REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD CIV-ACT-CON-2021/02716

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LTD **PLAINTIFF**

and

VERO GROUP CC **1ST DEFENDANT**

SAM NDAPANDULA KAPEMBE **2ND DEFENDANT**

Neutral Citation: *Development Bank of Namibia v Vero Group CC* (HC-MD-CIV-CON-2021/02716) [2022] NAHCMD 50 (11 February 2022).

CORAM: MASUKU J

Heard: **Determined on the papers**

Delivered: **11 February 2022**

Flynote: Costs – Taxation – Review of taxation in terms of rule 75 – Attorney and own client costs discussed – Basis upon which taxing officer can legitimately disallow items relating to attorney and own client costs –Legal Ethics – duty of legal practitioners to assist the court in respect of providing authority for legal contentions advanced.

Summary: The plaintiff and defendants entered into a short term loan facility written agreement. The clause in respect of costs in that agreement stipulated that the plaintiff would, in the event of litigation lodged by it, be entitled to costs on the scale of attorney and own client. The defendants breached that agreement and there after the plaintiff obtained default judgement in its favour which included costs on the scale of attorney and own client in line with the agreement.

Armed with judgement in its favour, the plaintiff prepared a bill of costs for taxation. During taxation, the taxing officer disallowed some items on the bill on the basis that the costs order issued by the court did not include costs for an instructed legal practitioner. This aggrieved the plaintiff which in turn lodged this review application in terms of rule 75. It alleged that the taxing officer was wrong in her decision to disallow the items in question, considering that costs in the matter were, in line with the agreement among the parties, on the scale between attorney and own client.

Held: Where parties enter into a written agreement in terms of which costs incurred in relation to litigation would be paid at the scale of attorney and own client, the costs in that regard includes all costs incurred.

Held that: The only basis upon which a taxing officer can legitimately disallow items relating to attorney and own client costs is if the said costs are unnecessarily incurred or of unreasonable amount.

Held further that: In the light of an agreement that costs be levied on the scale between attorney and own client, there is no need for a special order regarding the costs of an instructed legal practitioner to be made by the court. The successful party is entitled to recover those costs if they were necessarily incurred in the matter.

Held: That legal practitioners have an abiding ethical duty to assist the court as its officers. Where they make legal submissions, it is their duty to avail authority for the proposition contended for and not to require the court to go hunting for the relevant authority.

JUDGMENT

MASUKU J:

Introduction

[1] This is a matter brought to this court for determination in terms of the provisions of rule 75. The plaintiff, the Development Bank of Namibia ('DBN'), seeks to have reviewed a decision by the taxing officer to disallow certain items from its bill of costs submitted for taxation.

Background

[2] The facts giving rise to this application for review are clear and they acuminate to this: DBN, sued out a combined summons from this court against the defendants, Vero CC and its sole member, who served as surety, Mr. Sam Panduleni Kapembe. In its summons DBN sought payment from the defendants jointly and severally of an amount of N$ 2, 873,417.96 in claim 1 and N$ 15,594.45 in relation to claim 2, interest thereon and costs on the scale between attorney and own client.

[3] The defendants were duly served with the summons and they did not defend the claims against them. As a result, on 18 August 2021, default judgment was entered against both defendants in terms of the relief sought as stated above. I interpose to mention that Mr. Van Greunen, who represents DBN states incorrectly in his contentions that the judgment entered by the court was in respect of a summary judgment.

[4] In due course of time, the plaintiff, as it was entitled to, prepared a bill of costs for taxation by the taxing officer. The taxing of the bill took place on 19

September 2021. In the course of taxing the bill of costs, the taxing officer disallowed four items from the bill, namely, items 2, 11, 22 and 27. These items were disallowed by the taxing officer on the basis that the order of court issued on 18 August 2021 did not contain an order for the costs of an instructed legal practitioner. It is on that basis that the items were disallowed and DBN is aggrieved thereby.

Determination

[5] It would appear that the answer to the entire question submitted for determination as a stated case lies in the order of court, especially where it relates to costs. As indicated above, the order dated 18 August 2021, granted payment in the amounts claimed, together with interest and lastly, granted costs in DBN'S favour on the attorney and own client scale. This scale of costs was authorised by clause 17.2 of the agreement signed by the parties.

[6] Clearly, the order does not grant costs of an instructing and instructed legal practitioner. This it would appear, is the major, if not exclusive basis on which the taxing officer disallowed the items in question. DBN, through its legal practitioners submits that the costs issued by the court were agreed by the parties to be on the attorney and own client scale, meaning that if the plaintiff, DBN employed counsel in the matter, it should not be out of pocket therefor.

[7] It has been stated that 'costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but does not affect the principle on which it is based.'[1]

[8] There has been a raging debate over the years regarding the scale of costs, especially whether there should be a distinction between attorney and client costs and attorney and own client costs.[2] Generally, costs are granted on the party and party scale. There are those case, where because of some untoward behaviour

[1] *Nel v Nel* 1943 AD 280 at 287.

that the court may sanction costs on the punitive scale, otherwise referred to as attorney and client costs. There is another category, referred to as attorney and own client costs over which there is debate regarding whether it differs from attorney and client costs. It is unnecessary to engage in that debate in the light of what follows below.

[9] There are instances, such as in *Whelan v Whelan*[3] where parties enter into an agreement in terms whereof the defendant is to pay 'all the costs incurred by the defendant on the scale as between attorney and own client so as to give the defendant a full indemnity is respect of such costs.' As intimated above, the instant matter was such a case.

