

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: FIRST NATIONAL BANK NAMIBIA LIMITED Plaintiff and MARTHA SOOVOYE NEPOLO Defendant AND FIRST NATIONAL BANK NAMIBIA LIMITED Plaintiff and ERIKSON NEPANDO Defendant	Case No: HC-MD-CIV-ACT-CON-2023/01529 HC-MD-CIV-ACT-CON-2023/01544 Division of Court: Main Division Heard on: 19 March 2024
Heard before: Honourable Lady Justice Rakow	Delivered on: 26 April 2024
Neutral citation: <i>First National Bank Namibia Limited v Nepolo</i> (HC-MD-CIV-ACT-CON-2023/01529) (HC-MD-CIV-ACT-CON-2023/01544) [2024] NAHCMD 196 (26 April 2024)	
Order:	
<p><u>In the first matter - <i>First National Bank Namibia v Nepolo</i></u></p> <p>AD CLAIM 1</p> <ol style="list-style-type: none">1. Payment of the amount of in the amount of N\$59 670.47.2. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 4.50% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 1 March 2023 until date of payment.3. Cost of suit on attorney own client scale.	

AD CLAIM 2

4. Payment of the amount of N\$4 565.37.
5. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 6.45% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 18 February 2023 until date of payment.
6. Cost of suit.

In respect of the second case - *First National Bank v Nepando*

AD CLAIM 1

1. Payment of the amount of N\$74 918.35.
2. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 4.50% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 25 February 2023 until date of payment.

AD CLAIM 2

3. Payment of the amount of N\$19 510.94.
4. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 4.50% per annum calculated on the daily balance and compounded monthly in arrears from 25 February 2023 until date of payment.

AD CLAIM 3

5. Payment of the amount of N\$9 999.39.
6. Interest calculated on the aforesaid amount at prime rate (10.75%) plus 6.45% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 28 February 2023 until date of payment.

IN RESPECT OF CLAIMS 1 AND 2

7. Costs of suit as between counsel and own client such costs to include the costs of one

instructing and one instructed (where employed).

Reasons for order:

RAKOW J:

Introduction

[1] Both these matters came before me for default judgment applications and in both instances I asked to be addressed on the aspect of costs as the plaintiffs (who are in both instances the same) prayed for costs orders on an attorney own client scale.

[2] Plaintiff's action consists of two separate claims namely:

- a) Claim one is based on a written Personal Loan Agreement so concluded between the parties and in respect of which the defendant fell in arrears as a consequence of which the full amount still outstanding on the loan is claimed;
- b) Claim two relates to the overdraft facility so granted to the defendant by the plaintiff on the basis of an oral agreement concluded between the parties to that effect. This agreement is not governed by a written agreement as the Personal Loan and can therefore only attract a party-party cost order.

Arguments on behalf of the plaintiff

[3] The plaintiff's claim herein is derived from a written agreement so concluded between the parties, a copy of which is annexed to the plaintiff's particulars of claim, marked "A" ("the agreement"), the terms and conditions of which were incorporated into the particulars of claim as if specifically referenced and therefore so pleaded. As part of agreement the defendant made a written declaration whereby she agreed to be bound by the general terms and conditions attached to the agreement. She further expressly stated that she understood the terms and conditions so embodied therein as well as the risks associated therewith to her.

[4] It follows that the scale of costs sought by the plaintiff is that stipulated in clause 13 with specific application to the scale of costs between attorney and own client. It consequently follows that in respect of claim one the scale being sought is one which was contractually agreed upon between the parties.

Legal considerations and discussion

[5] The answer is however found in a judgment of this court, to wit *Development Bank of Namibia v Vero Group CC*¹ where Masuku J explained the following regarding the cost scale of attorney own client. He said:

‘There has been a raging debate over the years regarding the scale of costs, especially whether there should be a distinction between attorney and client costs and attorney and own client costs. Generally, costs are granted on the party and party scale. There are those case, where because of some untoward behaviour that the court may sanction costs on the punitive scale, otherwise referred to as attorney and client costs. There is another category, referred to as attorney and own client costs over which there is debate regarding whether it differs from attorney and client costs. It is unnecessary to engage in that debate in the light of what follows below.

