

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b> ENO AKPABIO AND ANTOHER v BODY CORPORATE THORENDAL AND 4 OTHERS	<b>Case No:</b> HC-MD-CIV-APP-AMC-2021/00004
	<b>Division of Court: High Court</b> Main Division, Windhoek
<b>Heard before:</b> HONOURABLE JUSTICE ANGULA, DEPUTY JUDGE PRESIDENT	<b>Decided on the papers</b>
	<b>Judgment delivered on:</b> 8 December 2022
<b>Neutral citation:</b> <i>Akpabio v Body Corporate Thorendal</i> (HC-MD-CIV-APP-AMC-2021/00004) [2022] NAHCMD 672 (8 December 2022)	
<b>The order:</b>  1. The Taxing Officer's decisions in respect of the below listed items in the bill of costs are set aside for the reasons that the Taxing Officer purported to exercise a discretion which he did not have or he incorrectly exercised his discretion: Items number 7, 9, 56 and 85.  2. The Taxing Officer's decisions in respect of the following items are upheld:	

Items numbers 57 and 66.

3. The matter is remitted to the Taxing Officer to reconsider the charges in respect of items 7, 9, 56 and 85 and to finalise the taxation of the Bill of costs.
4. No order as to costs.
5. The matter is removed from the roll and is considered finalised.

### **Reasons for order:**

ANGULA DJP:

#### Introduction

[1] The respondents were awarded a costs order by this court on 10 September 2021 on a party and party scale following a dismissal or striking of the appeal from the roll of an appeal by the applicants from the Magistrate's Court to this court. It would appear that the court found that the appeal was lodged out of time. The order did not specify that the costs include the costs occasioned by the employment of one instructed counsel. However, when the bill of costs was presented for taxation it included costs of an instructed counsel. The applicants objected to costs of instructed counsel however the taxing master allowed some of those costs, albeit at a reduced rate.

#### Background

[2] Aggrieved by the ruling of the Taxing Officer, the applicants launched the present review application in terms of rule 75 objecting to the items in the bill of costs allowed by Taxing Officer. Thereafter the Taxing Officer filed his stated case in terms of rule 75(2). The parties thereafter filed their respective contentions as required by the rule.

Items in the bill of costs objected to

[3] The first item objected to, is number 7. It is described in the bill of costs as follows: 'Telephone call from client re appointment of instructed counsel – N\$300.00'. Upon objection the amount was reduced to N\$150.00. The Taxing Officer reasoned that the item charged was actual costs incurred by the instructing legal practitioner. Furthermore that the amount was reduced as per agreement by the legal practitioners representing the respective parties at the taxation. There is a dispute between the parties whether this item was allowed by agreement and whether the charge should be reduced.

[4] I should mention in this regard that the legal practitioner who represented the applicants at the taxation has in the meantime ceased to represent them. Furthermore there is no record of the taxation proceedings from which one could verify whether the charge was indeed reduced by agreement. It thus falls on me to make a determination on this item.

[5] In my view there is merit in the applicants' submission that the court order did not specify that the costs allowed included the costs occasioned by the employment of an instructed counsel and for that reason the charge should not be allowed. This is also in line with rule 124(1) which provides that unless the court authorizes fees consequent upon the employment of an instructed legal practitioner only the fees of one legal practitioner are allowed. For this reason alone the item should not have been allowed.

[6] Another reason why the charge should not be allowed is because it appears to me that the charge constitutes costs between attorney and client. This because the telephone call was initiated by the client to the legal practitioner. Ordinarily and logically the call should have emanated from the legal practitioner suggesting to the client a suitable counsel to be instructed. In any event, I do not agree with the taxing officer's reasoning that the work was done and therefore should be charged for or that the respondents should be reimbursed. In my view the cost for the telephone call was unnecessarily incurred. The client should have waited for the legal practitioner to call him or her concerning the employment of an instructed counsel.

