



NOT REPORTABLE

CASE NO: SA 79/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DIETMAR DANNECKER

Applicant

and

LEOPARD TOURS CAR AND CAMPING HIRE CC

First Respondent

BARBARA HAUSNER

Second Respondent

MANFRED HAUSNER

Third Respondent

Coram: FRANK AJA

Heard: IN CHAMBERS

Delivered: 17 September 2020

Summary: This is an application for review of the Taxing Master's *allocatur*. The Taxing Master allowed N\$36 000 as fees to counsel in respect of the perusal of the record and awarded N\$16 200 as a day fee for attending to court and arguing the appeal. Applicant objected to these amounts. The cost items objected to were items 31(1) and 31(5) of the bill of cost. Applicant contended further that he also objected to items 31(3) and 31(4).

The issue before court is whether the fees allowed by the Taxing Master in respect of the fees claimed for the engagement of what is referred to in the bill of costs as 'counsel' and which for the purposes of the taxation, was accepted to refer to an instructed legal practitioner as opposed to the instructing legal practitioner.

Rule 25(3) provides that 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 . . .'. In this case, contemporaneous notes made during the taxation indicate that there was an objection only to items 31(1) and 31(5) – the contemporaneous notes on the copy of the bill of costs in possession of the respondent reflect the same objection. The Taxing Master's stated case dated 30 June 2020 mentions that there were objections to these two items only, to which respondent agreed.

Rule 26(2) states that the fees of an instructed legal practitioner (counsel) shall not be taxed unless the court authorises it. This means the court must have already indicated that these extraordinary costs are to be allowed in terms of its costs order. Secondly, the costs of appearance to argue the appeal are not specified in Annexure 'A' and as pointed out in *Afshani*, this allows the Taxing Master to tax day fees and refreshers to legal practitioners engaged in the appeals in his or her discretion. The quantum of these fees will 'by necessity, differ from case to case and depend on the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount of the dispute and any other factors the Taxing Master may consider relevant, such as the degree of expertise and seniority required (not possessed by) whoever appears in the matter'.

Held, where an item was not objected to at the taxation, an objection cannot be raised afterwards.

Held, the objective documentary evidence, namely the contemporaneous notes made on the bills of costs indicate that items 31(3) and 31(4) were not objected to when the taxation took place on 11 June 2020 and that the request to include these two items in the stated case cannot be allowed.

Held that, the principle in *Afshani & another v Vaatz* finds application. As far as item 31(1) is concerned, it should have been taxed in terms of Annexure 'A' to rule 26, namely para 1(b) under heading 'Taking instructions' and para 1(b) under the heading 'Perusal'. In the result, what should have been taxed under item 31(1) of the bill of costs was N\$17 800 and not N\$36 000.

Held that, item 31(5) of the bill of costs (ie attendance on appeal) is not specified as a separate item in Annexure 'A'. The Taxing Master is not prevented from regarding this as an extraordinary item to be taxed in his discretion.

Held that, the Taxing Master correctly acted within his powers when he determined item 31(5) in the bill of costs.

It is thus held that, the review succeeds in respect of item 31(1), but not that of item 31(5) of the bill of costs. Each party shall pay its own costs.

REVIEW JUDGMENT

FRANK AJA:

[1] The applicant seeks to review the Taxing Master's *allocatur*. The bone of contention is the fees allowed by the Taxing Master in respect of the fees claimed for the engagement of what is referred to in the bill of costs as 'counsel' and which for the purposes of the taxation, was accepted to refer to an instructed legal practitioner as

opposed to the instructing legal practitioner. It is evident from the bill of costs that the respondents' legal practitioner (instructing legal practitioner) engaged another legal practitioner (instructed legal practitioner) to assist the respondents in the appeal. For the sake of convenience this instructed legal practitioner is referred to as 'counsel'.

[2] The Taxing Master allowed N\$36 000 as fees to counsel in respect of the perusal of the record and awarded N\$16 200 as a day fee for attending to court and arguing the appeal.

