

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: **HC-MD-CIV-ACT-CON-2022/02786**

In the matter between:

DR WEDER KAUTA & HOVEKA INC

PLAINTIFF

and

SQUARE FOOT DEVELOPMENT CC

FIRST DEFENDANT

ZIVELI PROPERTY DEVELOPMENT (PTY) LTD

SECOND DEFENDANT

DIRK OOSTHUIZEN

THIRD DEFENDANT

Neutral citation *Dr Weder, Kauta & Hoveka Inc. v Square Foot
Development CC (HC-MD-CIV-ACT-CON-2022/02786)
[2023] NAHCMD 450 (28 July 2023)*

Coram: Schimming-Chase J

Heard: 10 July 2023

Delivered: 28 July 2023

Flynote: Taxation – Attorney-and-client bill – Taxation of an attorney-
and-client bill is not a prerequisite for legal proceedings to recover fees –

Unless the fees have been agreed upon, the client may by way of a special plea require taxation of the bill – at that stage – the court cannot adjudicate upon the bill of costs before taxation.

Summary: Serving before court is an action for professional services rendered by the plaintiff to the defendants for work done in an action instituted by another party against the defendants, before a notice of withdrawal as legal representative was delivered. The plaintiff presented its bill of costs to defendants. The defendants admitted certain services were rendered, but deny that they approved the appointment of instructed counsel, and that the amount claimed by the plaintiff constitutes a fair and reasonable fee for the services rendered.

The parties are in disagreement as to whether the plaintiff's bill should be taxed by the taxing master under the auspices of the Registrar, or whether by the Law Society of Namibia.

The plaintiff contended that the Law Society of Namibia be enjoined to tax the attorney-and-client bill, as the regulator of legal practitioners. The defendant in turn contended the Law Society of Namibia is only to be enjoined to tax a bill of costs where requested by a party, and where the fees and disbursements incurred relate to non-litigious work, and that the Registrar as Taxing Master be enjoined to tax the plaintiff's bill of costs.

Held that, the Law Society as repository a public power, cannot tax the bill of the plaintiff where the dispute on fees relates to litigious work conducted.

Held that, it is not for the taxing master to decide whether the client is liable to the attorney, but the taxing master may during taxation consider whether there is evidence that the work was done and disallow fees claimed for work not done. Thereafter an *allocator* is issued on which further action may be taken.

Held that, the taxing master shall be the registrar of this court, and the matter

will be stayed pending finalisation of that process.

ORDER

1. The plaintiff's bill is referred for taxation to the taxing master under the auspices of the Registrar of Court.
 2. The action is stayed pending the issue of an *allocator* by the aforementioned taxing master.
 3. There shall be no order as to costs.
 4. The matter is postponed to **30 October 2023 at 15:30** for a Status hearing.
 5. The parties are directed to report to court on the further conduct of the matter on or before **25 October 2023 at 15:00**.
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JUDGMENT

SCHIMMING-CHASE J:

[1] Serving before court is in an interlocutory proceeding seeking an order to have a bill of costs drawn by the plaintiff taxed.

[2] The plaintiff is Dr Weder, Kauta & Hoveka Incorporated, a private company duly registered in accordance with the laws of the Republic of Namibia, with its principal place of business situated at 3rd Floor, WKH House, Jan Jonker Road, Ausspannplatz, Windhoek, Republic of Namibia.

[3] The first defendant is Square Foot Development CC, a close corporation with registration number CC/2013/12850 with its principal place of business at No. 133 Sam Nujoma Avenue, C/O Du Toit Accounting Services Walvis Bay, Republic Of Namibia.

[4] The second defendant is Ziveli Property Development (PTY) LTD, a private company with limited liability, registration number 2005/756, duly registered in accordance with the applicable company law in the Republic of Namibia with its principal place of business at No. 22 Nachtigal Street, Windhoek, Republic Of Namibia.

[5] The third defendant is Dirk Oosthuizen, a major male businessman with Identity Number: 69081200313 with his residential address situated at No. 6, 10th Street South, Meersig, Walvis Bay, Republic Of Namibia.

[6] It is common cause between the parties that the plaintiff's claim is premised on professional services rendered by the plaintiff to the defendants, for representation in litigation before this court. The defendants admit that the plaintiff performed certain professional services, but deny that they approved the appointment of instructed counsel, and that the amount claimed by the plaintiff constitutes a fair and reasonable fee for the services rendered.

[7] The particulars of claim allege specifically that legal services were rendered in the matter bearing case number HC-MD-CIV-ACT-DEL-2019/01372. Attached to the particulars of claim is an invoice, including disbursements due to two advocates.

