

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-EXP-2016/00275

In the matter between:

**THE NAMIBIAN COMPETITION COMMISSION**

**APPLICANT**

and

**PUMA ENERGY (PTY) LTD**

**RESPONDENT**

**Neutral citation:** *The Namibian Competition Commission v Puma Energy (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2016/00275) [2022] NAHCMD 354 (19 July 2022)

**Coram:** ANGULA DJP

**Heard:** 5 April 2022

**Delivered:** 19 July 2022

**Flynote:** Costs – Taxation – Review of taxation – Rule 75 – Taxation of foreign instructed counsel’s fees – Instructed counsel who have been permitted by the Chief Justice to appear in this court in terms of section 85 of the Legal Practitioners Act 15 of 1995 are deemed to be legal practitioners of this court and their clients are entitled to be reimbursed such counsel’s fees – A successful party is therefore entitled, by way of the indemnity principle, to claim costs paid to its foreign instructed counsel for legal services rendered in this jurisdiction.

**Summary:** The applicant and respondent were parties to litigation proceedings concerning a warrant of search issued and authorised in favour of the applicant – On 8 November 2018 the court set aside the warrant and ordered the applicant to pay the respondent's legal costs, such costs to include the costs of three instructed counsel and one instructing counsel.

Pursuant to the costs order granted in its favour, the respondent presented two bills of costs for taxation. One bill of costs was for Engling, Stritter & Partners, a Namibian based law firm which acted as correspondent legal practitioners on the instructions of Bowman Gilfillan, a South African based law firm. The other bill of costs was for Bowman Gilfillan.

At the taxation the applicant's legal practitioner objected to the taxing of the bills of costs contending that the taxing master did not have authority to tax a bill of costs of a law firm whose lawyers have not been admitted to practise law in Namibia. The taxing master ruled that he had the authority to tax the bill of costs. The applicant launched a review application in which it sought an order setting aside the taxing master's said ruling. The court found that the taxing master did not have the authority in law to tax Bowman Gilfillan's bill of costs. It accordingly made an order on 24 March 2021 setting aside the taxing master's aforesaid ruling.

Thereafter the respondent amended its bill of costs to include the fees of its three South African instructed counsel, all of whom it had employed to act on its behalf. Bowman Gilfillan's bill of costs was not presented for taxation. The applicant again objected to the fees of the South African instructed counsel as well as to the fees and disbursements of Engling, Stritter & Partners that related to attendances between the two firms which were previously included in Bowman Gilfillan's bill of costs. The applicant's objection was based on the argument that the respondent was prevented by the principle of *res judicata* from amending its bill of costs because of the court's order of 24 March 2021. Furthermore, the applicant objected to the taxation of the South African instructed counsel's invoices, on the basis that those counsel were instructed by Bowman Gilfillan who are not admitted to practise in this

jurisdiction. The taxing master upheld the objection and disallowed the fees in respect of the fees of the respondent's three South African instructed counsel.

*Held that*, the taxing master's reason for disallowing the items concerned was premised on the wrong understanding and the effect of the court's order of 24 March 2021.

*Held that*, the order simply ruled on the lack of authority or competence of the taxing master to tax a bill of costs of a legal practitioner who is not admitted to practise in this jurisdiction.

*Held further that*, the taxing master's ruling that the respondent was not entitled to claim costs of its three South African instructed counsel because they were instructed by Bowman Gilfillan a foreign law firm, was clearly wrong in his reasoning for the reason that Engling, Stritter & Partners were the legal practitioners of record for the respondent and had right of appearance before this court. The fact that Engling, Stritter & Partners acted as correspondents for Bowman Gilfillan did not affect the respondent's right to recover its costs based on the court's costs order of 8 November 2018 made in its favour by Geier J.

*Held further that*, the respondent's instructed counsel were allowed by the Chief Justice in terms of section 85 of Legal Practitioners Act 15 of 1995, to appear and represent the respondent in this court. They were therefore deemed to be legal practitioners of this court. And therefore the respondent as a successful party, by way of an indemnity principle, was entitled to claim costs it paid its instructing counsel for their legal services rendered to it.

*Held further that*, it was of little or no consequence at all that counsel's invoices were made out to Bowman Gilfillan. As long as it could be proved to the taxing master that the respondent indeed paid its counsel.

*Held further that*, the taxing master, being a quasi-judicial officer, had no power to overturn the order of the High Court which ordered the applicant to pay the

respondent's South African's instructed fee; and that the taxing master was under law obliged to implement the court's order and not to disobey it.

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### ORDER

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1. The matter is referred back to the taxing master, Mr Lottering. In his absence another taxing master who is directed to consider and assess the reasonableness or otherwise of the following items in respondent's bill of costs: 1, 6, 9, 12, 13, 15, 16, 17, 18, 19, 22, 24, 25, 26, 27, 29, 32, 40, 44, 46, 47, 48, 49, 52, 58, 62, 65, 66, 70, 75, 78, 79, 80, 81, 86, 87, 88, 89, 90, 92, 96, 97, 98, 99, 100, 101, 102, 108, 112, 113, 118, 120, 123, 124, 130, 131, 140, 141, 142, 148, 155, 157, 159, 160, 172, 173, 182, 183, 184, 197, 200, 201, 202, 206, 213, 216, 227, 229, 230, 231, 232, 233, 240, 244, 245, 248, 251, 252, 253, 262, 267, 287, 289 and 293.
  2. The taxing master must further consider and scrutinize the following items pertaining to the fees of the respondent's instructed counsel: 34, 35, 36, 37, 38, 39, 83, 84, 85, 163, 164, 165, 166, 168, 188, 189, 190, 191, 192, 193, 194 and 195, 254, 255, 256, 257, 258, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284 and 285.
  3. The items listed in order 2 above are to be considered for taxation as per court order by Geier J dated 8 November 2018 applying the criteria and principles applicable to the evaluation of disbursements claimed in a bill of costs submitted for taxation in this division.
  4. The applicant is to pay to the respondent's costs of this application limited to the sum of N\$25 000.
  5. The matter is considered finalised and is accordingly removed from the roll.
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## JUDGMENT

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ANGULA DJP:

### Introduction

[1] This is an application for the review of taxation of costs made in terms of rule 75 of the rules of this court. The dispute in this matter concerns the allowable fees and disbursements due to the law firm Engling, Stritter & Partners ('ESP') in respect of legal services rendered to their client, Puma Energy (Pty) Ltd ('Puma'), in a litigious matter between Puma and the Namibian Competition Commission ('the Commission').

### Factual background

[2] On 8 November 2018 this court made an order which set aside a warrant of search, which it had authorised in favour of the Commission and ordered the Commission to pay Puma's legal costs. Such costs were to include the costs of three instructed counsel and one instructing counsel.

[3] Thereafter, Puma's legal practitioner presented two bills of costs to the taxing master for taxation. One bill of costs was for ESP and the other bill of costs was titled 'correspondents bill of costs Bowman Gilfillan'. Bowman Gilfillan is a South African based law firm, which instructed ESP as their correspondents' legal practitioners in Namibia. The legal practitioner for the Commission objected to the taxation of the bill of costs for Bowman Gilfillan contending that the taxing master did not have the power to tax a bill of costs of a law firm whose lawyers have not been admitted to practise law in Namibia. Pursuant to the objection the taxing master ruled that he had the power to tax the bill of costs of Bowman Gilfillan.

[4] As a result of the said taxing master's ruling the Commission launched a review application in which it sought an order setting aside the taxing master's ruling. The application came before me whereby on 24 March 2021, I reviewed and set

aside the taxing master's ruling. In view of the fact that the wording of the order is subjected to conflicting interpretations, I reproduce it in full below:

'It is hereby ordered that:

1. That the decision by the first respondent, Owen Lottering N.O that he, as a taxing master of the High Court, is well within his jurisdiction to tax the fourth respondent, a foreign Law Firm's bill of costs, is hereby reviewed and set aside.
2. That the first respondent does not have the jurisdiction or the authority in law to tax the fourth respondent's bill of costs as presented.
3. There is no order as to costs.
4. The matter is removed from the roll and is considered finalised.'

#### Proceedings before the taxing master

[5] Thereafter, ESP presented one amended bill of costs which contained the fees of the two South African counsel whom they had instructed to act in the matter. ESP decided not to present Bowman Gilfillan's bill of costs. In fact, ESP withdrew that bill of costs. The legal practitioner for the Commission once again objected to the fees of the South African instructed counsel as well as the fees and disbursements of ESP that related to their attendances between them and Bowman Gilfillan which were previously included in the bill of costs of Bowman Gilfillan.

