'are not finally determined until the costs ordered by the court have been taxed'*. Apart from this, taxation also ensures that *'the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of the litigation which resulted in the order for costs'*[6]. These purposes of taxation are captured in rule 125(3) which provides that:

'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 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.'

[16] The South African High Court[7] opined that the intention, of the equivalent, of our rule 125(3) is to ensure that the ultimate winner of a suit must not have the fruits of victory reduced by having to pay too high a proportion of his or her costs by way of an attorney and client bill. It has also been recognized, on the other hand, that the interests of the loser must be protected and that party must not be oppressed by having to pay an excessive amount of costs.

[17] The touchstone is for expenditure to be allowed which has been reasonably and properly incurred. This was put as follow by the Supreme Court in the matter of *Afshani and Another v Vaatz*[8]:

'[27] 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

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5 AC Cilliers Law *of Costs* at Paragraph 13.10.

6 *Trollip v Taxing Mistress, High Court and Others* 2018 (6) SA 292 (ECG).

7 *Ibid.*

8 *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) at para [27].

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. To afford the party who has been awarded an order for costs a full indemnity for all costs incurred by him or her in relation to his or her claim or defence, Note 1 instructs the Taxing Master to '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', but, save as against the party who incurred them, not to allow any costs which appear to him or her 'to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to a legal practitioner or by other unusual expenses'.

The discretion of the taxing master

[18] Cilliers[9] said the following of the discretion vested in a taxing master:

'The discretion to decide what costs have been necessarily or properly incurred is given to the taxing master and not to the court. It is now a well-established rule that in regard to *quantum,* both as to the qualifying fees for medical expert witnesses, other expert witnesses, and counsel's fees, the decision of the taxing master is a discretionary one.

The taxing master has a discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that he or she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, the decision will be subject to review. (*City of Cape Town v Arun Property Development (Pty) Ltd 2009 (5) SA 226 (C) [at] 232.*) In addition, even where the discretion has been exercised properly, a court on review will be entitled to interfere where the decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances, or as to the practice of the court.

The taxing master's discretion is wide, but not unfettered. In exercising it the taxing master must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned. The discretion is not properly exercised if such facts or circumstances are ignored or misconstrued.'

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9 Supra footnote 5.

Approach to review a taxing officer's decision.

[19] In the *Afshani and Another v Vaatz* the Supreme Court restated the test applicable when dealing with a review of taxation as follows:

'… courts of law will not readily disturb a ruling of a Taxing Master falling within his or her discretion unless he or she:

(a) has not exercised his discretion judicially but has done so improperly;

(b) has not brought his or her mind to bear upon the question; or

(c) has acted on a wrong principle (see e.g., *General Leasing Corporation Ltd v Louw* 1974 (4) SA 455 (C) at 461 - 462 and Noel *Lancaster Sands (Pty) Ltd v Theron and Others* 1975 (2) SA 280 (T) at 282F).

In addition, given the supervisory powers the court retains to ensure fairness, reasonableness and justice in court-annexed procedures - such as the taxation of bills of costs (compare the authorities referred to *in Pinkster Gemeente van Namibia (previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 17B to H) - the court may also correct the Taxing Master's ruling not only on the aforementioned common-law grounds of review, but also when it is clearly satisfied that the Taxing Master was wrong (cf *Legal and General Assurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G - H).

Discussion

[20] In her stated case, quoted earlier in this judgment, in terms of rule 75, the Taxing Officer indicated that she had regard to this Court's judgment in the matter of *Hollard v Minister of Finance*, which confirmed that a taxing officer has in the execution of his or her duties the discretion to permit costs that are necessary, proper and reasonable for the attainment of justice or for a party who defended the matter. That case further confirmed that although the rules of Court requires adherence to the prescribed tariff, they also permit a degree of flexibility to the taxing officer in deserving cases.

[21] The taxing Officer stated that she thus exercised her discretion and ruled that the maximum rate for the instructed legal practitioner shall be N$ 3 000.00 per hour and the N$ 1 500.00 per hour for the second instructed legal practitioner as per party-party scale.