[8] Apart from the case number alleged, it is not indicated whether the matter is litigious or non-litigious. Not even an invoice for the disbursements due and owing to the aforementioned advocates is attached. A perusal of the ejustice court file in the matter cited in the plaintiff's particulars of claim, shows that the plaintiff represented the first and second defendants in this matter after summons was issued against the defendants, and others, in the

aforementioned case number. Action was instituted on 23 March 2019, and the records reflect that the plaintiff represented the defendants in that matter until on or about 26 February 2020, when the plaintiff filed a status report evincing its withdrawal as practitioners of record for the defendants.

[9] Based on the above, the court must conclude that the services for which the plaintiff claims payment, were rendered in respect of a litigious matter, the case number cited in the particulars of claim. In fact, this is not disputed by the parties.

[10] Although not raised in the form of a special plea, the defendants pleaded that the action be stayed pending the taxation of the plaintiff's bill. They further pleaded that they did not approve the appointment of instructed counsel, and that the plaintiff had not rendered an invoice to the defendants.

[11] The case between the parties proceeded for case management, and during the pre-trial conference, the parties in their joint pre-trial report recorded:

'That the plaintiff has not presented a bill of costs, in respect of its claim, for taxation. And with leave of the court refer the matter for taxation.'¹

[12] The parties could however not agree on who should tax the plaintiff's bill. It is the contention of the plaintiff that the Law Society of Namibia tax the bill, while the defendants contend that the Taxing Master, falling under the auspices of the Registrar, tax the bill.

[13] Both parties provided heads of argument to the court supporting their contentions.

[14] Counsel for the plaintiff pointed to the powers of the registrar as the taxing officer as contained in rule 125 subject to rule 124, and argued that taxation in terms of the rules which involves an assessment by the taxing

¹ Para 3.7 of the parties' joint pre-trial report dated 7 June 2023.

officer of the reasonable charges and disbursements which may fairly be claimed against the losing party by way of an indemnity for the successful party in respect of the costs incurred in conducting the litigation against the losing party. The taxing officer thus is limited to costs awarded to a successful litigant, as contended on behalf of the plaintiff.

[15] In addition, counsel for the plaintiff argued that the rule envisages instances where the taxing master has no jurisdiction to tax bills of costs, one such instance being where the authority to tax fees involves the Law Society of Namibia. The essence of the argument was that the Law Society is entitled to tax attorney and own client fees where a client raises objection to the fees of their legal practitioner,² and that taxation by the Law Society is not permissible in instances where the tariff is determined by statute.³

[16] Thus the Law Society as the regulator of legal practitioners in Namibia – especially where tariffs are not prescribed by statute – should be the appropriate forum for taxation.

[17] On behalf of the defendants, it was argued that rule 125 read with rule 25 of the Supreme Court Rules, presents an anomaly in linguistic styling as it were, in that rule 25 identifies the taxing master in relation to the Supreme Court as the Registrar of that court.

[18] Argument proceeded that, considering the purpose of taxation as set out in *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA*,⁴ being that the taxing master is enjoined to decide which costs to allow by bringing an objective evaluation, on the basis of the stipulated criteria, to bear on the bill. As such, at every taxation, the taxing master is the functionary enjoined with the obligation to ensure that

² Damaseb, P. 2020. *Court Managed Civil Procedure of the High Court of Namibia*. First Edition. Juta: Cape Town, p 364.

³ *Vaatz v Law Society of Namibia* 1996 NR 272 (HC).

⁴ *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 15G-H.

only the costs, charges and expenses as appear to him or her have been necessary or proper for the attainment of justice or for defending the rights of any party are allowed.⁵

[19] Counsel further argued that the attorney is his client's master of costs, often deciding, either on his/her own or in conjunction with counsel, what steps to take, what evidence to obtain for use in the litigation, evaluating the work and effort involved in the matter and what the charges therefor should be. It was submitted that as an officer of the court, the legal practitioner is enjoined to act responsibly and to draw his party-and-party bill of costs so as to include therein only what is permissible to recover from the party condemned in such costs.

[20] Counsel submitted that taxing of costs is the function of taxing master,⁶ and that the taxing master ought to be the registrar of the High Court in this instance.⁷ Counsel proceeded that although the rules of this court are silent on the identity of the taxing master, the practice directions issued in accordance with the 2014 rules of this Court, provide guidance as to the identity of the taxing master, where it states:⁸

'A party who desires to have a bill of costs taxed must submit a written request to the registrar for a date for taxation, and the request must be accompanied by a copy of the bill to be taxed.'