[6] The proceedings before the taxing master have been transcribed. The items objected to by Mr Kauta for the Commission are in two categories. The first category are items which related to the attendances between ESP, as Namibian correspondent attorneys for Bowman Gilfillan. The objected items on the ESP bill of costs are as follows:

Item numbers: 1, 6, 9, 12, 13, 15, 16, 17, 18, 19, 22, 24, 25, 26, 27, 29, 32, 40, 44, 46, 47, 48, 49, 52, 58, 62, 65, 66, 70, 75, 78, 79, 80, 81, 86, 87, 88, 89, 90, 92, 96, 97, 98, 99, 100, 101, 102, 108, 112, 113, 118, 120, 123, 124, 130, 131, 140, 141,

142, 148, 155, 157, 159, 160, 172, 173, 182, 183, 184, 197, 200, 201, 202, 206, 213, 216, 227, 229, 230, 231, 232, 233, 240, 244, 245, 248, 251, 252, 253, 262, 267, 287, 289 and 293.

[7] The description of the attendances in respect of the items objected to appear on the bill of costs. It is thus unnecessary to repeat it here.

[8] The second category of the items objected to is, in respect of Puma's South African instructed counsel. As pointed out earlier in this judgment, after the order of 24 March 2021, ESP amended its bill of costs not only in respect of its own attendances, but it also transferred counsel's tax invoices from Bowman Gilfillan's bill of costs to its own bill of costs. Those items are listed with ESP's contentions and I took the liberty to reproduce it immediately below. They are:

- '18.1 Adv Engelbrecht SC invoice 1181  
Objected items number 34, 35, 36, 37, 38 and 39.
  
- 18.2 Adv Engelbrecht SC invoice 1223  
Objected items number 83, 84 and 85.
  
- 18.3 Adv Engelbrecht invoice number 1292  
Objected items number 163, 164 and 165.
  
- 18.4 Adv Unterhalter SC invoice number 060420017  
Objected items number 166,164 and 168.
  
- 18.5 Adv Engelbrecht SC invoice number 1310  
Objected items number 188, 189, 190,191 and 192.
  
- 18.6 Adv Unterhalter invoice number 17052017  
Objected items number 193, 194 and 195.
  
- 18.7 Adv Trengrove SC invoice number 3854  
Objected items number 254, 255, 256, 257 and 258.
  
- 18.8 Adv Engelbrecht SC invoice 1489

Objected items number 273, 274, 275, 276, 277, 278 and 279.

18.9 Adv Trengrove invoice 3861

Objected items number 280, 281, 282, 283, 284 and 285.'

[9] The ground of objection as formulated by Mr Kauta in the transcribed record of the taxation proceedings reads as follows:

'[A]ll these items were in the Bill of Costs that the Court has ruled, you have no, sorry the Taxing Master has no jurisdiction to tax as items number, and I want to put on record, item 1 was as item 1, item 6 and if I may ask the Taxing Master to make a note on your Bill of Costs because it really took us a while on what item it appeared, item 1 appeared as item 1, item 6 is item 5 (intervention). . . .'

[10] In motivation of his objection Mr Kauta argued, as I understand his argument, that Puma was prevented by the principle of *res judicata*, to present an amended bill of costs because of the order of 24 March 2021. As regards instructed counsel's fees, Mr Kauta argued that Puma was equally precluded from claiming those fees because its legal practitioner did not file an affidavit to request their instructed counsel's tax invoices from being excluded from Bowman Gilfillan's bill of costs which the court ruled that the taxing master did not have authority to tax. Counsel further argued that Puma was 'estopped in law'.

[11] Naturally, Mr Oosthuizen on behalf of Puma, argued contrawise contending that Puma was in law entitled to amend its bill of costs and is further entitled to reimbursement of its three counsel's fees per the court order by Geier J.

[12] Having heard the parties' respective submissions, the taxing master reserved his ruling. He thereafter delivered his ruling on 28 March 2021. As regards the fees for instructed counsel he reasoned that since Bowman Gilfillan was the instructing legal practitioners, they were the ones who should claim instructed counsel's fees and not ESP. On the issue of ESP amending their bill of costs after the matter was taken on review, he declined to express an opinion and took the view that it would be best to await the court's pronouncement on that aspect.