[9] There are instances, such as in *Whelan v Whelan*² where parties enter into an agreement in terms whereof the defendant is to pay ‘all the costs incurred by the defendant on the scale as between attorney and own client so as to give the defendant a full indemnity in respect of such costs.’ As intimated above, the instant matter was such a case.

[10] In dealing with class of attorney and client costs, Zietsman J held as follows in *Whelan v Whelan*:

‘It is clear that parties can agree to a basis of taxation different from that which will be applied when a simple order is made that attorney and client costs are to be paid. In the case of *Enslin GR v Gallo D* 1984 (1) PH F27 (D) it was held that where an unsuccessful litigant was ordered to pay the other party’s costs “as between attorney and own client” such costs should be taxed on the most generous of the three bases referred to by Roos. But even in such a case costs authorised by the client, but which could be described as unnecessary luxuries would not be allowed.’

[11] Dealing with the concept of attorney and own client costs, Van Dijkhorst J stated the following in *Ben McDonald Inc and Another v Rudolph and Another*³:

‘The term “own client” is a misnomer. In the context of taxation or otherwise an attorney can only tax a bill of costs incurred by him in respect of his (own) client’s matter. Not that of the client of somebody else. “Attorney and own client costs” therefore has a technical meaning – pertaining to the basis of taxation – when used in the context of litigation. These costs are allowed on taxation of an attorney’s bill

¹ *Development Bank of Namibia v Vero Group CC* (HC-MD-CIV-CON-2021/02716) [2022] NAHCMD 50 (11 February 2022).

² *Whelan v Whelan* 1990 (2) SA 29 (E) 30-31.

³ *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 B-C.

to his own client. They include all costs except when unnecessarily incurred or of an unreasonable amount.'

[12] It is clear that in this matter, the parties entered into a written agreement in terms of which all costs incurred in relation to litigation would be paid at the rate of an attorney and own client. In this regard, the costs, as stated immediately above, include all costs. This means that if DBN, for instance, incurred costs in instructing counsel in the drafting or settlement of the pleadings and appearance in court, it is accordingly entitled, in terms of the agreement, to recover those costs incurred in relation to counsel from the defendants in this matter.

[13] It would appear to be trite learning from the Ben McDonald case above that the only basis upon which the taxing officer can legitimately disallow items relating to attorney and own client costs is if the said costs are unnecessarily incurred or of an unreasonable amount.'

[6] In the matter of *Ben McDonald Inc and Another v Rudolph and Another*⁴ (also quoted by Masuku J above) Van Dijkhorst J described the terminology used for categories of costs as follows:

'1. Party and party costs:

These are costs awarded against the losing party in litigation and are taxed in terms of Rule 70 with a view to a full indemnity to the successful party but limited to costs necessary or proper for the conduct of the litigation...

2. Attorney and client costs:

2.1 In cases where the losing party in litigation is to pay them, this means the same as attorney and own client costs as defined below.

2.2 In cases where the losing party in litigation is to pay them to the successful party this means all reasonable costs incurred on behalf of the client although not strictly necessary or 'proper'. In practice this means that these costs are taxed according to tariff, but generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on party and party basis. The limited scope of this taxation follows from the fact that Rule 70 also governs taxation between attorney and client.

2.3 Attorney and own client costs, whether in the sense of 2.1 above or where they are to be paid by the losing party to the successful party, means all costs incurred except where unreasonable.