[21] Counsel argued that the rules of this court, read with the practice directions, enjoins the registrar of this court to tax the plaintiff's bill of costs, especially if one has regard to the rule 125 that prohibits the registrar to tax

⁵ *Kaura and Others v taxing Master of the High Court and Another* [2016] NAHCMD 138 (A121/2015; 10 May 2016) at para 5.

⁶ *Venter v Venter* 1970 (3) SA 257 (A) 261(E).

⁷ Erasmus Superior Court Practice, B1-428, Commentary on rule 70(1). See also: Kruger, A & W, Mostert. 2010. *Taxation of Costs in the Higher and Lower Courts: A practitioner call*; and, AC Cilliers. *Law of Costs*.

⁸ Practice Direction 46(1).

costs, where some other officer is empowered to do so.⁹ The thrust of the argument was that in terms of sections 40 and 48 of the Legal Practitioners Act 15 of 1995 (as amended) (hereinafter the 'Legal Practitioners Act'), read with rule 23 of the Amended Rules of the Law Society of Namibia, the Law Society is only enjoined to tax costs, pertaining to non-litigious work, and or where the parties agree to the Law Society taxing such costs, save that the Law Society shall not assess fees and disbursements in instances where a state official is empowered to do so.

[22] It is trite that although taxation of an attorney-and-client bill is not a prerequisite for legal proceedings to recover fees,¹⁰ unless the fees have been agreed upon, the client may by way of a special plea require taxation of the bill,¹¹ and at that stage, the court cannot adjudicate upon the bill of costs before taxation.

[23] Rule 125 of the rules of this court provides:

'(1) The taxing officer is, subject to rule 124, competent to tax a bill of costs for services actually rendered by a legal practitioner in connection with litigious work of the court and he or she must tax such bill, subject to subrules (7), (8) and (11), in accordance with the provisions contained in Annexures D and E, except that the taxing officer may not tax costs in instances where some other officer is empowered to do so.'

Further:

'(3) With a view to awarding the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs are borne by the party against whom such order has been awarded the taxing officer must on every taxation allow all such costs, charges and expenses as appear to him or her to have been

⁹ Rule 125(1) of the rules of the High Court.

¹⁰ *Chapman Dyer Miles & Moorhead Inc. v Highmark Investment Holdings CC* [1997] 4 A11 SA 247 (D), 1998 (3) SA 608 (D).

¹¹ *Benson v Walters* [1984] 1 A11 SA 283 (A), 1984 (1) SA 73 (A).

necessary or proper for the attainment of justice or for defending the rights of any party.’

[24] Section 48(d) of the Legal Practitioners Act provides:

‘The Council may exercise the powers of the Law Society and, without limiting the generality of that power, may -(d) prescribe the manner of assessment of the fees payable by any person to a legal practitioner in respect of the performance on behalf of such person of non-litigious work and in respect of expenses reasonably incurred by the legal practitioner in connection with the performance of that work and, at the request of such person or legal practitioner or of its own accord, assess such fees in the prescribed manner . . .’

[25] Furthermore, rule 23(1) of the Amended Rules of the Law Society of Namibia provides:

‘The Council, or any committee appointed by the Council for that purpose, may at the request of any person or member, assess the fees and disbursements payable by such person or a member in respect of the performance of any work other than litigious work by a member in his capacity as legal practitioner: Provided that the Council or the committee shall not assess fees and disbursements in instances where a state official is empowered to do so or where fees and disbursements for the work in question are prescribed by any statutory tariff, save as in such an instance where an agreement exists between the legal practitioner and his client as far as the fee is concerned.’

[26] From a reading of the Legal Practitioners Act and the Amended Rules of the Law Society of Namibia, the Law Society shall only be enjoined to tax costs at the request of any person – and assess fees and disbursements payable by such person, in respect of the performance of any work other than litigious work. (Emphasis supplied)

[27] As outlined earlier in this judgment, it is common cause between the parties that the alleged professional services rendered by the plaintiff to the defendants pertain to litigation before this court. Therefore, the Law Society

in its statutory capacity cannot tax the bill of the plaintiff where the dispute in relation to litigious work persists between the parties.

[28] The argument of the plaintiff thus stands to be rejected. I refer to *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another*,¹² where the Supreme Court held:

‘As was made clear by the High Court, the starting point in any enquiry relating to the exercise of public power is that the rule of law and the principle of legality require that public officials and institutions may only act in accordance with powers conferred upon them by law.¹³ As was unequivocally stated by this court in the *Rally for Democracy and Progress* matter, the Constitution requires that the exercise of any public power is to be authorised by law – either by the Constitution itself or by any other law.¹⁴

[29] What thus remains for consideration, is the contention of the defendants that the person responsible for the taxation of the plaintiff’s bill of costs is the Registrar of the High Court, referring to *Grindlays International Finance (Rhodesia) Ltd v Ballam*.¹⁵

[30] On a proper reading of *Grindlays*, it is evident – with respect, that the court states a common cause proposition that the taxing master is an officer of the Supreme Court appointed in terms of s 34(1)(a) of the Supreme Court 59 of 1959, deriving his authority to tax bills of costs from rule 70(1)(a) of the Uniform Rules of Court.

