REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00505

In the matter between:

DR DANIEL CHRISTIAAN JORDAAN	**1st APPLICANT**
AIRCRAFT OWNERS AND PILOTS ASSOCIATION	**2nd APPLICANT**

and

NAMIBIA CIVIL AVIATION AUTHORITY	**1st RESPONDENT**
DR. BASTIAAN HENDRIK KOSTER	**2nd RESPONDENT**
GORDON HENDRIK ELLIOT	**3rd RESPONDENT**

Neutral citation:	*Jordaan v Namibia Civil Aviation Authority* (HC-MD-CIV- MOT-GEN-2020/00505 [2022] NAHCMD 194 (14 April 2022)
Coram:	TOMMASI J
Date referred for review:	**5 November 2021**
Delivered:	**14 April 2022**

Flynote: Costs – Taxation – Review of taxation – Rule 75 – Court restating what a taxing officer is required to state in his/her stated case as stipulated in Rule 75(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 – items not set out, objections advanced not recorded and no finding of fact included making it difficult for the court to adjudicate - Criteria for deviating from tariff in terms of Rule 125(7) restated – The taxing officer may at any time depart from any of the provisions on tariffs in this rule in extraordinary or exceptional cases when strict adherence to the provisions would be inequitable and unfair. – None of these factors raised in contention by respondents nor addressed in stated case.

Summary: The applicants are dissatisfied with the rulings of the taxing officer and requested the taxing officer to state a case in terms of Rule 75(2). The stated case however did not comply with the requirements of Rule 75(2). The court considered the objections which the applicants alleged were advanced at the taxation but not recorded by the taxing officer. The applicants objected to the failure to apportion the fees for successfully resisting the application on the ground of urgency and for argument on the merits as same still needs to be determined. The respondents argued that the matter was argued on the merits as well as on urgency and that these aspects in this case were inextricably interwoven. The applicants also objected to the award of 100% of counsel's fees and the incorporation of fees for the postponement where the parties agreed that the wasted costs would be determined at the end of the hearing of the matter.

Held that; the taxing officer was required to apportion the fees between the cost incurred in respect of urgency and the cost in respect of the merits. Bearing in mind that (a) the parties argued both urgency and the merits on 8 February 2021; and (b) that the parties must again argue the merits in due course.

Held further that; in the absence of the contention that the case was extraordinary or exceptional and that strict adherence to the tariff would be inequitable and unfair, the maximum fee would find application and that counsel's fee ought to be reduced accordingly.

Held further that; the parties agreed that the wasted costs of the postponement should be determined at the eventual hearing of the matter and items relating thereto should not have been allowed.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The application for review of the *allocatur* of the taxing officer succeeds.
2. The ruling of the taxing officer to allow 100% of the instructed counsel's fee (item 48 which is instructed counsel's account) is set aside. The taxing officer's ruling to allow items 16 and items dated 16 and 17 December 2020 appearing in instructed counsel's account (item 48 in the bill of costs) relating to the postponement of the matter is set aside.
3. The ruling of the taxing officer to allow the full fee for work done in respect of urgency and the merits in respect of items 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48 are set aside; and
4. The matter is remitted to a taxing officer to:
    (a) tax items 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48 of the bill of costs afresh.
    (b) reduce the instructed counsel's fee to the maximum fee allowed in terms of Schedule E of the Rules of Court where same exceed the maximum fee allowed.

(c) remove items 16 of the bill of cost and items dated 16 and 17 December 2020 appearing in instructed counsel's account (item 48 in the bill of costs) relating to the postponement; and

(d) adjust the *allocatur* accordingly.

5. No order is made as to costs.

6. The matter is removed from the roll and considered finalized.

JUDGMENT

TOMMASI J:

[1] The applicants are dissatisfied with the rulings of the taxing officer and brought this application for review in terms of Rule 75. The respondents opposed the application.