[7] In the circumstances the charge should be directed to the correct party, in this case to the client. Most importantly the taxing officer could not exercise his discretion contrary to the court's order which did not direct the applicants to pay costs of the instructed counsel. It follows that the Taxing Officer's decision in this regard stands to be reviewed and set aside.

[8] The next item objected to, is item number 9: It reads: 'Drawing Memorandum of instructions, Counsel's Brief and making copies (1hour 30 min) (1set x 234 pages). – N\$1800.00 and Disbursements N\$1190.' The fee charge was reduced to N\$1200 and disbursements of N\$1190 was not reduced.

[9] The applicants' objection is premised on the same reason as in respect of item 7. The Taxing Officer again reasoned that whether the work had been done by instructing counsel or instructed counsel it was necessary work done and therefore ought to be allowed at a reduced rate of an instructing attorney as prescribed in the tariffs. Therefore the attendance cannot simply be disregarded.

[10] In my view the fact that the court order did not allow the respondents to recover costs for an instructed counsel, such costs cannot be recovered by the instructing counsel. Viewed in the context that the work charged for was done by an instructing legal practitioner, it was not necessary for the instructing counsel to draft instructions and to brief to instructed counsel. It would have been a different consideration if for instance the instructing counsel drafted something such as particulars of claim or drafted an answering affidavit and then instructed counsel to settle same. In the present matter the work done by the instructing counsel was not necessary under the circumstances.

[11] In addition, an instructing counsel is not entitled in terms of the rules to charge disbursements such as the sum of N\$1190 allowed by the Taxing Officer. An instructing counsel is only allowed to charge fees. For those reasons the Taxing Officer's decision in this regard stands to be reviewed and set aside.

[12] The next item objected to, is item number 56. It reads: 'Telephone consultation with client re: discussions with Adv. Dicks and strategy in respect of proceedings (10) min' - N\$300'. The taxing officer's decision to allow this charge equally stands to be set aside for the reason that the court order did not authorise the respondents to recover costs incurred in relation to an instructed counsel.

[13] The applicants further objected to item number 57 which reads: 'Logging onto E-Justice and attending to receipt of and perusing Notice of set down (5 min) - N\$300.00'. The ground for objection is that this charge also relates to an instructed counsel. There is no merit in this objection. No instructed counsel is involved in this activity. The objection stands to be rejected.

[14] The next item objected to, is number 66. It reads: 'Drawing Joint Status Report (30) min – N\$600.00 - reduced to N\$300. Item reduced. Taxing Officer's discretion.' The applicants contend that the Taxing Officer improperly exercised his discretion when he allowed this charge albeit at a reduced rate. I am not persuaded by the bare allegation by the applicants that the Taxing Officer exercised his discretion improperly in respect of this item. No facts are stated to move me to interfere with the Taxing Officer's exercise of his discretion in this regard. Accordingly the objection is rejected.

[15] The last item objected to by the applicants is number 85 which reads: 'Consideration of brief and matter, attending to research and drafting note on submissions and telephone attendances (10hours@ N\$ 1 700.00p/h)'.

[16] The applicants' objection is that the charge related to instructed counsel's attendances which was not authorised by the court order. Furthermore the charge constitutes a duplication in respect of attendances by instructing counsel already allowed. The applicants therefore contend that in allowing these charges the Taxing Officer again improperly exercised his discretion.

[17] The respondents conceded that they were not entitled to recover the costs of both instructing and instructed counsel. They however contended that they were entitled to recover the costs of the instructing legal practitioner. The respondents further conceded that there was a duplication of charges as alleged by the applicants.

[18] The Taxing Officer, in the exercise of his discretion then proceeded to tax off five hours charged by the respondents' instructed counsel. He allowed the remaining five hours to be charged by the instructing counsel at the rate allowed by the tariffs for instructing counsel namely N\$1200 per hour. The charges in respect of this attendance were reduced from N\$17 000 to N\$ 6000.