[3] Mr Vaatz on behalf of the applicant objected to these amounts. He raised three issues. First, all legal practitioners who practise in the Supreme Court are subject to the same tariff of fees and hence that the claim in respect of the perusal of the record should have been based on the number of pages as per the tariff of fees which would entitle the respondent to be reimbursed in the amount of N\$1695 in respect of the two days used to peruse the record. In respect of the daily fee relating to the hearing of the appeal, Mr Vaatz points out that the actual time spent in court was 2¹/₂ hours and per the tariffs stipulated per hour this item should have been, if taxed at the maximum tariff, an amount of N\$3900. On this basis the respondent will be allowed a total reimbursement in respect of the perusal of the record and the appearance in court of N\$5595 instead of the N\$52 000 that the Taxing Master allowed.

[4] I must point out in passing that the respondents do not take issue with the calculations based on the tariff by Mr Vaatz. The reference to N\$1695 in respect of the perusal is actually wrong as the tariff allows N\$10 per page which means the

taxed amount should be N\$16 950 for the record containing 1695 pages and not N\$1695 as suggested by the respective legal practitioners.

[5] The second issue raised by Mr Vaatz was that counsel's fees cannot be claimed as the rules only allow for 'such costs, charges and expenses' as stipulated in the rules and not for fees which according to Mr Vaatz cannot be equated with 'costs, charges or expenses'.

[6] The third issue raised by Mr Vaatz is the reasonableness of the fees charged by counsel. The unreasonableness of the fees are premised on two considerations. Firstly, the unreasonableness of charging a full day for the hearing of the appeal when it only took 2¹/₂ hours. According to the submission of Mr Vaatz no other profession would allow such fee. Secondly, the instructed legal practitioner's daily rate of N\$25 000 is averred to be totally unreasonable. According to Mr Vaatz, if one multiplies this with 22 working days per month over an 11 month's period (he graciously allowed counsel one month's leave) this person will earn about N\$6 million per annum which Mr Vaatz maintains is an extremely high income.

[7] The two cost items objected to and referred to above were included as items 31(1) and 31(5) of the bill of costs. Mr Vaatz contends that he also objected to items 31(3) and 31(4) of the bill of costs. There is a dispute on this score between the Taxing Master and the respondent's legal practitioner on the one hand and Mr Vaatz on the other and I deal with this dispute before I get back to items 31(1) and 31(5) of the bill of costs.

[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.

[9] The bill of costs on which the Taxing Master made his *allocatur* and which amounts to contemporaneous notes made during the taxation indicates that there was objection only to items 31(1) and 31(5). The contemporaneous notes on the copy of the bill of costs in possession of the respondents' legal practitioner reflect the same position, ie objections against items 31(1) and 31(5) only. The Taxing Master in his stated case dated 30 June 2020 mentioned that there were objections to these two items only. The respondents agree with this proposition. However Mr Vaatz per a notice styled 'Request for Stated Case' sought a stated case in respect of items 31(1), 31(3), 31(4) and 31(5) on the basis that the principles he maintains should be applied to tax 'instructed counsel's fees' would be applicable to these other items too. Whereas it is correct that if the principle advanced by Mr Vaatz is applied to items 31(3) and 31(4) these items will have to be reduced or disallowed, I am of the view that the objective documentary evidence, namely the contemporaneous notes made on the bills of costs referred to above indicate that items 31(3) and 31(4) were not objected to when the taxation took place on 11 June 2020 and that the request to

include these two items in the stated case cannot be allowed and accordingly I do not deal with these items in this review.

