

Neutral citation: *Xinfeng Investments (Pty) Ltd v Chief Executive Officer: BIPA* (HC-MD-CIV-MOT-REV-2022/00330) [2023] NAHCMD 489 (9 August 2023)

Results on merits:

Merits not considered.

The order:

1. The application for the review of the allocatur of the taxing officer succeeds.
2. The ruling of the taxing officer in respect of items 33, 42, 81 and 82 is set aside.
3. The matter is remitted to the taxing officer to tax items 33, 81 and 82 of the bill of costs afresh and consider the reasonableness of counsels' fees in accordance with the Rules of Court.
4. No order is made as to costs.

The matter is removed from the roll and regarded as finalised.

Reasons for orders:

Prinsloo J:

Introduction

[1] This application is brought in terms of rule 75(1) of the Rules of Court to review the taxation of costs on the items objected to or disallowed by the taxing officer during taxation, which was held on 23 November 2022.

[2] The present case concerns a request by the third to the sixth respondents¹ for a judge to review the items objected to or disallowed by the taxing officer during the taxation. The respondents seek to review items 33, 42, 81 and 83 of the applicant's Bill of Costs. Items 33, 81 and 83 relate to instructed counsel's fees, whereas item 42 also relates to counsel's fees but specifically to the memorandum of advice prepared by counsel.

[3] The taxing officer had to determine whether the matter before court was of a complex nature and whether the rate charged by senior counsel, being N\$3500 per hour, as opposed to the allowable maximum or N\$1800 stipulated in the rules for party and party costs, would be

¹ I refer to the parties as they were in the main application.

justified.

[4] The respondents, being dissatisfied with the ruling of the taxing officer as to items objected to or disallowed requested the taxing officer to state a case for the decision of a judge. The respondents and the applicants had submitted their written contentions in compliance with rule 75(4) of the Rules of Court.

The stated case in terms of rule 75(1) that served before the taxing officer

[5] In her stated case in terms of rule 75, the taxing officer contended that rule 125(7) allows for a deviation from the tariffs to be employed for party and party costs and from the court's order it is clear that the court regarded the matter as one of a complex nature and as a result the court order should include the costs of one instructing and two instructed counsel.

[6] The taxing officer took the point that the aforementioned order should be read with rule 124(3), which reads '124 (3) In order for the court to make an award of cost against the opposing party to include the cost of an instructing legal practitioner and an instructed legal practitioner it must be satisfied that – (a) the employment of the instructed legal practitioner is reasonable and necessary because of that instructed legal practitioner's special skill or the complexity of the matter; or..'. In light thereof, it cannot be disputed that the matter was indeed one of a complex nature and as a result of the parties' submissions that if the ruling was that the matter was complex that the rates charged in the bill as far as the counsels' fees were concerned, would remain.

[7] As a result, the taxing officer resolved that the rate would remain as is on the bill.

[8] With regards to the memorandum of advice, the taxing officer further resolved that it was not clear what the singular charge or the attendance alone might have been and as a result, the taxing officer allowed this item owing to the complexity of the matter.

The submissions by the parties

[9] The respondents disputed the factual basis behind the reasons advanced by the taxing officer and the quantification of the applicant's junior and senior instructed counsels.

[10] The respondents further deny the taxing officer's contention that it was agreed during the taxation hearing that, if the taxing officer ruled that the matter was of a complex nature, the rate of

N\$3500 per hour must be justified. The respondents deny that there was such an agreement but contend that irrespective of what the parties purportedly contended the taxing officer still had to apply her discretion and not simply allow 100% of senior counsel's rate.

[11] On the rate charged for the junior counsel, the respondents submitted that the taxing officer, contrary to Annexure E, section A at para 5 of the rules, which provides that where fees for more than one instructed legal practitioner is allowed, the fees on taxation for each of the additional instructed legal practitioners so involved may not exceed one half of the fees allowed in respect of the most senior of the instructed legal practitioners. The complaint of the respondents is that in the current instance, the taxing officer did not tax down the junior counsel's rate to half of the senior counsel's rate but instead allowed the full rate actually charged by junior counsel. The taxing officer also did not fully deal with this issue in her stated case.

[12] Lastly, on the issue of the memorandum of advice drawn by senior counsel, the respondents submitted that the approach by the taxing officer in determining this item was flawed. It is submitted on behalf of the respondents that everything was dependent on the complexity of the matter. It is further submitted that the work done by the applicant's senior counsel for work done in respect of the memorandum of advice cannot be recovered from the respondents on a party and party scale. At the time of drawing the memorandum of advice, the founding affidavit had already been drawn and filed on eJustice. When the respondents' legal practitioner who attended the taxation requested to inspect the memorandum to determine why the memorandum was requested from senior counsel at that stage of the litigation, he was informed that the memorandum was confidential and access to the document was denied.

[13] As a result, it is submitted that the costs incurred in connection to the memorandum of advice is incidental or collateral to the litigation. It is further their argument that requesting the opinion of senior counsel after founding papers had been drawn and before the filing of the respondents' answering papers relates to an incidental step in the litigation and thus does not qualify for party and party costs.

[14] The counsel for the first and the second respondents agreed with the contentions made on behalf of the third to the sixth respondents.

[15] The applicants submitted, as opposed to the respondents, that the matter was indeed complex in nature, and the taxing officer made the correct decision in allowing the rates charged by the instructed senior and junior counsel. It is submitted that the complexity of the matter can be inferred from the fact that the third to sixth respondents secured foreign counsel who would only

be able to appear before our courts upon the Chief Justice issuing a certificate in terms of s 85(2) of the Legal Practitioner's Act 15 of 1995. This s 85(2) certificate, so the submission goes, would only be issued if the Chief Justice or the Judge President is satisfied that, having regard to the complexity or special circumstances of the matter, it is fair and reasonable for a person to obtain the services of a lawyer who has special expertise relating to the matter.

