

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

RULING IN TERMS OF PRACTICE DIRECTION 61

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| Case Title: Epafras Edison Haimene v Tuhafeni Simon | Case No: HC-MD-CIV-ACT-2017/03310 |
| | Division of Court: High Court Main Division, Windhoek |
| Heard before: Honourable Lady Justice Prinsloo | Decided on the papers |
| | Judgment delivered on: 31 January 2023 |
| Neutral citation: <i>Haimene v Simon</i> (HC-MD-CIV-ACT-2017/03310) [2023] NAHCMD 19 (31 January 2023) | |
| The order: 1. The defendant's application as per Notice of Motion dated 12 September 2022 is dismissed with costs. | |
| Reasons for order: PRINSLOO J: <u>Introduction</u> | |

[1] The defendant brought an application for review in terms of rule 75 of the High Court Rules of the taxation of the bill of cost by the taxing officer.

Background

[2] The action was instituted by the plaintiff on 8 September 2017. The defendant filed his plea and counterclaim on 14 December 2017. During February 2018 the parties engaged in settlement negotiations and reached a settlement on the main action. The settlement agreement dated 23 February 2018 was made an order of court.

[3] On 5 May 2018 the plaintiff abandoned his claim against the defendant and the defendant elected to pursue his counterclaim and as a result, became dominus litis.

[4] Hereafter the matter was fraught with interlocutories and other ancillary matters. The matter was eventually set down for trial for the period 18 to 22 July 2022. On the trial date the defendant failed to appear. The court then, after hearing the defendant's legal representative, Mr Namandje, and having considered the affidavit filed in support of his application to withdraw as counsel of record the court granted the application and Mr Namandje was excused from the proceedings.

[5] Once Mr Namandje departed from the proceedings Ms Shipindo proceeded to move an application for absolution from the instance in terms of rule 98. The court then recorded the following order:

'IT IS HEREBY ORDERED THAT:

1. Mr Namandje is granted leave to withdraw as counsel of record.

FURTHER, having heard Ms Shipindo:

And whereas the Plaintiff withdrew his claim previously and the Defendant had to advance his counterclaim during the current trial proceedings but remained absent from the court proceedings in spite of being aware of the current trial date:

THE COURT GRANTS THE FOLLOWING ORDER:

1. Absolution from the instance is granted in terms of Rule 98(2) of the Rules of Court.
2. The Defendant/Plaintiff in reconvention to pay the Plaintiff/Defendant in reconvention's wasted cost for the week of 18 July 2022 to 22 July 2022.
3. The matter is removed from the roll: Case Finalized.

BY ORDER OF THE COURT'.The allocator

[6] The plaintiff drafted a bill of cost amounting to N\$255 000. The bill of cost was drawn from the date of inception of the action up to and including the aforementioned order when absolution from the instance was granted.

[7] The taxing officer, having heard the parties allowed an amount of N\$320 595.63. This amount includes the drawing of the bill of cost, attendance, VAT and disbursements allowed.

[8] At the time of the taxation, there was no opposition to the bill of cost. On 12 September 2022, Mr Shimutwikeni came on record on behalf of the defendant and filed a Notice of Motion noting the defendant's dissatisfaction with the ruling of the taxing master and requested that the taxing master state a case for the decision of a judge in terms of Rule 75(1).

[9] The plaintiff in his answering papers emphasises the following:

- a) The main action was abandoned after the parties reached settlement on the main action as far back as 5 May 2018;
- b) Absolution from the instance with costs was granted in respect of the counterclaim, which carries a cost order which emanates from inception until finalization. The counterclaim was instituted on 14 December 2017 and only finalized on 19 July 2022.
- c) From the bill of costs it is clear that the cost allowed were from the inception of the counterclaim, carrying half the cost of case management whilst the plaintiff's claim was

alive.

[10] No replying affidavit was filed by the defendant disputing the aforementioned averments

Items in the bill of costs objected to

[11] I need to point out that what is noticeable from the matter before me is that the defendant does not, in his Notice of Motion, request that the allocator of the taxing officer be reviewed and set aside, only that she states a case.

[12] From the defendant's papers, it appears that he objects to the taxation of the bill in its entirety. In his founding affidavit the defendant does not object to specific items in the bill of cost but contended that if one has regard to the court order of 19 July 2022 (as set out under para 5 above) then the only costs that should have been allowed to be taxed by the taxing officer should have been limited to items 205 to 209, which amounts to N\$59 340, inclusive of VAT, the drawing of the bill of costs and attendance to taxation. This relates specifically to the punitive cost order made by this court on 19 July 2022.

[13] The point of departure for the taxing officer, as set out in the stated case is rule 98(2) that reads:

'(2) If a trial is called and the defendant appears and the plaintiff does not appear in person or by his or her legal practitioner, the defendant is entitled to an order granting absolution from the instance with costs, but he or she may lead evidence with a view to satisfying the presiding judge that final judgment should be granted in his or her favour and the presiding judge if so satisfied may grant such judgment.