[2] On 26 March 2021 I struck applicants' urgent application from the roll for lack of urgency. In the reasons for the judgment I indicated that the general rule is for costs to follow the event and there is no reason why the court should depart from this rule. I therefore ordered the applicants to pay the respondents' cost of the application which costs were to include the cost of one instructing counsel and one instructed counsel. When the judgment was delivered I advised the applicants that they could re-enrol the matter in line with the Rules of Court. The applicants aver that they intend on re-enrolling the matter through the filing of an application for re-instatement and that the merits of the matter must still be argued.

<u>The Stated Case by the Taxing Officer</u>

[3] The material parts of the taxing officer's stated case is as follow:

'The Applicants' legal practitioner objected to the ruling of the taxing officer that paragraph 5 of Section A and the maximum tariff of Section B of Annexure E, Tariff of fees for Instructed Legal Practitioners on a scale as between "Party and Party" must be applied in the Bill of Cost. The Taxing Officer applied discretion and reviewed all objected items on the bill of cost and taxed off where necessary and reasonable as guided by the party –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*[1], 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$1800 in deserving cases'.

Applicants' case

General objections to the Stated Case

[4] The applicants contend that the taxing officer's stated case falls short of the requirements prescribed in terms of Rule 75(2). They referred the court in this regard to *Dannecker v Leopard Tours Car and Camping Hire CC*[2] at paragraph 29 thereof where Schimming Chase J stated the following 'The taxing master is the decision maker for purposes of this rule and how her decision was reached on the items must be properly recorded, so as to comply with the judicial nature of the taxation process.'

[5] The applicants submitted that the taxing officer's omission to give reasons for her ruling(s) places the applicants and the Court in an invidious position. They submitted further that the incomplete stated case obstructs the proper drafting of applicant's written contentions and also does not assist the Court in making a judgment with all the facts before it.

1st ground of objection

[1] *Hollard v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00002) [2020] NAHCMD 32 (31 January 2020).
[2] *Dannecker v Leopard Tours Car and Camping Hire CC* (I 2909/2006) [2021] NAHCMD 496 (27 October 2021).

[6] The applicants argued that, despite the fact that the merits of the application must still be argued, the taxing officer allowed the respondents their entire costs as if they had been successful in disposing of applicants' entire application. The applicants further submitted that the taxed bill of costs reflect that the respondents' instructed and instructing counsel were allowed fees for work done on both the urgency and the merits portion in their opposition to applicants' application referring to items 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48. They contend that the merits portion by far exceeds the work done compared to the urgency portion of the bill of costs and no apportionment has been done between urgency and merits. They submit that costs on the merits are not recoverable by respondents at this stage and the taxing officer should not have allowed the items claimed relating to the merits which is still a live issue before court. They also submitted that although they advanced this objection, no mention thereof was made in the stated case.

2nd Objection – Item 48

[7] The second objection relates to item no 48 of the bill of costs. The objection here is that the taxing officer allowed respondents' instructed counsel 100% of his costs at a rate of N$ 2 700 per hour (N$ 27 000 per day) whereas the prescribed tariff in terms of Section A and B, allows a maximum of N$ 1 800 per hour. The applicants accept that the taxing officer has the discretion to depart from the fixed tariffs in terms of Rule 125(7) but submit that this matter, even though brought as an urgent application, was not exceptional and extraordinary as defined by Rule 125 (7). Applicants further submitted that allowing N$ 1 800 per hour for respondents' instructed counsel would also not have been inequitable as it would've served as a reasonable recovery rate (66.66%) on the party and party scale.

[8] The applicants in this regard referred the court to *Afshani vs Vaatz*[3] where Maritz AJ stated that: 'costs are not awarded on a party and party basis as punishment to the litigant

[3] *Afshani vs Vaatz* 2007 (2) NR 381 (SC).

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 litigants' unjust actions or omissions in a dispute…' The applicants are of the view that the taxing officer's ruling that they should pay instructed counsel's full expenses, is a punitive measure.

3rd Objection - Item 16 & Item 48

[9] The third objection relates to the postponement of the matter. The applicants submitted that it was agreed between the parties that the cost of postponement would be determined at the end of the matter and that no specific determination was yet made in respect of these reserved costs and are therefore not part of the costs of the urgent application. This objection they aver were advanced at the taxation but no reference was made thereof in the stated case.