[16] With reference to the cost order granted by this court, it is further submitted that the said order should be read in conjunction with rule 124(3), and it is clear from the facts that the matter was of a complex nature which required counsel with special skills to handle the matter.

[17] On the issue of the memorandum of advice, the applicants submitted that it is common knowledge that such a document requires specialised skills and knowledge. In this regard, the court was referred to *Ndjarakana v Minister of Safety and Security*.²

[18] The applicants concluded with the contention that the taxing officer was correct in her decision not to determine the singular fee for the memorandum of advice alone, as every item pertaining to counsels' fees was dependent on the ruling that the matter is complex.

Discussion

[19] In the *Hollard Insurance Company of Namibia Limited and Others v Minister of Finance and Another*³ Claasen J, quoting from *Coetzee v Taxing Master South Gauteng High Court and another*¹³ stated that:

'Evidently the wide discretion conferred in rule 70(5) is the true fount for any 'application of the mind' by a taxing master to the task of fixing a fee. Importantly, so it seems plain to me, the text of the subrule expresses a very clear structure to the approach licensed by the subrule; i.e. the tariff is the default position, which may be departed from under the conditions prescribed, i.e. 'extraordinary or exceptional cases.' Underlined for emphasis.

[20] Claasen J continued in para 21 of the judgment to state that:

'It is implicit in rule 125(7) that a party who intends to rely on this provision has a duty to present relevant factual and legal issues to the taxing officer. During the taxation such an applicant has to tender sufficient reasons in order to satisfy the criteria as set out in this rule. In turn a taxing officer has to cumulatively evaluate the relevant factors and may depart from the tariffs in extraordinary or exceptional

² *Ndjarakana v Minister of Safety and Security* (A 225/2016) [2016] NAHCMD 272 (20 September 2016).

³ *Hollard Insurance Company of Namibia Limited and Others v Minister of Finance and Another* (3) (HC-MD-CIV-MOT-REV 2 of 2017) [2020] NAHCMD 32 (31 January 2020) at para 18.

cases wherein strict adherence to the tariffs will be inequitable.’

[21] The reviewing court would not readily interfere with the discretion of the taxing officer⁴ unless he or she has not exercised his or her 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] Angula DJP in *Kamwi v Standard Bank of Namibia Limited*⁵ stated that:

‘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 in costs. If the taxing officer fails to exercise his discretion correctly, the court has a duty to interfere.’

[23] Having considered the taxing officer’s stated case, it is clear that she regarded the order of the Court and, having read it together with rule 123(4), concluded that the matter was complex in nature.

[24] The complaint by the respondents is that even if the matter was complex in nature, which they dispute, it does not justify the tariff allowed for the instructed counsels.

[25] Rule 124(4) provides that where fees in respect of the employment of more than one instructed legal practitioner are allowed in a party and party bill of costs, the fees so permitted in respect of that additional employed instructed legal practitioner may not exceed one half of those allowed in respect of the most senior instructed legal practitioner employed.

[26] When rule 124(4) is read with Annexure E, Sections A and B of the Rules of Court, it is clear that instructed counsel is allowed a maximum of N\$1800 per hour (N\$18 000 per day) and as a result, the junior instructed counsel would be entitled to a fee of N\$900 per hour (N\$9000 per day).

[27] These amounts are, however, not etched in stone as rule 125(7) clearly provides that the taxing officer may at any time depart from any of the provisions on tariffs in this rule in extraordinary or exceptional cases when strict adherence to the provisions would be inequitable and unfair. Rule 125(7), therefore, allows the taxing officer to go beyond the maximum amount

⁴ *Afshani v Vaatz SA 01-2004* [2007] NASC 18 October 2007.

⁵ *Kamwi v Standard Bank of Namibia Limited (A 101/2011)* [2018] NAHCMD 196 (29 June 2018) at para 7.

specified in the tariff. However, the taxing officer must use this discretion judiciously in accordance with the guidelines outlined in rules 125(5) and 125(7).

[28] It is to be noted that the granting of a cost order under rule 124(3) including the costs of an instructing legal practitioner and an instructed legal practitioner does not automatically imply that the taxing officer can depart from the tariff without proper consideration. A deviation must still be justified in terms of rule 124(7).

[29] The correct approach would be that the taxing officer must still consider whether there are extraordinary or exceptional circumstances to depart from the prescribed tariffs. Even if it is accepted that the matter had been complex in nature, it is necessary for the taxing officer to consider the reasonableness of the counsels' fees with regard to the complexity of the issues raised.

[30] In this instance, there was no indication of how the taxing officer arrived at the conclusion of going beyond the prescribed tariffs or why 100% of the instructed junior counsel must be allowed.

[31] On the issue of the memorandum of advice, I do not take issue with the fact that such a memorandum is a document that requires significant legal expertise and skill. The question is whether the respondents can be held liable for the costs of said document.

[32] The applicants did not dispute the respondents' submissions as to the stage of the litigation when the memorandum of advice was drawn, i.e. when the founding affidavit had already been drawn. The respondents were not privy to the contents of this document, and I must agree with the respondents that this document appears to be incidental or collateral to the litigation, and the respondents do not qualify for party and party costs.

Conclusion

[33] For the reasons set out above, I am of the view that the taxing officer did not exercise her discretion properly, and the review of the *allocatur* of the taxing officer succeeds.

[34] In the result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondents
<p>N Mhata Of Nambili Mhata Legal Practitioners Windhoek</p>	<p>J Visser of Koep & Partners Windhoek And N Marcus of Nixon Marcus Public Law Office Windhoek</p>