

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTIVE 61

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| <b>Case Title:</b><br><br>NEVILLE ANDRE vs SONJA OLIVIER  | <b>Case No:</b><br>HC-MD-CIV-ACT-DEL-2019/03282        |
|   | <b>Division of Court:</b><br>High Court, Main Division |
| <b>Coram:</b> Miller AJ   | <b>Delivered on:</b><br>1 February 2023                |
| <b>Neutral citation:</b> <i>Andre v Olivier</i> (HC-MD-CIV-ACT-DEL-2019/03282) [2023] NAHCMD 22 (1 February 2023)                                       |  |
| <b>ORDER:</b><br><br>1. The review application is dismissed.<br>2. The rulings by the taxing master are confirmed.<br>3. There is no order as to costs. |  |
| <b>REASONS FOR ORDERS:</b>  |  |
| MILLER AJ:  |  |

[1] The applicant is dissatisfied with the rulings of the taxing officer and brought this application for review in terms of rule 75(1) and (2) of the Rules of Court. The respondent opposed the application.

[2] On 9 November 2020 this court made the following orders:

‘1.The plaintiff's claim is dismissed.

2. The plaintiff is ordered to pay the costs of the defendant, such costs to include costs of one instructing and one instructed counsel.

3. The defendant is ordered to pay the wasted costs of the plaintiff occasioned by the postponement of the action on 06 to 10 July 2020 on an attorney and own client scale.

4. Matter is removed from the roll and regarded as finalized.’

### Background

[3] On 5 July 2022, the parties appeared before the taxing officer who issued an allocatur on the same day. The applicant is aggrieved by the taxing officer’s decision. On 21 July 2022, the applicant issued a notice in terms of rule 75, calling upon the taxing officer to state his case for the decision of a judge.

### The Stated Case by the Taxing Officer

[4] The material parts of the taxing officer’s stated case is as follows: I quote verbatim:

‘Objection by plaintiff was item 1, 2, & 3 - has similar title and scope, thus are similar.

No counter argument was advanced by defendant at taxing session. Decision was to reduce the purported time spent. In terms of item 17 Dated 22 October 2019, attend to counsel's chambers to deliver documents and discuss defendant's plea to be filed. Objection by plaintiff was that item 14, has similar wording and appears to have the same purpose. No counter argument was had by the counsel at session. Decision was to tax off completely as similar billing occurred at 14. In respect of item 35 - Dated 20 November 2019, attend to Law Society too serve defendants

mediation brief. The objection by plaintiff was that 30 minutes is unreasonable for such delivery. Counsel for the defendant did not make any issue of it. Decision was to reduce it to 15 minutes invoking discretionary powers as provided for in rule 125(7) it was considered excessive billing. In respect of item 38 the Plaintiff objected to the time spend on preparation for mediation prior to the commencement of the mediation hearing. Defendant's counsel did not dispute that 30 minutes was unreasonable. Decision was to reduce the time spent to 15 minutes. A seasoned counsel, intimately involved in case content, ought not be prepare for 30 minutes with all background of the case. In respect of item 39 the bill reflected 2 hours' time spent in mediation. Objection by plaintiff was only 1 hour was spent. Again defendant's counsel did not render any counter argument to it. A seasoned counsel, who has been subjected to a case content, ought not to prepare for 30 minutes with all background of the case.

In respect of item 52 - dated 24 January 2022, attend to draft further witness statement in re: Mr. Djamel. The objection by the plaintiff was that this witness statement was not necessary as it added no value to case and was not used. The defendant's counsel did not dispute such. The item was taxed off. In respect of item 58 - Dated 31 January 2020, attend to advocate chambers to deliver witness statements for settling. Objection was witness statement should have been delivered via email and not physical to save time and costs. Defendant's counsel was not forthcoming anyhow and appears to maintain status quo. Decision was to tax down the item. In respect of item 60 - Dated 26 February 2020, draft email to witness re: Mohamed Djamel Meziane attaching witness statement. Objection was that this witness was irrelevant as it did not add value anyhow and was not used. No counter argument upon reference to item. Decision was to disregard it totally. In respect of item 114 - Dated 8 September 2020, attend to court. Objection was billing must relates to time spent in court. No counter argument by defendant's counsel at session. Decision was to tax down the day fees. In respect of item 143 - Dated 13 September 2020, invoice #0000562: Advocate. Defendant's counsel did not object anyhow. In ruling, regard was had to Rule 125(7) provides that 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. Decision, accordingly reduced the taxed costs.

Rule 125(7) states that a Taxing Officer may at any time depart from provision on tariffs in this rule in extraordinary or exceptional cases when strict adherence to the provisions would be inequitable and unfair. This is applicable in item 114 and 143 where the fees for court attendance by counsel and advocate invoice are deemed excessive. The counsel for the defendant never

objected to any issues raised by the plaintiff during the taxation. The bill of cost was compiled by the defendant's counsel.' sic

#### Applicants' case

[5] The items in the bill of costs which the applicant has qualms with as gleaned from applicant's notice of motion in terms of rule 75 are as follows: Items 2, 3, 17, 35, 38, 39, 52, 58, 60, 114 and 143. I now summarise the arguments advanced by the applicant in his written contentions.