[19] In defence of the Taxing Officer's foregoing decision it was argued on behalf of the respondents that that that the work was done in the furtherance of the respondents' case and for that the respondents incurred expenses in the sum of N\$17 000.00 for work done by their instructed counsel. Therefore, so the argument went, they cannot completely be out of pocket as if no work was done and no expenses incurred.

[20] The principle is well-establish that the purpose of a costs order is to indemnify a party, in whose favour the costs order has been made for all costs reasonably incurred in defence or in pursuit of his or her claim. The recovery of costs must take place within the procedure prescribed by the rules of court.

[21] Rule 124 regulated the right of a party in whose favour an order of cost has been made. For instance sub-rule 124(1)(j) provides that a party is allowed to recover costs 'as between party and party for one legal practitioner only in an appeal from the or review from magistrates' courts'. It is common cause that the costs order upon which the bill of costs was based, was made in the appeal proceedings from a magistrate's court. The rule further provides that a party may only charge fees for the employment of an instructed counsel if such has been authorised by the court. It is common cause that the costs order did not

authorised the recovery of costs consequent upon the employment of an instructed counsel.

[22] I do not agree with the submission made on behalf of the respondent to the effect that, in the present matter, it does not matter whether the work was performed by an instructed counsel as long as such costs are to be recovered at the rate prescribed for one legal practitioner. In other words, even though the work was in actual fact performed by an instructed counsel, as in the present matter, it can be deemed to have been performed by an instructing legal practitioner. Counsel did not refer me to any authority for this proposition, neither could I find one through my own research.

[23] Rule 124 does not contain such an implied deeming provision. In my view to recover costs for work not performed by the legal practitioner as stipulated by the rule is at best devious and at worst unlawful in that it is contrary to the provision of the rule. And as far as it applies to the present matter it would be contrary to the terms and conditions of the court order granted in favour of the respondents. In my view it is not permissible for the Taxing Officer to bypass the clear provisions of rule 124 and the terms of the court order under the guise of exercising a discretion.

[24] It bears mentioning that the respondents were not without a remedy. They could have applied for an amendment of the court order to authorise them to recover the costs occasioned by the employment of an instructed counsel. As a matter of fact the respondents applied for a variation of the order in terms of which the applicants were ordered to pay the respondents' costs. This was because the first order issued by the court did not deal with the issue of costs at all. That necessitated the respondents to apply for a variation of the order.

[25] I am therefore of the considered view that the Taxing Officer improperly exercised his discretion in respect of item 85. His decision to allow that item stands to be reviewed and aside.

Costs

[26] The general rule is that cost follows the event. In the present matter both parties have achieved almost equal measures of success. The applicants appeared in person and as such are not entitled to charge fees except for the necessary disbursements. Their costs are therefore minimal. I however take into account the fact that the applicants persisted with the rule 61 proceedings which they later withdrew. I declined to grant an order of costs to any of the parties in respect of that rule 61 proceedings because I took the view that both parties were acting unreasonably which unnecessarily wasted court resources.

[27] The respondents on the other hand were represented by a legal practitioner who is entitled to charge fees. In this connection I take into account that the present review application was triggered by the fact that the respondents charged fees for instructed counsel. Their counsel belatedly conceded that they were not entitled to costs in respect of an instructed counsel.

[28] Taking all those factors into consideration and in the exercise of my discretion I have decided not to make an order of costs in favour of any of the parties.

#### Order

[29] In the light of the considerations and the findings made herein I make the following order.

1. The Taxing Officer's decisions in respect of the below listed items in the bill of costs are set aside for the reasons that the Taxing Officer purported to exercise a discretion which he did not have or he incorrectly exercised his discretion:  
Items number 7, 9, 56 and 85.
2. The Taxing Officer's decisions in respect of the following items are upheld:  
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items 7, 9, 56 and 85 and to finalise the taxation of the Bill of costs.

4. No order as to costs.

5. The matter is removed from the roll and is considered finalised.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondents</b>
I Akpabio The second applicant in person	K Marais of Fisher, Quarmby & Pfeifer