[13] The taxing master then made the following ruling:

'Having due regard to both counsel and having regard to the review order I hereby rule that:

1. Taxation will commence on a date to be determined between counsel and the office of the Registrar.
2. All disputed items which are in the bill presented which also reflected in the bill which was reviewed are disallowed.
3. As correspondents, no advocate fees will be allowed in favour of the correspondent firm.'

[14] It is clear from the ruling that the taxing master upheld the objection raised by Mr Kauta on behalf of the Commission. It is the above ruling that forms the subject matter of this review application.

#### Contentions by the parties

[15] Both parties submitted written contentions in terms of rule 75.

[16] In her written contentions, Ms Beukes from ESP contends on behalf of Puma that the taxing master's upholding of the objection based on the argument of *res judicata* advanced by Mr Kauta, was misunderstood or misconstrued. As a result he refused to allow ESP's fees necessarily incurred, as well as instructed counsel's fees. Counsel further argues that the interpretation of the *res judicata* principle does not fall within the discretionary power of the taxing master. Counsel further argues that the taxing master misunderstood the application of the principle of *res judicata*. As a result he found that ESP was prevented from amending its bill of costs. In essence, Ms Beukes submits that the *res judicata* principle is not applicable to the facts of the present matter.

[17] As regards a party's right to amend its bill of costs, Ms Beukes referred to the *Law of Attorneys Costs and Taxation Thereof*<sup>1</sup> where the learned author opined that there is nothing in principle preventing an attorney from withdrawing a bill before taxation has taken place and submitting a fresh bill containing additional items.

[18] Lastly counsel argued that the disallowance of instructed counsel's fees goes against the indemnity principle as set out in rule 125(3).

[19] Mr Kauta on his part, submits on behalf of the Commission that it is incorrectly submitted on behalf of Puma that the taxing master found that the *res judicata* principle prevents Puma from amending its bill of costs. On the contrary, so the argument goes, the taxing master found that there is no basis in law on which Puma can amend its bill of costs to incorporate items and or fees for litigious work done by a South African based law firm.

[20] As regards the invoices in respect of fees of the instructed counsel, Mr Kauta points out that on the face of the invoices it is clear that such invoices were billed to Bowman Gilfillan and not to ESP. Counsel therefore submits that it will be irregular to include those invoices in the bill of costs presented by ESP.

### Discussion

[21] In my view, the starting point in resolving the dispute between the parties is to determine the effect of the order of 24 March 2021. As has been observed – and this is clear from the transcribed record – it was strenuously argued by Mr Kauta for the Commission that the order has the effect of *res judicata* as a result of which Puma was prevented from amending its bill of costs prepared by ESP. This argument was wrong and I noted that it has not been persisted with in the written contentions on behalf of the Commission.

[22] Clearly, the order was directed at reviewing the decision of the taxing master whereby he ruled that he had the jurisdiction or authority to tax a bill of costs of a law firm whose lawyers have not been admitted to practise in this jurisdiction. It is wrong

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<sup>1</sup> M Jacobs and N E J Ehlers *Law of Attorneys' Costs and Taxation Thereof* (1979) at 227 – 228.

to submit, as Mr Kauta does at para 9 of his written submissions, that: 'The above was done despite the court setting aside the foreign law firms bill of costs and the items contained therein'. Earlier I quoted the order verbatim. On a proper reading of the order it is clear that it did not set aside the bill of costs of the foreign law firm or the items contained therein. That was also not the relief sought by the Commission in its notice of motion. For the avoidance of doubt, I hold that the order of 24 March 2021 does not have any effect on Puma's amended bill of costs.

[23] It is common cause that two separate bills of costs were presented. The order stated that the taxing master did not have authority to tax Bowman Gilfillan's bill of costs as presented.

[24] I have already earlier in this judgment quoted the grounds of objection for the items which were eventually disallowed by the taxing master, namely because they were in the bill of costs that the court has ruled that the taxing master has no jurisdiction to tax.

[25] It would appear that the taxing master's reason for disallowing the items concerned was also premised on the wrong understanding of the effect of the order of 24 March 2021. This is clear from order number two of his ruling when referring to the items concerned as 'which also reflected in the bill which was reviewed' (underlining supplied for emphasis). As pointed out elsewhere in this judgment the order did not review Bowman Gilfillan's bill of costs. The order simply ruled on the lack of authority or competence of the taxing master to tax a bill of costs of a legal practitioner who is not admitted to practise in this jurisdiction.