[10] The applicants contended that no determination was made by the court regarding the postponement of the matter and the taxing officer therefore had no discretion to allow the costs of the postponement. They submit that the costs of the Hearing held on 17 December 2020 are reserved costs and it is not cost in the cause but are costs which must be addressed by a Judge at the trial or settlement of a matter. Reserved costs, they reason, do not follow the result and the winner of the action and/ or application is not automatically entitled to the reserved costs without either an order or agreement to that effect. The applicants define reserved costs as a specific costs order that delays the adjudication of the liability of costs to a later stage. They submit that the matter is in any event still not finalised and the Judge hearing the merits of the matter will be able to make a ruling in respect of the reserved costs of the hearing on 17 December 2020.

Respondents' contentions

[11] In terms of Rule 75 (4) the taxing officer must supply 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. The stated case was uploaded on e-justice on 28 October 2021, but this is addressed only to the applicants despite the fact that the respondents filed a notice of intention to oppose. In light hereof I considered the respondent's contentions although it was filed out of time.

Res judicata

[12] The respondents contend that, applicants filed a status report after the court's order was issued and the reasons for the order were released. The matter was enrolled before the court for clarification of the court order. The court made the following order:

> 'The court declines the request of the applicant (sic) to provide clarity on the cost order given in the ruling on urgency.'

[13] The respondents contended that the court has already expressed itself on the issue of whether or not the cost should be for the entire application or only for the wasted costs incurred for hearing the matter on an urgent basis by indicating that the order is clear. This issue therefore has already been adjudicated and is thus *res judicata*.

Non-compliance with the rules

[14] The respondents averred that the application for review was brought outside the time frame provided in Rule 75 which provides that it should be filed within 15 days after the signing of the a*llocator.* The *allocato*r was signed on 15 September 2021 and filed on e-justice on 16 September 2021. The notice of motion was filed on 6 October 2021.

[15] The respondents generally submitted that the application on the merits has become moot or academic and that the applicants' intention to re-enrol the application is merely a ruse.

Issues Considered

Res judicata

[16] The court made an order for the applicants to pay the respondents the cost of the application which cost was to include the cost of one instructing and one instructed counsel. The applicants thereafter approached the court to re-enrol the matter as they sought clarity with regard to the cost order. The court declined this request. The cost issue was argued before the court and the court had already decided the issue. The cost order thus became final in its effect and the court was not at liberty to clarify this order as the court is *functus officio*.

[17] The review however is another matter altogether. The court reviews the taxation officer's decisions regarding a bill of cost. This court, in terms of the provisions of Rule 75 performs the function of review in respect of the taxing officer's decision(s). The review is therefore not *res judicata.*

Non Compliance with the rules – Applicants

[18] Rule 75(1) requires that:

> "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." [my emphasis]

[19] It is therefore incorrect to state that the *dies* start running when the *allocatur* is signed. The ordinary meaning of issued in terms of the Oxford Dictionary is “to supply or distribute (something)”. I would accept that the allocator was distributed on 16 September 2021 and the applicants were well within the time frame provided for in Rule 75 (1) when they filed their notice of motion.

Intended re-enrolment

[20] Rule 73(5) provides as follow:

‘Where the urgent application is struck off from the roll for lack of urgency or condonation for non-compliance with rules of court is refused and the applicant wishes to continue to prosecute the application on the merits, the applicant must set down the application in the normal course as an opposed motion and in that case the rules of court or practice directions apply.’

Practice Directive 27 reads as follows;

‘If the applicant in terms of rule 73(5) desires to continue to prosecute an application struck from the roll for lack of urgency, the application must be continued in the normal course on the judicial case management roll of the managing judge who struck the matter for lack of urgency.’

[21] The application therefore must be enrolled before the court in terms of the rules and practice directives. A notice should be issued by the managing judge scheduling a case management conference hearing. The court may therefore be called upon to adjudicate the merits. Clearly the issue of costs for the application on the merits remains contentious.

Shortcomings in the Taxing Officers Stated Case.

[22] The taxing officer is required in terms of Rule 75(2) to 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.