[22] The defendants contend that the taxing officer 'applied her discretion incorrectly in finding that the defendants' application for leave to amend (the interlocutory application) was comparable with the case of *Hollard v Minister of Finance* to justify a deviation from the normal party and party prescribed tariffs in terms of rule 125(7).

[23] The defendants furthermore contended that the costs awarded in favour of the plaintiff was awarded on a party and party scale. They thus argued that the Taxing Officer's discretion in terms of Rule 125(7) relates in particular to the taxation of attorney and client bill of costs in extraordinary and exceptional circumstances. Relying on amongst other decisions[10] the decision of *Loots v Loots*[11] the defendants argued that:

> '4. … Rule 125(7) enables the Taxing Master to go beyond the fixed party and party tariff when taxing "attorney and client" and attorney and own client" bills of costs. This is an important distinction that must be made drawn and in general the party and party tariff must be rigidly applied.
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> 5. The actual tariffs charged by Plaintiff's instructed counsel instructed counsel compared to the allowed party and party rate (N$ 4000 .00 per hour and vs N$ 1 800 per hour) does not automatically make a matter exceptional or extraordinary and does not by itself justify a departure from set tariffs in terms of Rule 125(7). The taxation should be stricter than would be the case in taxation where the costs are to be paid by a client to his attorney, and luxuries incurred with the approval of the plaintiff should not allowed against the first to third defendants.'

[24] I do not agree with the defendants' contentions and the narrow interpretation they seek to place on rule 125(7). My reasons for disagreeing with

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[10] *Greenblatt and Another v Wireohms South Africa (Pty.) Ltd*., 1960 (2) SA 527 (C) at p. 529; *Thornycroft Cartage Co. v Beier & Co. and Another*, 1962 (3) SA 26 (N) at p. 28).

[11] *Loots v Loots* 1974 (1) SA 431.

the defendants are that, firstly the Taxing Officer's reliance on the *Hollard matter* was not for the purpose of indicating that this matter is comparable to the *Hollard matter*. The Taxing Officer, in my view, relied on the *Hollard matter* simply to indicate that that matter confirmed that a Taxing Officer has a wide discretion when considering bills of cost.

[25] Secondly in the matter of *Loots v Loots*[12] the Court said:

'Rule 70 (5) [the equivalent of our Rule 125(7)], however, confers a discretion on the Taxing Master to depart from any of the provisions of the tariff "in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable".

This discretion relates perhaps in particular to attorney and client bills of costs, and is confined to extraordinary or exceptional cases. In general therefore the tariff must be rigidly applied. (*Greenblatt and Another v Wireohms South Africa (Pty.) Ltd*., 1960 (2) SA 527 (C) at p. 529; *Thornycroft Cartage Co. v Beier & Co. and Another*, 1962 (3) SA 26 (N) at p. 28).

To my mind therefore the Taxing Master was correct in taxing the present bill on the intermediate basis as contemplated by TINDALL, J.A., in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*, supra. and the mere fact that these fees were not allowed on a more liberal or higher scale than those laid down in the Rules of Court does not mean that he failed to apply this intermediate basis. It is apparent from the authorities quoted by me above that the Taxing Master is bound to apply, or at least to be guided fairly rigidly, by the scale of fees provided in the tariff, and only to depart from them when in his discretion extraordinary or exceptional cases present themselves where strict adherence would be inequitable. The existence of a different tariff which a law association of local attorneys regards as a desirable one to operate as between themselves and their clients does not, to my mind, in the circumstances of the present case, constitute such an exceptional or extraordinary case. Such an agreed tariff may possibly apply as between an attorney and his own client, where, as happened in the present case, the client had at the outset agreed to pay his attorney such higher fees, but those higher fees cannot be recovered from another party who was not a party to any such prior agreement, even where he has agreed to pay costs on an attorney and client basis.' [My underlining.]

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12 *Ibid.*

[26] The dicta in the *Loots v Loots* matter is therefore not authority for the proposition that Rule 125(7) enables the Taxing Master to go beyond the fixed party and party tariff only when taxing "attorney and client" and attorney and own client" bills of costs.