[26] It has been held that a court will only interfere with the taxing master's exercise of his or her discretion where he or she failed to bring his or her mind to bear on the question in issue or has acted upon wrong principles or where his or her decision was based on clearly wrong principles.<sup>2</sup>

[27] The duty of the taxing master is to assess the reasonableness or otherwise of each item in the bill of costs for legal services actually rendered by the legal

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<sup>2</sup> *Shali v The Prosecutor General* POCA 9/2011 [2021] NAHCMD 44 (31 October 2012).

practitioner to his or her client in his capacity as such. Certain items in the bill of costs do not require the taxing master to exercise his or her discretion because they are predetermined by the prescribed tariffs. Such items only require an arithmetical calculation. For instance, the fee for drawing summons is fixed by the tariffs. However, the fees for a legal practitioner for taking instructions to institute proceedings sets a range within which the legal practitioner can charge his or her fees. That is where the taxing master's discretion comes into play. The taxing master is then enjoined to assess the reasonableness or otherwise of the charge by the legal practitioner taking into account inter alia the complexity of the matter, the seniority of the legal practitioner and the proposed rates of tariff set by the rules.<sup>3</sup>

[28] The enquiry or approach by the taxing master to a bill of costs presented for taxation is well established, namely that he is enjoined with the obligation to ensure that only those costs and charges that appear to him or her to have been necessarily incurred are allowed.<sup>4</sup> The questions which the taxing master in this matter ought to have asked himself and determined were: first, whether items concerned were in respect of services actually and necessarily rendered by ESP to Puma in connection with litigious dispute between the parties, and secondly, whether the items were reasonable in the circumstances. The taxing master must disallow fees charged for services unnecessarily rendered which appears to him or her to have been rendered or incurred through over-caution, negligence, mistake or lack of knowledge of the applicable law to the facts of that particular dispute on the part of the legal practitioner.

[29] Once the objection was raised the taxing master ought to have gone through item by item, hear the parties' respective submissions and then make a ruling on each item on whether to allow or disallow it and provide reasons for his ruling in respect of each specific item. In the present matter the objection was made on the bulk of the items, no representations were made on each specific item. The ruling by the taxing master lacks particularity or specify as to why a specific item was disallowed.

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<sup>3</sup> *Grindlays International Finance (Rhodesia) Ltd v Ballam* 1985 (2) SA 636 (W).

<sup>4</sup> *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk* 2002 NR 14 (HC) at 15I -17E.

[30] In my view, both the ground of objection as stated in the transcribed record and the reason given by the taxing master for disallowing the items concerned are based on the wrong application of the principle relating to indemnification of legal costs by a successful party. It cannot be a valid reason that items are disallowed simply because they were incorporated from the bill of costs which was withdrawn before taxation. In this regard the taxing master was clearly wrong. For this reason alone the taxing master's decision stands to be set aside.

[31] There is an even stronger reason why the taxing master's ruling stand to be set aside. This is: the taxing master declined to express a view on whether Puma was permitted in law to amend its bill of costs by incorporating items which were initially included in the bill of costs of Bowman Gilfillan and then transferred to ESP's bill of costs. The objection was pertinently raised by Mr Kauta while Mr Oosthuizen on the other hand contended that ESP was entitled to amend its bill of costs.

[32] I should mention that Mr Kauta has now changed fronts in this regard. Counsel now contends as follows in his written submissions:

'The applicant is not opposing that the respondent is entitled to amend its bill of costs, the applicant's contention is that the respondent is not entitled to amend its bill of costs to claim litigious work not legitimately done by Engling, Stritter and Partners.'

[33] The transcribed record of the taxation proceedings speaks for itself. The record clearly demonstrates that that was not the Commission's stance. The Commission's position with regard to the amendment of the bill of costs is also reflected in the taxing master's ruling where he states as follow:

'Additionally, Mr Kauta made the aspersion (sic) that after the matter was taken on review, the correspondent firm went on to amend their bill of costs, re-incorporating items from the bill which was contested and taken on review, to the other. On this issue, I do not wish to elaborate. I am of the view it would be best to await for the court to pronounce itself on this, should another review be instituted.'

[34] To my mind the taxing master in essence refused to exercise his discretion and the duty imposed upon him by the rules of this court. The taxing master was

under an obligation to make a ruling on the question which was squarely placed before him and not to defer it to the court. That amounts to an abdication of duty. I am of the considered view that for this further reason the taxation proceedings stand to be set aside. I turn to consider the taxing master's decision of disallowing the fees of instructed counsel.