[10] In dealing with class of attorney and client costs, Zietsman J held as follows in *Whelan v Whelan*:

'It is clear that parties can agree to a basis of taxation different from that which will be applied when a simple order is made that attorney and client costs are to be paid. In the case of *Enslin GR v Gallo D* 1984 (1) PH F27 (D) it was held that where an unsuccessful litigant was ordered to pay the other party's costs "as between attorney and own client" such costs should be taxed on the most generous of the three bases referred to by Roos. But even in such a case costs authorised by the client, but which could be described as unnecessary luxuries would not be allowed.'

[11] Dealing with the concept of attorney and own client costs, Van Dijkhorst J stated the following in *Ben McDonald v Rudolph*:[4]

'The term "own client" is a misnomer. In the context of taxation or otherwise an attorney can only tax a bill of costs incurred by him in respect of his (own) client's matter. Not that of the client of somebody else. "Attorney and own client costs" therefore has a technical meaning – pertaining to the basis of taxation – when used in the context of litigation. These costs are allowed on taxation of an attorney's bill to his own client. They include all costs except when unnecessarily incurred or of an unreasonable amount.'

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[2] *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T); See also *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790.
[3] *Whelan v Whelan 1990* (2) SA 29 (E) 30-31.
[4] *Ben McDonald v Rudolph* 1997 (4) SA 252 B-C.

[12] It is clear that in this matter, the parties entered into a written agreement in terms of which all costs incurred in relation to litigation would be paid at the rate of an attorney and own client. In this regard, the costs, as stated immediately above, include all costs. This means that if DBN, for instance, incurred costs in instructing counsel in the drafting or settlement of the pleadings and appearance in court, it is accordingly entitled, in terms of the agreement, to recover those costs incurred in relation to counsel from the defendants in this matter.

[13] It would appear to be trite learning from the *Ben McDonald* case above that the only basis upon which the taxing officer can legitimately disallow items relating to attorney and own client costs is if the said costs are unnecessarily incurred or of an unreasonable amount.

[14] From reading the determination by the taxing officer regarding the reasons for disallowing the items in question, it was not on either of the bases mentioned above, namely because they were unnecessarily incurred or were unreasonable in amount. The reason proffered is that the court did not make a specific order that an instructed legal practitioner was to be paid his or her costs.

[15] I am of the considered view that the taxing officer, whilst possibly acting *bona fide,* acted wrongly. An order issued by the court which allows costs on the attorney and own client, will necessarily include the costs of an instructed legal practitioner, if so instructed as that would be the amount paid by the successful party's client and which it would, because of the scale of costs authorised, be entitled to recover from the losing party. In such a case, where there is an agreement for costs to paid on the attorney and own client scale, it is unnecessary that the court order should state in clear terms that such costs granted are to include the costs of an instructed legal practitioner.

[16] The agreement in this case, entitles DBN to recover the costs of the instructed legal practitioner from the defendants even in the absence of a specific order from the court allowing those costs. Where those costs are contended or appear to be unnecessarily incurred or of an unreasonable amount, the taxing

officer may disallow the amount and replace it with one that he or she regards as reasonable in the circumstances. It is however improper for the taxing officer disallow the costs on the basis that there is no specific court order for payment of the costs of the instructed legal practitioner when the costs granted by the court are on the attorney and own client scale.

[17] I am of the considered view that the taxing officer was incorrect in her decision regarding the disallowed items in this matter. As such, the disallowing of the costs on the ground stated is wrong in law and should be set aside therefor. To do otherwise would be in conflict with the agreement that the parties would have entered into, in other words, frustrating the principle of freedom of contract.

Conclusion

[18] In the light of the discussion above, together with the conclusions reached, it is the court's considered view that the plaintiff's objection to the decision made by the taxing officer, is well founded and must therefor be upheld, as I hereby do.

Dissatisfaction

[19] I must record my disenchantment with the neglect of responsibilities by DBN's legal practitioner in this review. All that was done on the plaintiff's behalf was to lay the factual basis for the contention that the taxing officer was wrong in her decision to disallow the items in question. That was all.

[20] The court was literally left to its own devices and it had to run helter- skelter, in search of authority to support the conclusion it reached. The fact that the court agreed with DBN's contention in the end does not relieve legal practitioners from performing their abiding duty to the court, namely, to assist the court with the determination of disputes by citing the relevant authority in support of the case propounded, together with adverse authority as well.

[21] In this, Mr. Van Greunen failed dismally. Some of the cases brought on review are not straightforward and the court requires assistance from the parties

involved. To leave the court in the dense forest of authority to hunt and find the relevant ones is clearly irresponsible and is to be deprecated. In future, where this scenario repeats itself, I will send the matter back to the legal practitioners involved for them to perform their legal and ethical duty to the court.

[22] As a mark of the court's disapproval of Mr. Van Greunen's conduct in this matter, he will be disallowed the right to charge his client for the attendances related to the review in terms of rule 75.

Order

[23] In the premises, and for the reasons advanced above, I am of the view that the decision by the taxing officer to disallow the items complained of was wrong in law and must be set aside. In the circumstances, the following order is issued:

1. The decision made by the Taxing Officer to disallow items 2, 11, 22 and 27 of the Plaintiff's bill of costs is hereby reviewed and is set aside.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge