



REPORTABLE

CASE NO: SA 51/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ULTIMATE SAFARIS (PTY) LTD

Applicant

and

JIM JEREMY GARISEB

Respondent

Coram: FRANK AJA

Heard: In Chambers

Delivered: 08 April 2022

Summary: This is a review, in terms of rule 25 of this court's rules, of a case stated by the Taxing Master at the request of the applicant. The respondent was, with costs, successful against the applicant on appeal. The respondent was represented by a legal practitioner instructed by the Directorate of Legal Aid.

The Taxing Master taxed and allowed the bill in the total amount of N\$ 242 598.53. This decision is taken on review on the principal ground that the legal practitioner who acted on behalf of the respondent could not charge more for the prosecution of the appeal than the maximum rate allowed for in the Legal Aid Regulations, i.e. N\$10 000 per appeal.

Held, that s 17 of the Legal Aid Act 29 of 1990 provides that costs are taxed in the normal manner irrespective of whether a litigant was legally aided or not. Thus that section renders the fact that a litigant made use of a legal practitioner appointed by the Director of Legal Aid irrelevant to the taxation of costs.

Held, further, that the Taxing Master acted upon a wrong principle by treating the cost order as one of a legal practitioner and client's own costs, rather than that of a legal practitioner and client costs. There is a further misdirection by the Taxing Master by ignoring the fact that a universal tariff charge per hour is contrary to the provisions of the tariff.

The allocatur issued in this matter is set aside and the affected items on the bill of costs are referred back for reconsideration by the Taxing Master.

TAXATION REVIEW

FRANK AJA:

Introduction

[1] The respondent was the successful party on appeal to this court in a dispute he was involved in with the applicant. Respondent's legal practitioner on appeal was appointed by the Director of Legal Aid. Applicant was ordered to pay 'the costs of the appeal on the scale as between legal practitioner and client'. This is the same scale that was prior to Independence of Namibia refer to as 'attorney and client' scale.

[2] The respondent in due course provided his bill of costs and it was taxed by the Taxing Master on the above basis who issued an allocatur on 29 November 2021 in the amount of N\$242 598,53. The applicant seeks to review this determination by the Taxing Master.

[3] The attack on the allocatur on behalf of the applicant is twofold, namely that the legal practitioner who acted on behalf of the respondent could not charge more for the prosecution of the appeal than the maximum rate allowed for in the Legal Aid Regulations,¹ i.e. N\$10 000 per appeal and in the event that the normal tariff applied, that the acceptance of the hourly fee of N\$2500 per hour as per the bill of costs by the Taxing Master was not justified.

Legal Aid Act 29 of 1990 (the Act)

[4] Section 17 of the Act deals with the position where costs are awarded to a legally aided person as it happened in the present matter. Section 17(1) provides as follows.

‘Where a court awards costs to a legally aided person in any proceedings, such costs shall be the costs which would have been payable if the services performed under legal aid had been performed by a practitioner on the instruction of a client without benefit of legal aid, and such costs shall be taxed accordingly.’

[5] Section 17(2) provides that the costs so taxed shall be payable to the Director of Legal Aid who may pursuant to s 17(5) refund the amount or a portion thereof to

¹ Annexure B to the Legal Aid Regulations per GN 85, GG 6892, 30 April 2019.

the legally aided person which the director considers just and equitable where such person contributed to the costs of the litigation.

[6] Section 17(2) referred to above thus renders the fact that a litigant made use of a legal practitioner appointed by the Director of Legal Aid irrelevant to the taxation of costs. Costs must be taxed in the normal manner irrespective of whether a litigant was legally aided or not.

Invoices from legal practitioners

[7] It is clear from the invoices that the legal practitioner presented to the Director of Legal Aid that they were premised on the provision of Reg 6(1) of the Regulations. This regulation provides that such practitioner 'may claim an amount equal to 50% of the fees as set out in the . . . Supreme Court Rules . . . '.

[8] From the invoices it appears that the legal practitioner charged, among others, N\$2500 per hour for time spent on the matter. The invoices indicated the full amount claimed per hour from which 50% is deducted before disbursements were added. The Directorate of Legal Aid paid the legal practitioner on this basis.

[9] It is not necessary to determine whether this approach to the fees payable to the legal practitioner instructed by the Directorate of Legal Aid was correct or whether the tariff of N\$10 000 per appeal was the correct tariff as averred by the applicant, as whatever tariff applied between the legal practitioner and the Director of Legal Aid had no bearing on the taxation of costs as pointed out above.