[35] As pointed out earlier in this judgment, on 8 November 2018, Geier J made an order setting aside the warrant of search which was authorised by the court in favour of the Commission. He further ordered that the Commission pay Puma's costs with the following order: 'Such costs are to include the costs of three instructed counsels and one instructing counsel'. The counsel were from South Africa. They were granted leave to appear in the matter by our Chief Justice in terms of section 85 of the Legal Practitioners Act 15 of 1995. They thus appeared and represented Puma in this court. Subsequent thereto they presented their invoices to Bowman Gilfillan who instructed them in South Africa to act in the matter. It is common ground that Bowman Gilfillan instructed ESP as their correspondent's attorneys in Namibia.

[36] The Commission's legal practitioner objected to the South African instructed counsel's invoices at the taxation, on the basis that those counsel were instructed by Bowman Gilfillan who were not admitted to practise in this jurisdiction. Counsel argued that those 'Advocates were instructed by none lawyers'.

[37] The taxing master ruled that 'As correspondents, no advocate fees will be allowed in favour of the correspondent firm'. The 'correspondent firm' is ESP. This appears from the taxing master's summary where the following is stated:

'Mr Kauta for the applicant is of the view that, Engling, Stritter and Partners, as correspondents for the instructing firm Bowman Gilfillan, is not entitled to claim fees in respect of instructed counsel. Needless to [say] Mr Ooshuizen has [a] contrary view.'

[38] First, there is no doubt that the taxing master is clearly wrong in his reasoning. I say this for the reason that ESP are the legal practitioners of record for Puma before this court. They are the ones who have right of appearance before this court. They have been paid by Puma for representing Puma in a litigious matter in this

court. The fact that they acted as correspondents for Bowman Gilfillan does not affect Puma's right based on Geier J costs order, as a successful party to be reimbursed for its costs and disbursements it has paid to its legal representatives. It stands to reason that Bowman Gilfillan has no right to claim instructed counsel fees at taxation. Only ESP has such right to claim instructed counsel's disbursements as legal practitioners of record for Puma.

[39] Secondly, there is a strong reason which militates against the above taxing master's decision. The taxing master, being a quasi-judicial officer, has no power to overturn Geier J order which ordered the Commission to pay Puma's instructed counsel's fee. It was not open to the Commission to take that point at the taxation. If the Commission was unhappy with the court's order, it should have appealed against that costs order. Therefore, the taxing master was under law obliged to implement the court's order and not to gain-say it. For this reason alone, the taxing master's decision in this regard stands to be set aside.

[40] The third reason why the taxing master's decision should be set aside is this: It is common cause that the instructed counsel were allowed by the Chief Justice in terms of section 85 of Legal Practitioners Act 15 of 1995, to appear and represent Puma in this court. In my view, through that admission they became or are deemed to be legal practitioners of this court and their clients are entitled to be reimbursed such counsel's fees.

[41] Therefore, Puma as a successful party, by way of an indemnity principle, is entitled to claim costs it paid its instructed counsel for their legal services rendered to it. In my view, it is of little or no consequence at all that counsel's invoices were made out to Bowman Gilfillan. As long as it can be proved to the taxing master that Puma indeed paid its counsel, then that should be the end of the matter. The taxing master should simply proceed to assess the reasonableness or otherwise of the instructed counsel's fees. As Damaseb PT put it at page 360 of his work<sup>5</sup> 'In terms of rule 125(11). . . . the successful litigant is entitled to be recompensed for those services of any of those instructed legal practitioners on the basis set out in the tariff for work necessary done.'

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<sup>5</sup> P T Damaseb *Court-Managed Civil Procedure of the High Court* (2020).

[42] It is not the Commission's case that those counsel did not render legal services to Puma neither is it the Commission's case that Puma did not pay its instructed counsel's fees. It follows therefore, in my view that, quite apart from the above court's order, the taxing master was under a legal obligation to scrutinise the fees by instructed counsel as vouchers for legal work done in connection with a litigious matter between Puma and the Commission.

[43] In the result, the matter is referred back to the taxing master, failing him another taxing master who is directed to consider the items previously disallowed and listed at paras [6] and [8] above as well as the instructed counsel's tax invoices in the previous taxation proceedings, one by one giving reasons for disallowing such item.