[23] It is indeed so that the taxing officer's stated case does not set out any items. She simply refers to the fact that the Legal Practitioner for the applicants advanced that paragraph 5 of Section A and the maximum tariff of Section B of Annexure E, must be applied. The reason given why she did not apply the said tariff is because she has the discretion not to do so. No finding of any fact was included so it is very difficult for this court to determine how the taxing officer applied her discretion. I shall assume for purposes hereof that she refers to item 48. No mention is made of the other items objected to and the respondent does not contend that these objections were not raised. I must then infer that the objections were advanced but that they were not recorded and not mentioned in the taxing officer's stated case.

Apportionment of the fees between urgency and merits.

[24] In *Heritage Health Medical Aid Fund vs Registrar of Medical Aids*[4]*,* Sibeya J at page 3, paragraph 4 states the following:

'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.'

[25] I agree with the sentiments expressed hereinabove. This however does not mean no attempt should be made to apportion the fees between urgency and merits. Failure to do so may amount to a duplication of fees if the respondents are awarded

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

costs after hearing the matter on the merits and this would operate unfairly against the applicants. Careful consideration and a balanced approach is required when costs are apportioned.

[26] The respondents successfully raised urgency as a point *in limine* and are entitled to the party and party costs in respect of urgency. The costs relating to the merits must still be determined after a full hearing on the application on the merits. The taxing officer was required to carefully consider each item in order to determine firstly whether it is possible to apportion the work done, and if so which portion thereof could reasonably be apportioned bearing in mind that the merits of this matter must still be argued. In this matter the taxing officer failed to deal with this issue at all.

[27] The applicants advanced that the other items mentioned above ought to be apportioned whilst the respondents argued that the urgency aspect was *in casu* inextricably interwoven with the merits

[28] It is evident that the parties argued urgency as well as the merits on 8 February 2020. The applicants correctly concede that a full day's fee for counsel's appearance on 8 February 2020, at the maximum fee allowed should be permitted as well as the fee for the instructing counsel.

[29] It is however my considered view, in light of the failure by the taxing officer to address the issue in her stated case, that the parties should be afforded the opportunity to submit which portion of the items raised herein by the applicants should be for work done in respect of urgency and which portion thereof was reasonably necessary to place the respondents in a position to argue the merits on 8 February 2021. The matter thus stands to be remitted to a taxing officer to consider the apportionment of the fees for work done in item no 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48.

<u>Tariff for Respondent's instructed counsel's account</u>

[30] Item 48 relates to the fee of the instructed counsel in the sum of N$428,490

[31] Rule 125(5) provides that the taxation of the fees of an instructed legal practitioner as between party and party may be allowed by the taxing officer as he or she considers reasonable, due regard being had to –

(a) the time necessarily taken;
(b) the complexity of the matter;
(c) the nature of the subject matter in dispute;
(d) the amount in dispute;
(e) the seniority of the legal practitioner employed;
(f) the fees ordinarily allowed for like services before the promulgation of this rule; and
(g) any other factors which he or she considers relevant.

[32] In terms of Rule 125(7), the taxing officer may at any time depart from any of the provision on tariffs in this rule in extraordinary or exceptional cases when strict adherence to the provisions would be inequitable and unfair. This cloth the taxing officer with a discretion to exceed the maximum amount provided for in the tariff. The taxing master however is required to exercise this discretion judiciously i.e in accordance with the guidelines provided for in Rule 125(5) and 125(7). In this instance there was no indication how the Taxing Officer arrived at the conclusion that 100% of the instructed counsel's fees must be allowed.

[33] Claasen J in *Hollard v Minister of Finance, supra* at page 9, paragraph 24, has this to say regarding the exercise of the discretion:

'I heed to the guidance by the Supreme Court in *Afshani v Vaatz*[5] that reviewing courts should not readily interfere with the discretion of a taxing officer, unless he or she has not exercised his discretion judicially but has done so improperly or has not brought his or her mind to bear upon the question or has acted on a wrong principle.'