[10] The invoices are however of importance as it suggests that the hourly fees is in line with the Supreme Court tariff. This is so because Reg 6(1) does not refer to 50% of a legal practitioner's usual rate but to 50% of the tariffs set out in the Rules of the Supreme Court. This tariff varies depending on the purpose for which the legal practitioner is engaged. Thus for preparation of the record it varies between N\$250 and N\$450 per half hour and for attendance at the hearing N\$350 to N\$650 per half hour.

[11] When it comes to the taxation of the bills of costs, the fact that an attorney and client scale must be used does not mean that what must be assessed are the costs which an attorney is entitled to recover from his or her own client irrespective of the result of the case as maintained by the Taxing Master.² A legal practitioner is not necessarily entitled to a higher fee for what he or she does as between attorney and client than the client can recover in a party and party bill.³ There is no reason why the tariff should not be taken as a guide where no express or implied agreement to authorise higher charges is proved.⁴ As pointed out in *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging*:

' . . . there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party. For instance, in the taxation of the attorney's bill against his client, the latter could not

² *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597.

³ *Oshry & Lazar v Taxing Master & another* 1947 (1) SA 657 (T) at 660.

⁴ See *Oshry case supra* and *Georgian House Antiques (Pty) Ltd v Henri Lidchi & Co (Pty) Ltd* 1970 (2) SA 488 (D).

object to a special fee, however high, to counsel which he had specially authorised. . . . But before the amount of attorney and client bill can be recovered against the opposite party it must be taxed against the latter. . . . And on this, taxation charges in the nature of luxuries incurred with the approval of the client, who may happen to be rich man, and may have authorised his attorney to pay exceptionally high fees to counsel, would not be allowed against the losing party. Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid by the client to his attorney.⁵

[12] Nevertheless, it seems that attorney and client charges are treated somewhat more liberally than party and party charges when it comes to the taxation of bills of costs in such cases.⁶ It need also be pointed out that the use of an hourly universal charge cannot be justified where this is not provided for by the tariff. For example, the legal practitioner in this matter claims N\$2500 for an hour spent on the perusal of the judgment *a quo* whereas the tariff provides for N\$35 per page in this regard.⁷ As stated in *Malcolm Lyons & Munro v Abro & another*⁸ it is not allowed 'to take as a baseline an universal tariff charge per hour which does not exist' in the rules or tariff. This is even so where an attorney and client bill of costs is taxed between an attorney and his client.⁹ It should be noted in this regard that the tariff provides for fees not specifically mentioned in the tariff under 'General' in the range between N\$100 and N\$300.

⁵ Nel case supra at 607-608.

⁶ *Sacca Beperk v Burger* 1974 (3) SA 732 (C).

⁷ Annexure A, Section C – Perusal para 1.

⁸ *Malcolm Lyons & Munro v Abro & another* 1991 (3) SA 464 (W).

⁹ *Malcolm Lyons* case above at 469D-E.

[13] Whereas the Taxing Master may allow tariffs higher than those specified for the tariff he can only do so in extraordinary or exceptional circumstances where a strict adherence to the tariffs will be unjust. No such justification appears from the record and this is possibly because of the wrong approach taken to the taxation based on the premise that what a successful litigant is entitled to is what he or she (would have) paid his legal practitioner irrespective of the outcome of the matter without measuring that payment against either the tariff or its reasonableness in the circumstances.

Conclusion

[14] In view of what is stated above I am of the view that the Taxing Master did not exercise his discretion properly and that he, furthermore acted upon the wrong principle in that he:

- (a) not properly applied his mind to the fact that the cost order was not a legal practitioner and client's own costs, but a legal practitioner and client costs, secondly;
- (b) ignored the fact that a universal tariff charge per hour is contrary to the provisions of the tariff.

[15] In the result, the allocatur will have to be set aside for the determination of the relevant items afresh as all these items relate to charges per hour that were allowed. The number of hours were reduced substantially by the Taxing Master and this aspect was not the subject matter of any attack and hence need not be reconsidered.

What needs to be reconsidered are only the hours accepted by the Taxing Master to establish whether such claims must be assessed on a time basis or on some other basis according to the tariff. Once this is established the reasonableness of the charges need to be considered with reference to the normal principles.

[16] As this review is successful, the applicant (respondent in the appeal) should be entitled to the costs of this review and I shall make such an order.

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

1. The allocatur issued in this matter is set aside.
2. Items 2, 4, 14, 20, 21, 28, 29, 36, 38, 39, 41, 51, 52, 53, 55, 57 and 60 of the Bill of costs are referred back to the Taxing Master to be determine of afresh taking cognisance of the principles set out in the judgment and to issue a new allocatur in respect of the Bill of costs.
3. The respondent (appellant in the appeal) is to pay the costs of this application.