[44] In my view, it does not augur well with the principle of the SADC regional integration to disallow costs of legal services rendered by lawyers from the members' countries. For instance, this jurisdiction benefits much from input by lawyers from South Africa because of the historic legal connection between our countries, as our law and procedures are both rooted in the Roman Dutch legal system.

[45] In view of the above, I am of the considered view that consideration should be given in the taxation of bills of costs from instructed counsel from the SADC region, to treat such as invoices attached to the bill of costs of an admitted local legal practitioner's bill of costs.

### Costs

[46] As far as the costs of this review are concerned rule 125 vests me with the discretion to consider whether one of the parties should pay the costs of the other party. In this connection, I am of the view that the Commission was unnecessarily pedantic and took legal points which were not applicable in the circumstances of this case and later abandoned. In my view, counsel for the Commission convinced the taxing master to apply wrong legal principles to the facts in the present matter such



as the principles *res judicata* and estoppel which were not applicable to the facts of this matter. Those arguments were not persisted with in this review.

[47] Counsel further threatened the opposite side with an appeal to the Supreme Court against the taxing master's decision in the event such decision went against his position. In this regard the record reads:

'No, no I have elected a very good cause of action why, and I can tell you this matter will end up in the Supreme Court, and you will lose, you elected, you did not wave, to say you waved, you did not wave.'

[48] The statement was made in the course of the arguments that Puma did not file an affidavit to exclude its instructing counsel fees when the bill of costs of Bowman Gilfillan was withdrawn. Counsel then argued that Puma made an election or waved its rights to claim its instructed counsels' fees and therefore Puma was estopped. That argument has been abandoned in the present proceedings.

[49] It is my view that this threat or statement was uncalled for. A party's rights of appeal is a matter of procedural right. In my judgment it was not proper nor called for, for counsel for the Commission to mention appeal to the Supreme Court during arguments before the taxing master, lest it influence the taxing master's decision.

[50] For all those reasons and considerations, I am of the considered view that the Commission should pay the costs of these proceedings. Its legal counsel's behaviour at the taxation proceedings was unbecoming of someone representing a public body such as the Commission. It is every person's constitutional right to be represented by a counsel of choice, even if that counsel happens to be a foreign counsel and should be able to be indemnified for the costs necessarily incurred by employing such counsel.

[51] Taking everything into consideration, I am of the considered view that using the costs prescribed in an interlocutory proceeding as benchmark – slightly adjusted upward – a sum of N\$25 000 is fair and reasonable in the circumstances.

[52] In the result, I make the following order:

1. The matter is referred back to the taxing master, Mr Lottering. In his absence another taxing master who is directed to consider and asses the reasonableness of the following items in Engling, Stritter & Partners' bill of costs: 1, 6, 9, 12, 13, 15, 16, 17, 18, 19, 22, 24, 25, 26, 27, 29, 32, 40, 44, 46, 47, 48, 49, 52, 58, 62, 65, 66, 70, 75, 78, 79, 80, 81, 86, 87, 88, 89, 90, 92, 96, 97, 98, 99, 100, 101, 102, 108, 112, 113, 118, 120, 123, 124, 130, 131, 140, 141, 142, 148, 155, 157, 159, 160, 172, 173, 182, 183, 184, 197, 200, 201, 202, 206, 213, 216, 227, 229, 230, 231, 232, 233, 240, 244, 245, 248, 251, 252, 253, 262, 267, 287, 289 and 293.
2. The taxing master must further scrutinize the following items pertaining to the fees of the respondent's instructed counsel: 34, 35, 36, 37, 38, 39, 83, 84, 85, 163, 164, 165, 166, 168, 188, 189, 190,191, 192, 193, 194 and 195, 254, 255, 256, 257, 258, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284 and 285.
3. The items listed in order 2 above are to be allowed for taxation as per court order by Geier J dated 8 November 2018 applying the criteria and principles applicable to the evaluation of disbursements claimed in a bill of costs submitted for taxation in this division.
4. The applicant is to pay the respondent's costs of this application limited to the sum of N\$25 000.
5. The matter is considered finalised and is accordingly removed from the roll.

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H ANGULA  
Deputy Judge-President



APPEARANCES

APPLICANT:

P KAUTA

Of Dr Weder, Kauta & Hoveka Inc, Windhoek.

RESPONDENT:

D BEUKES

Of Engling, Stritter & Partners, Windhoek.