[14] The taxing officer took the view that the court order made in terms of rule 98(2) deals with two aspects, firstly an order for absolution from the instance and secondly, a cost order in favor of the party absolved.

[15] In the context of the history of the matter it is however important to bear in mind that

the plaintiff withdrew his main action pursuant to the settlement of his claim.

Applicable legal principles

[16] If the costs have been awarded on a party-party basis, which was the case in this matter, the taxing master/officer is required to 'allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred or increased through over-caution, negligence or mistake or by payment of a special fee to counsel or special charges and expenses to witnesses or to other persons or by other unusual expenses'.¹

[17] Taxation of costs is governed by rule 125 of the High Court Rules. Angula DJP in the case of *Kamwi v Standard Bank Namibia Limited*² had this to say:

'[7] The legal principles applied by the courts, over the years are that: the Taxing Officer has a discretion, to be judicially exercised, in allowing or disallowing items on a bill of costs. Such discretion must be exercised reasonably and justly on sound legal principles. In the exercise of such discretion, the Taxing Officer must ensure that the unsuccessful litigant is not unduly oppressed by having to pay excessive amount of costs. If the Taxing Officer fails to exercise his discretion correctly, the court has a duty to interfere³.'

[18] Further to this, Kanguuehi AJ held in the case of *African Dynasty Investment CC v Gomes*⁴ that:

'Thus, in taxation of costs, the taxing master exercises a discretion. In that regard the court may interfere with the taxing officer's decision if he or she has not exercised his or her discretion judicially; if he or she has not brought his or her mind to bear upon the question; or he or she has disregarded important matters and taken into account extraneous matters, or he or she has acted on the basis of a wrong principle. These are common law grounds of review so succinctly enunciated in the landmark case of *Johannesburg Consolidated Investment Co (JCI) v*

¹ *Kaura v Taxing Master of the High Court* (A 121/2015) [2016] NAHCMD 138 (10 May 2016).

² *Kamwi v Standard Bank Namibia Limited* (A 101/2011) [2018] NAHCMD 196 (29 June 2018).

³ *Kloot v Interplan Inc and Another* 1994 (3) SA 236 at 238 H-J.

⁴ *African Dynasty Investment CC v Gomes* (I 2009/2015) [2019] NAHCMD 235 (8 July 2019).

Johannesburg Town Council 1903 TS 111 at 116.’

[19] The principle is well-established 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.

[20] In the matter of *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC & Others*⁵ Justice Frank AJA stated that:

[8] In terms of rule 25(3) a party dissatisfied with the ruling of the Taxing Master may request the Taxing Master to ‘state a case for the decision of a judge’ in respect of such ruling(s). This can only be done where ‘an item or part of an item’ was objected to or ‘disallowed by the Taxing Master of his or her own accord . . .’. The reference to an item disallowed on own accord by the Taxing Master is of no relevance to the present matter. Where an item was not objected to at the taxation, an objection cannot be raised afterwards.’

[21] In *Hollard v Minister of Finance*⁶, The court had this to say regarding the exercise of the taxing master’s discretion:

[24] I heed to the guidance by the Supreme Court in *Afshani v Vaatz*⁷ 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’.

[22] The defendant did not object at the taxation to any of the items on the bill of cost, despite the representation by a legal practitioner at the time. The defendant after the fact attempts to raise the issue of the taxed costs and the court order of 19 July 2023, unsuccessfully in my view.

⁵ *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC & Others* No. SA 79, delivered on 17 September 2020 at para 8.

⁶ *Hollard v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00002) [2020] NASC 18 October 2007 at para 24.

⁷ *Afshani v Vaatz* SA 01-2004 [2007] NASC 18 October 2007.

[23] It appears that the defendant lost sight of a few issues. Firstly the plaintiff, as the successful party is entitled to his costs upon the order of absolution from the instance. Such costs date back to the date of the inception of the defendant's counterclaim. Secondly, the defendant in his approach to the cost order of 19 July 2022 is opportunistic to say the least. It is clear that he was also mulcted with a punitive cost order for the week of 18 July 2023 to 22 July 2022 for the way in which he conducted his matter.

[24] The absolution order was granted in terms of rule 98(2) of the rules of court, which included costs. I am perplexed by the view of the defendant that he would not be liable for the costs pursuant to this court granting an order for absolution from the instance with costs in respect of his counterclaim.

[25] It is clear from the bill that the costs allowed by the taxing officer were from the inception of the counterclaim, and the cost in respect of the main claim was half of the cost of the case management whilst the plaintiff's case was alive.

[26] Taking all those factors into consideration, I am of the view that the taxing officer judiciously exercised her discretion and should not be interfered with. The application of the defendant, if one can qualify it as an application as no further relief is sought, is dismissed with costs.

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| Judge's signature: | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Plaintiff | Defendant |
| R Shipindo | H Shimutwikeni |

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| <p style="text-align: center;">Of</p> <p>Shipindo & Associates Incorporated, Windhoek</p> | <p style="text-align: center;">Of</p> <p>Henry Shimutwikeni & Co Inc, Windhoek</p> |
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