[10] As far as item 31(1) is concerned, Annexure 'A' to rule 26 provides under the heading 'Perusal' expressly for the perusing of a record on appeal and allows N\$10 per page in this regard. In addition under the heading 'Taking Instructions' the issue of taking instructions to prosecute or defend an appeal is likewise specifically referred to and the costs stipulated is between N\$500 and N\$900. As it is clear from *Afshani & another v Vaatz*¹ where the tariff expressly provides for a matter, the tariff is to be followed. Thus Maritz JA put it as follows:

'It falls to be noted, however, that any services incorporated in the meaning of those legal concepts which have been specified separately in the tariff (such as "perusing record on appeal" . . .) ought to be taxed as a separate item'

[11] It thus follows that items 31(1) should have been taxed in terms of the provisions of Annexure 'A' namely para 1(b) thereof under the heading 'Taking Instructions' and para 1(b) under the heading 'Perusal'. This means that what should have been taxed under item 31(1) is N\$900 in respect of the accepting of the instructions to appeal and N\$16 950 in respect of the perusal of the record. It is common cause that the record consists of 14 volumes containing 1695 pages. In the result what should have been taxed under item 31(1) of the bill of costs is N\$17 850 and not N\$36 000.

¹ *Afshani & another v Vaatz* 2007 (2) NR 381 (SC) para 31.

[12] As far as item 31(5) of the bill of costs is concerned, ie the attendance on appeal, this is not specified as a separate item in Annexure 'A'. This does not prevent the Taxing Master from regarding this as an extraordinary item to be taxed in his discretion. Firstly, rule 26(2) states that the fees of an instructed legal practitioner (counsel) shall not be taxed unless the court authorises it. This means the court has already indicated that this extraordinary costs is to be allowed in terms of its costs order. Secondly, the costs of appearance to argue the appeal is not specified in Annexure 'A' and as pointed out in *Afshani* this allows the Taxing Master to tax day fees and refreshers to legal practitioners engaged in appeals in his or her discretion.² The quantum of these fees will 'by necessity, differ from case to case and depend on the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount of the dispute and any other factors the Taxing Master may consider relevant, such as the degree of expertise and seniority required (not possessed by) whoever appears in the matter'.³

[13] On the basis of the above principle the Taxing Master acted within his powers when he determined item 31(5) in the bill of costs. It seems the Taxing Master did not accept the daily fee of N\$25 000 but worked on a daily fee based on N\$18 000. I cannot fault this nor was there any criticism specifically aimed at this rate.

[14] Lastly, as mentioned, Mr Vaatz submitted that counsel's fees cannot, in the context of the rules be taxed as the rules refer to costs, charges and expenses which he submits does not include counsel's fees. I do not agree. Rule 26(1) expressly

² *Afshani* at 372A.

³ *Afshani* at 392B-D.

refers to the fees allowed to legal practitioners conducting any matter in this court. These fees are stated to be set out in Annexure 'A'. The heading to Annexure 'A' confirms this as it reads 'Legal Practitioners Fees'. Furthermore the legal fees are in any event a costs to a litigant. I am thus satisfied that fees of counsel can indeed be taxed pursuant to Annexure 'A' of the rules.

[15] As the review in respect of item 31(1) of the bill of costs is successful, but not that of item 31(5) of the bill of costs I am of the view that each party should pay its own costs in respect of this review. I do acknowledge that the amount in respect of item 35(1) of the bill of costs is higher than that of item 31(5) however, the challenges on behalf of the applicant against the reasonableness of the fees failed as well as the submission with regard to the non-taxability of the fees of instructed counsel. Hence my view that the proposed costs order would be fair.

[16] In the result I make the following order:

- (a) The taxation review succeeds to the extent set out below.
- (b) The instructed counsel's fees referred to in item 31(1) of the respondents' bill of costs is taxed down to N\$17 850.
- (c) The Taxing Master's *allocatur* is set aside and substituted by the following:
Taxed and allowed in the amount N\$83 435,60.

- (d) Each party shall pay their own costs in respect of this application.

FRANK AJA

APPLICANT:

A Vaatz

Of Andreas Vaatz & Partners, Windhoek

SECOND and THIRD RESPONDENTS:

S Oosthuizen

Of Erasmus & Associates, Windhoek