

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ELIFAS HAMEVA

FIRST APPELLANT

IMMANUEL HAMEVA

SECOND APPELLANT

versus

THE MINISTER OF HOME AFFAIRS

RESPONDENT

CORAM: MAHOMED, C.J. et DUMBUTSHENA,
A.J.A, et HANNAH, A.J.A.

Heard on: 1996.04.23

Delivered on: 1996.10.09

APPEAL JUDGMENT

HANNAH, A.J.A. : This is an appeal from a decision of the High Court upholding a decision of the taxing master to disallow certain costs incurred in litigation between the parties.

The appellants were the plaintiffs in an action brought in the High Court against the respondent. The claim was settled on the basis that the respondent would pay to the appellants the sum of N\$7 500 together with the appellants' disbursements in accordance with the High Court tariff. A bill of costs was then prepared by the Legal Assistance Centre who had acted on behalf of the appellants and on 17th November, 1994 the bill was taxed. By agreement between the parties the taxing master allowed two items in respect of

disbursements to the deputy-sheriff for service of documents. In addition he allowed disbursements made in respect of the appellants' travelling and subsistence expenses presumably incurred in order to attend trial. However, the taxing master disallowed the balance of the bill amounting to N\$2 467 comprising disbursements made for counsel's fees and stamp duty.

The Legal Assistance Centre, which had paid the disbursements from its own funds, was dissatisfied with the taxing master's ruling and it requested him to state a case for the decision of a judge in terms of Rule 43 of the High Court Rules. That the taxing master did and the matter was subsequently heard by the High Court (Mtshabane and Teek J.J.) and the taxing master's decision was upheld.

The point successfully taken on behalf of the respondent before the taxing master and upheld by the Court quo concerned the deed of trust in terms of which the Legal Assistance Centre was established. The deed of trust created a charitable and educational trust known as the Legal Assistance Trust for the purposes of:

- Ma) Establishing and supporting a Legal Assistance Centre at or by which legal assistance will be given in the public interest and without charge to persons requiring such assistance and at or by which legal research and legal education may also be undertaken.
- b) Generally to support, in addition to the Legal Assistance Centre, any other similar undertaking and to engage in any other related activities which in the opinion of the trustees are likely to further the interests of law and justice."

Having set out these two general purposes of the trust the deed then set- out four objects of the trust, the first two of which are as follows:

- " (a) to establish and provide financial support to a Legal Assistance Centre or Centres at or by which legal assistance will be given in the public interest and without charge to persons requiring such assistance and at or by which legal research and legal education may also be undertaken. To employ the Director of each such Centre (who shall be a qualified advocate or attorney) and other members of the staff of any such Centre including advocates and attorneys and to pay salaries of the said employees directly or through the Centre;
- (b) to provide financial assistance to persons to enable them to obtain legal advice or legal assistance if in the opinion of the Trustees the giving of such advice or assistance is likely to further the purposes of the Trust."

The argument successfully advanced before the taxing master and the Court a quo was essentially this. The Legal Assistance Centre was established in terms of the deed of trust and, as such, is bound by the provisions of the trust instrument. The trust deed provided in unambiguous language that one of the purposes of the trust was to establish and

SUDDORC -

".... a Legal Assistance Centre at or by which legal assistance will be given in the public interest and without charge to persons requiring such assistance"

It also provided that one of its objects was to establish and support financially - .

".... a Legal Assistance Centre or Centres at or by which legal assistance will be given in the public interest and without charge to persons requiring such assistance"

It is clear from these words, so the argument went, that the Legal Assistance Centre is bound, in terms of the trust instrument, to render legal assistance to those it chooses to assist without charge to those persons. And that remains the position whether the legal assistance is given by legal practitioners actually in the employ of the Legal Assistance Centre or by legal practitioners instructed by the Legal Assistance Centre. Whichever be the case, the Legal Assistance Trust itself is bound by the terms of the trust instrument to provide the necessary finance with the result that the assisted person incurs no liability for legal expenses whatsoever. And if the Legal Assistance Centre enters into an agreement with the assisted person to recoup disbursements such as counsel's fees, and in the instant case there was no evidence that it had, that would be contrary to the provision in the trust instrument that legal assistance will be given without charge and, as such, would be ultra vires the trust deed.