[34] The absence of reasons however makes it very difficult for the court to determine whether the taxing officer applied her mind. The court must not hasten to interfere with

[5] *Afshani v Vaatz* SA 01-2004 [2007] NASC 18 October 2007.

the discretion of the taxing officer but must also guard against rendering the review process nugatory.[6]

[35] The application was brought on an urgent basis requesting the court to set aside the decision of the first respondent, not to renew first applicant's designation as a duly licensed DSAME owing to his breach of certain protocols. The first applicant cites amongst other things, that his right to practice his profession has been seriously infringed by the respondents without following due process. The applicants employed the services of a senior counsel. The respondents' counsel, although not a senior counsel, is experienced and skilled in advocacy. The complexity of the issues necessitated the employment of instructed counsel who is experienced and skilled. The applicant's future income was at stake and the respondents aver that they are called upon to ensure the safety of air travel. This would justify the maximum fee allowed as per Schedule E of the Rules relating to the tariff of fees for instructed counsel.

[36] The objection however is in respect of the taxing officer deviating from the tariff and allowing 100% of the fee of N$2 700. The applicants submitted that the case was not exceptional and extraordinary. The respondents' response hereto is that the court will be presented with random taxed Bills of Costs wherein instructed Counsel's fees are allowed beyond the maximum of N$1 800 per hour on a party and party scale tariff and that it is in fact an established norm to allow reasonable rates of counsel above the maximum fee.

[37] Neither the taxing officer nor the respondents addressed the requirements as stated in Rule125 (7). I am further not persuaded that the case was extraordinary or exceptional and that strict adherence to the provisions of the tariff would be inequitable and unfair. In the circumstances I conclude that the prescribed maximum tariff as contended by the applicants should be applied.

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[6] *INKU v NKOSI* 1981 (1) SA 142 (B), page 144, "It is well established that the quantum of counsel's fees is pre-eminently a matter for the discretion of the Taxing Master, but, if that approach should be elevated into a rule that the reviewing Judge should be quick to defer to the Taxing Master, the right of review becomes nugatory".

[38] It follows that the ruling to allow 100% of the instructed counsel's fee must be set aside and that the fee ought to be reduced to the maximum fee allowed for the instructed counsel where the items in counsels' account (item 48) exceeds the maximum prescribed fee as per Schedule E of the Rules of Court.

Wasted cost occasioned by the postponement of 17 December 2021 – Item 16 & Item 48.

[39] The parties herein agreed to the postponement and that the wasted cost of the postponement of 17 December 2020 was to be adjudicated at the end of the eventual hearing. The court did not make this an order of court but there is no reason why the court should not honour this agreement and determine the wasted costs at the end of the matter. In the absence of a cost order regarding the costs for the day of postponement, cost ought not to have been allowed. This includes item 16 of the bill of costs as well as the items appearing in the instructed counsel's account for 16 and 17 December 2020.

[40] In the premises the following order is made:

1. The application for review of the allocatur of the taxing officer succeeds.
2. The ruling of the taxing officer to allow 100% of the instructed counsel's fee (item 48 which is instructed counsel's account) is set aside.
3. The taxing officer's ruling to allow items 16 and items dated 16 and 17 December 2020 appearing in instructed counsel's account (item 48 in the bill of costs) relating to the postponement of the matter is set aside.
4. The ruling of the taxing officer to allow the full fee for work done in respect of urgency and the merits in respect of items 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48 are set aside; and
5. The matter is remitted to a taxing officer to:
   (a) tax items 5, 7, 10, 11, 19, 23, 24, 25, 30, 35, 37, 41, 42 and 48 of the bill of costs afresh.

(b) reduce the instructed counsel's fee to the maximum fee allowed in terms of Schedule E of the Rules of Court where same exceed the maximum fee allowed.

(c) remove items 16 of the bill of cost and items dated 16 and 17 December 2020 appearing in instructed counsel's account (item 48 in the bill of costs) relating to the postponement; and

(d) adjust the allocatur accordingly.

6. No order is made as to costs.

7. The matter is removed from the roll and considered finalized.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF:	S Ellis of Ellis & Partners Legal Practitioners
DEFENDANT:	G Kasper of Murorua Kurtz Kasper Incorporated