Agreed items or amounts are presumed to be reasonable... This presumption of reasonableness cannot be irrebuttable as this would open the door to clients agreeing to exorbitant fees with attorneys or counsel in the knowledge that the opponent will foot the bill. This will be *contra bonos mores*. My approach that in

⁴ *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 B-C.

an attorney and own client bills which have to be paid by the other party the attorney should not be given a free hand, untrammelled by the frown of the Taxing Master, is in conformity with the approach of the Appellate Division in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 608. The appellate Division in placing its stamp of approval on orders for attorney and client costs still insisted on a stricter approach on taxation where the bill is taxed against the losing party as 'it is essential...to prevent injustice to the latter'. Admittedly the term 'attorney and own client costs' was not used, but the principle is the same. A court may castigate a party in an award of costs but will not countenance unjust treatment.'

[7] The issue was also canvassed by Stegmann J in *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*⁵. He said the following:

'Inasmuch as Eksteen J applied the principles of *Nel*, Loots is in my respectful view further authority for the propositions that:

1. When a bill drawn as between attorney and client is to be taxed, the basis of taxation varies according to whether the costs debtor who must pay the bill is the attorney's own client or the opposing party. A stricter basis of taxation applies when the opposing party must pay ('inter-party attorney and client taxation') than when the attorney's own client must pay ('pure attorney and client taxation'). This is to avoid injustice to the opposing party. This stricter (inter-party attorney and client) basis of taxation is referred to as an 'intermediate' basis because, though 'stricter' (ie less generous to the costs creditor) than the taxation of a bill to be paid by a client to his own attorney, it is nevertheless in principle more generous (to the costs creditor) than the party and party taxation of a bill to be paid by a costs debtor, in the ordinary way - a taxation that must adhere strictly to the tariff in Rule 70 (unless the case is one contemplated by Rule 70(5)(a), so that the Taxing Master may, in his discretion, depart from the tariff).
2. The 'intermediate' (inter-party attorney and client) basis of taxation applies whether the costs debtor has been ordered to pay attorney and client costs, or whether he has merely agreed to do so (cf *Loots* (above at 433H); and *Markman v Richardson* 1969 (3) SA 465 (E) at 467C - D).
3. The 'intermediate' basis of taxation does not justify departures from the tariff in Rule 70 except, in terms of subrule (5)(a) 'in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable'.
4. The mere fact that one party ('the costs debtor') has agreed to pay the costs of another ('the costs creditor') taxed as between attorney and client does not necessarily constitute an 'extraordinary or exceptional' case within the meaning of that phrase in Rule 70(5)(a); nor does the fact that a law association of local attorneys has agreed amongst themselves upon a tariff higher than that contemplated

⁵ *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W).

by Rule 70.'

[8] It is therefore clear that although a cost order of attorney own client is recognized, it is very similar to an order for costs to be paid on an attorney client scale. The taxing master still has the oversight to tax down costs claimed on both these scales if in the taxing master's opinion the amount claimed is exuberant and *contra bonus mores*. The concern raised by the court regarding the fact that any amount can now be agreed upon and then be payable, is in a way taken care of by the oversight of the taxing master. It is further also necessary to note that any of the contracting parties would be entitled to the same costs scale and where the litigation in this instance is instituted against the bank, the contracting party would also be entitled to claim costs on an attorney own client scale.

[9] In the result, I make the following default judgment orders:

In the first matter - *First National Bank Namibia v Nepolo*

AD CLAIM 1

1. Payment of the amount of in the amount of N\$59 670.47.
2. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 4.50% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 1 March 2023 until date of payment.
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11. Interest calculated on the aforesaid amount at the prime rate (10.75%) plus 4.50% per annum calculated on the daily balance and compounded monthly in arrears from 25 February 2023 until date of payment.

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13. Interest calculated on the aforesaid amount at prime rate (10.75%) plus 6.45% per annum and which interest is calculated on a daily basis and compounded monthly in arrears as from 28 February 2023 until date of payment.

IN RESPECT OF CLAIMS 1 AND 2

14. Costs of suit as between counsel and own client such costs to include the costs of one instructing and one instructed (where employed).

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:

<p>A Strydom On instructions of Theunissen, Louw & Partners, Windhoek</p>	
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