The next leg of the argument turned on the legal principles underlying an award of costs in civil litigation. Rule 70(3) of the Rules of the High Court provides:

"(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 shall be borne by the party
against whom such

order has been awarded, the taxing master shall, on every taxation, 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"

It was not contested by the appellants that a bill of costs is that of the client and not the client's attorney: City Real Estate v Ground Investment Group (Natal) (Pty) Ltd and Another, 1973(1) SA 93 (N) at 97A; Costello v Registrar of the Kich Court, Salisbury and Another, 1974(3) 289 (R) at 290 F. Indeed the sub-rule just cited makes that much clear when it refers to a full indemnity for all costs reasonably incurred by the party who has been awarded an order for costs. And, so the argument went, the appellants were not entitled to claim the cost of disbursements which were incurred not by them but by the Legal Assistance Centre, disbursements for which they themselves were not liable.

Before this Court Mr Smuts submitted on behalf of the appellants that the respondent's argument was flawed and that the taxing master and the Court a quo were wrong to accept it. Mr Smuts submitted that when regard is had to the purposes and objects of the trust deed it becomes clear that the words "without charge" refer only to services provided by the Legal Assistance Centre directly through its own employees. The Legal Assistance Centre is not precluded by the trust deed from employing the services of expert witnesses or counsel in the furtherance of litigation, so counsel contended, nor is it precluded by the trust deed from recovering disbursements paid to

such witnesses or counsel from those it assists. It
would, in these

circumstances, be wholly artificial or unnecessarily-restrictive to construe the words "without charge" as extending to such disbursements. And it cannot therefore be said that the disbursements which were disallowed on taxation were not incurred by the appellants in relation to their claim. The taxing master was wrong to disallow them.

One ordinary meaning of the word "charge" is a liability to pay money laid upon a person (see Shorter Oxford Dictionary. 3rd ed.) and, in my view, the word "charge" is used in that sense both in the preamble to the trust deed and in its objects clause. In other words, legal assistance provided by the Legal Assistance Centre will be given, to persons requiring such assistance without imposing on those persons any liability to pay money. In short, the legal assistance will be free.

The question which, in my opinion, lies at the heart of this matter is what is the Legal Assistance Centre obliged by the terms of the trust deed to provide without charge? The short answer is legal assistance but legal assistance can, of course, take many different forms. At one end of the scale it may simply be the giving of legal advice. At the other end it can be the financing of a full-blown law suit. In the context of the trust deed I am firmly of the view that the expression "legal assistance" should be given its widest meaning. The trust was clearly designed to provide the widest possible legal assistance in deserving cases. I can see no justification for limiting the expression "legal assistance" to assistance provided

directly through the

Legal Assistance Centre's own employees, as Mr -Smuts contended. The Legal Assistance Centre can, and I have no doubt in many cases does, provide funds to enable an entire action to be brought and fought. And when it does then on my reading of the preamble to the deed of trust and clause 2(a) thereof it cannot look to the assisted person for the recovery of the expenses involved whether they be disbursements or otherwise. I cannot accept Mr Smuts' argument to the contrary.

The position is not dissimilar to that in Gundrv v Sainsbury. 1910(1) K3 645. In that case there was an agreement between the plaintiff and his solicitor that nothing should be paid to the solicitor for costs. The English Court of Appeal had to consider the position of the unsuccessful defendant to the action. The Court held that at common law party and party costs are only given in the character of an indemnity. It accepted that they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. If the defendant had been ordered to pay costs the party receiving them would have been given a bonus. That was contrary to justice, common sense and the law.