[6] Applicant avers that during the taxation the plaintiff objected that the time spent to peruse the documents provided by client is not reasonable. The applicant further avers that the defendant did not improperly note the plaintiff's compliance to the item. As regards item 3, the plaintiff objected that there were no documents pertaining to the matter filed on E-justice to be perused for the stated time period.

[7] As regards item 17 applicant avers that the defendant did not incorrectly note the plaintiff's compliance. The plaintiff objected to the time spent in that it is unreasonable as the distance between counsel's chambers and instructing law firm is not great. As regards item 35 the plaintiff objected to the time spent for service of the document and in that it is unreasonable, considering the short distance between the Law Society and the defendant's legal practitioners' law firm.

[8] As regards item 38 applicant avers that the plaintiff objected to the time spent in preparation for mediation prior to the commencement of the mediation hearing. As regards item 39 applicant further avers that the plaintiff objected to the time spent in the mediation hearing and stated that the duration of the mediation was only 1 hour instead of 2 hours. As regards item 52 applicant avers that the plaintiff objected that the item should be taxed off because the witness statement drafted was never used in the proceeding as the witness was never called to testify. In respect of item 58 applicant avers furthermore that the plaintiff objected to the witness statement being delivered

physically in that it should have been delivered via e-mail.

[9] As regards item 60 applicant avers that the plaintiff objected and stated that the item should be taxed off because the witness was not part of the proceedings. In respect of item 114 no argument was advanced by the applicant. As regards item 143 applicant avers that the plaintiff objected that when a cost order is granted and there was an instructed counsel, the fees charged by the instructed counsel may not be recovered 100%.

#### Respondents' contentions

[10] Respondent contends that the provisions of rule 75(1) provide that applicant can only take matters on review which he objected to at the taxation. During the taxation plaintiff was represented by Mr. Schalk Oosthuizen. Defendant was represented by a candidate attorney Ms. Martha. Mr. Oosthuizen noted two objections to rulings made by the taxing master at items 1 and 63. The objection at item 1 was withdrawn by Mr. Oosthuizen following the amounts taxed off at items 2 and 3. 6. Respondent further contends that during the taxation respondent disputed the amount of time spent by applicant on certain items. Respondent contends that applicant failed to object to these determinations during the taxation. Respondent's further contention is that the applicant's legal representative who appeared at the taxation was not personally involved with the matter alternatively was not instructed properly and could not address the taxing master on several of the issues raised during the taxation.

[11] Respondent contends that the applicant failed to indicate that it was dissatisfied with the taxing master's determinations during the taxation and as stated above never objected to items taxed off by the taxing master. In light of the applicant's failure to raise objections during the taxation respondent submits that the court should dismiss applicant's review application. Respondent further contends that in failing to object to the determinations made by the taxing master, the applicant is deemed to have accepted the taxing master's ruling and by implication the discretion applied by the taxing master.

### Legal principles

[12] If the costs have been awarded on a party-and-party basis, the taxing 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 same, no costs shall be allowed which appear to the Taxing Master to have been 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'.<sup>1</sup>

[13] 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 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 postulated in the landmark case of *Johannesburg Consolidated Investment Co (JCI) v Johannesburg Town Council*.<sup>2</sup>

[14] In the matter of *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC & Others*<sup>3</sup> at paragraph 8 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.'

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

<sup>2</sup> *Johannesburg Consolidated Investment Co (JCI) v Johannesburg Town Council* 1903 TS 111 at 116.

<sup>3</sup> *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC & Others* Case No. SA79, delivered on 17 September 2020.

[15] In *Hollard v Minister of Finance*<sup>4</sup> paragraph 24, the court had this to say regarding the exercise of the taxing master's discretion:

'I heed to the guidance by the Supreme Court in *Afshani v Vaatz*<sup>5</sup> 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.'

[16] The applicant in his written submissions only states that "defendant did not incorrectly note plaintiff's complaint" Nowhere in his submission does the applicant indicate that he raised objections during the taxation hearing. The applicant ought to have raised his objections during the taxation hearing and not after the fact. As was clearly stated in the matter of *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC & Others*. That being the case, this court is unable to say that 'it is clearly satisfied that he (the taxing officer) was wrong'. I am of the view that the taxing master exercised his discretion judiciously and for the reasons advanced this court will not interfere with the taxing master's discretion.

[17] In the result the following order is made:

1. The review application is dismissed.
2. The rulings by the taxing master are confirmed.
3. There is no order as to costs.

| Judge's signature | Note to the parties: |
|-------------------|----------------------|
|                   | Not applicable.      |

<sup>4</sup> *Hollard v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00002) [2020] NAHCMD 32 (31 January 2020).

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