[31] While it is not for the taxing master to decide whether the client is liable to the attorney, the taxing master may during taxation consider

¹² *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC) para 49.

¹³ *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* 2010(2) NR 487 (SC) at para 23, also cited by the High Court at para 34.

¹⁴ *Ibid* para 23.

¹⁵ *Grindlays International Finance (Rhodesia) Ltd v Ballam* 1985 (2) SA 636 (W) 645E.

whether there is evidence that the work was done and disallow fees claimed for work not done.¹⁶ Once the *allocator* is issued, the parties are at liberty to enforce their rights.

[32] I find apposite in the circumstances to refer to *Nate Ndauendapo v Aussenkehr Farms (Pty) Ltd*.¹⁷ Similar to the present matter, the *lis* between the parties in *Ndauendapo* concerned the payment of fees for professional legal services rendered. Also on all fours with the present matter, the court was confronted with the question as to who shall be empowered to tax the bill of the plaintiff. Parker J, writing for the court, found:

[6] The crucial question that arises is: who should tax the plaintiff's bill of costs? Both Ms. Engelbrecht and Mr. Coleman agree that the bill should be taxed by the Registrar *qua* taxing master of this Court. Counsel referred me to textual and case-law authorities, which I have duly consulted. Counsel argue that the legal basis of the taxing master's duty in this regard is Rule 70 (1) of the Rules of Court. I respectfully agree with them. The opening lines of Rule 70 (1) states: "The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his or her capacity as such in connection with litigious work ..." (My emphasis) The word "competent" simply means "legally qualified".¹⁸ Considering the *ipssisima verba* of the above-quoted provision in Rule 70 (1), it is idle for one to contend that the competency of the taxing master under that rule is restricted to costs ordered by this Court. If that was the intention of the maker of the Rules, nothing would have prevented the maker from making such of his or her intention known by clear, express words. The provision in the Rule clearly says "any bill of costs" presented "by an attorney" for "litigious work".

[7] I, therefore, hold that there is no legal impediment preventing the taxing master from taxing the plaintiff's bill: indeed, Rule 70 (1) is an enabling provision in this regard. *A fortiori*, both parties agree the plaintiff bill of costs should be taxed by the taxing master.'

¹⁶ Harms, L. *Amler's Precedents of Pleadings*. Eight Edition. P 52; and the authorities collected there.

¹⁷ *Nate Ndauendapo v Aussenkehr Farms (Pty) Ltd* 2007 (1) NR 162 (HC).

¹⁸ The Concise Oxford Dictionary, 10 Ed.

[33] The interpretation by counsel for the defendants of *Grindlays*, read with *Ndauendapo* – decided before the amendment of the rules of this court in 2014, lends itself to a favourable finding that although not specifically defined in the 2014 rules of this court, the taxing master enjoined with the taxation of the plaintiff's bill of costs, shall be the registrar of this court.¹⁹ It is a litigious matter. This finding is compounded when read with Practice Direction 46(1) of this court, that requires: 'a party who desires to have a bill of costs taxed must submit a written request to the registrar for a date for taxation, and the request must be accompanied by a copy of the bill to be taxed.' (Emphasis added)

[34] As to costs in the present interlocutory, the general rule is that costs are in the discretion of the court. I do not believe that a costs order should be made in the matter, given the nature of the application.

[35] In the circumstances, I make the following order:

1. The plaintiff's bill is referred for taxation to the taxing master under the auspices of the Registrar of Court.
2. The action is stayed pending the issue of an *allocator* by the aforementioned taxing master.
3. There shall be no order as to costs.
4. The matter is postponed to **30 October 2023 at 15:30** for a Status hearing.
5. The parties are directed to report to court on the further conduct of the

¹⁹ For the definition of Registrar, I refer to rule 1 of the rules of the High Court, and means the registrar of court appointed in terms of section 30 of the High Court Act and includes a deputy registrar and assistant registrar appointed in terms of the said section.

matter on or before **25 October 2023 at 15:00.**

EM SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

S Paulus

Of Dr Weder, Kauta & Hoveka Inc.,

Windhoek

DEFENDANTS:

U Rukambe

Of Fisher, Quarmby & Pfeifer

Windhoek