The same principle has been accepted in Roman-Butch jurisdictions. For example, in Texas Co (SA) Ltd v Cape Town Municipality, 1926 AD 467 [Inr.es](#) C.J. said at p. 4 88:

"Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend

litigation as the case may be Speaking generally, only amounts which the suitor has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs." •

The learned Chief Justice then referred to certain exceptions to the general rule such as the case of an attorney who personally and successfully conducts his own case.

It should be mentioned that Mr Smuts referred us to certain other English cases such as Davies v Taylor fNo. 2) , 1973(1) All ER 955 (HL) ; O'Brien v Another v Robinson (Mo. 2). 1973(1) All ER 969 (HL) ; and Lewis v Averav (No. 2), 1973(2) All ER 229 (CA) . In the first-mentioned case the House of Lords held that the costs of a successful unassisted party in the appeal proceedings were costs incurred by him in those proceedings even though, under the terms of an insurance policy, his insurance company had agreed to pay the costs. Mr Smuts submitted that the same should apply by analogy to the present case. However, the case can, in my view, be readily distinguished. It was decided on the basis that in the absence of proof of an agreement between the respondent and his solicitors or between the solicitors and the insurance company that the respondent would not pay the solicitors costs, the solicitors could look to the respondent for payment for the work done and his liability would not be excluded by the fact that the insurance company had itself agreed to pay their costs. In the instant case, as I have endeavoured to point out, any liability of the appellants to pay for the

legal assistance provided by the Legal Assistance Centre was excluded by the terms of the trust deed.

The second-mentioned case was similar to the first and I will not dwell on it. In the third-mentioned case the appellant received legal assistance from the Automobile Association to pursue his appeal. He was successful in the appeal and applied for his costs to be paid out of the legal aid fund, the respondent having been legally aided. The question arose whether the costs had been incurred by him. Lord Denning M.R. said it was clear that the appellant was the person responsible for the costs. The Automobile Association only indemnified him against the costs. This case can, therefore, readily be distinguished on the facts from the one under consideration.

Other points were argued by Mr Smuts but for the most part they were subsidiary points dependent on the success of his principal argument and it is therefore unnecessary to deal with them. In so far as he sought to rely on the fact that the taxing master allowed disbursements in respect of the charges of the deputy-sheriff and that there is no difference in principle between these disbursements and those in respect of counsel's fees the answer is that these items were allowed by agreement between the parties. And in so far as he sought to rely on awards of costs in South Africa where the successful party was assisted by the Legal Resources Centre in that country the answer is that the point taken by the respondent before the taxing master was, in all probability, never taken in those cases. Further,

the trust deed under which the Legal Resources Centre in South Africa is established may well differ from the one which we have- to consider.

A further point argued on behalf of the appellants in the Court a cue concerned the application of the res inter alios principle. This point was described by the Court a quo as having been advanced in desperation and flying in the face of well-founded principles. I agree with that description. The point was not advanced with any real vigour before us and I can see no merit in it.

For the taxation review no have succeeded the Court a quo had to be satisfied that the taxing master was clearly wrong in disallowing the items in question: Ocean Commodities Inc. & Others v Standard Bank of S A Ltd & Others, 1984(3) SA 15(A). I found that in the circumstances of the case it could not so find. I would go further. In my opinion, the taxing master, having dealt with the issues before him with considerable acumen and care, arrived at the correct conclusion. The appeal must be dismissed; but as the respondent is not seeking an order for costs there will be no order in that regard.

The appeal is dismissed and no order is made as to costs.

I agree

MAHOMED, C.J

I agree

DUMBUTSHENA, A.J.A
11

ON BEHALF OF
APPELLANTS: Instructed
by:

ON BEHALF OF
RESPONDENT: Instructed
by:

ADV D F SMUTS
Legal Assistance Centre

ADV L C MULLER, S.C.
Government Attorney