[27] In the *Hollard matter* this Court per Justice Claasen, quoting from the *Coetzee v Taxing Master South Gauteng High Court and another* [13] stated that:

'Evidently the wide discretion conferred in rule 70(5) is the true fount for any 'application of the mind' by a taxing master to the task of fixing a fee. Importantly, so it seems plain to me, the text of the subrule expresses a very clear structure to the approach licensed by the subrule; i.e. the tariff is the default position, which may be departed from under the conditions prescribed, i.e. 'extraordinary or exceptional cases...'. Underline for emphasis.

[28] The learned Justice went[14] on and opined that it is implicit in rule 125(7) that a taxing officer has to cumulatively evaluate the relevant factors and may depart from the tariffs in extraordinary or exceptional cases wherein strict adherence to the tariffs will be inequitable. She said this does not mean that the tariffs and the principle of reasonable and necessary costs are taken out of the equation. The taxing officer has to strive towards a balance between indemnifying the successful party and remaining within reasonable boundaries, whilst being mindful that if rule 125(7) finds application, he or she has latitude to permit fees over the tariff. Quoting from the matter of *Cobb v Levy*[15] the learned judge further said where a person is enjoined by statute to exercise a discretion, he or she ought not to preclude himself or herself from doing so by following a rigid preconceived policy.

[29] I have thus come to the conclusion that the Taxing officer did not act on an incorrect premises when she found that she had a discretion to depart from the tariffs prescribed in Annexure E.

[30] I have no qualms with the defendants' argument that the actual tariff charged by plaintiff's instructed counsel compared to the allowed party and party rate

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13 *Coetzee v Taxing Master South Gauteng High Court and another* 2013 (1) SA 74 GSJ.

14 At paragraphs [18] to [22].

15 *Cobb v Levy* 1978 (4) SA 459 (T).

of N$ 4000 per hour as opposed to the prescribed rate of N$ 1 800 per hour does not automatically make a matter exceptional or extraordinary and does not by itself justify a departure from set tariffs in terms of rule 125(7). But this is not what the Taxing Master said she took into consideration when she decided to allow the plaintiff's instructed Counsel a rate of N$ 3 000 per hour in respect of the first instructed Counsel and half of that fee in respect of the second instructed counsel.

[31] The Taxing Officer indicated that she found the fees claimed by the plaintiff's instructed counsels to be 'deserving' a departure from the prescribed tariff. What the defendants lose sight of is the fact that in the 'interlocutory application' Justice Sibeya found that the amendment sought was complex, he said[16]:

'The defendants' notice to amend, as comprehensively set out in the Draft amended plea contains 40 paragraphs while the draft counterclaim contains 34 paragraphs. *To say that the amendments sought are substantive is an understatement. In their own words, the defendants submits that the issues raised in their intended amendment are legally intricate and factually interwoven.*' Underlined and italicized for emphasis.

[32] The defendants do not state what the alleged and complained of luxuries are which the plaintiff's instructed counsels have included in their bill of costs, save that they object to the granting of a specific number of items on the bill of costs already listed above. It bears mentioning that, there is no denial that the plaintiff's counsel did the work that they charged for nor do the defendants contend that the rate of N$ 3000 and N$ 1 500 per hour allocated by the Taxing Officer is unfair, unreasonable or inequitable.

[33] I have therefore come to the conclusion that having regard to the rules of this court and the authorities that I have referred to in this judgment the defendants have not laid any basis in law for this Court to intervene and upset the Taxing Officers decision to depart from the tariff prescribed in Annexure E to the rules of Court The review must accordingly fail as it does.

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16 *Grobler v A. S. S. Investments 165 CC* (HC-MD-CIV-ACT-CON-208/01503) [2021] NAHCMD 276 (04 June 2021) at paragraph [25].

Costs

[34] Neither party in their written contentions advanced any reason why costs must not be awarded to either party, should success find their favour. I thus see no reason why the plaintiff must not be allowed the costs it incurred opposing the review.

Order

In the result, I make the following order:

1. The review is dismissed, with costs.

2. The matter is regarded as finalized and removed from the roll.

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Ueitele S F I

Judge

APPEARANCES

PLAINTIFF:	A. Naude Of Dr. Weder, Kauta & Hoveka Inc. Windhoek
FIRST TO THIRD DEFENDANTS:	F. Erasmus Of Francois Erasmus & Partners Windhoek