



REPORTABLE

CASE NO.: SA 70/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

APPLICANT

and

PIONEERSPARK DAM INVESTMENT CC

RESPONDENT

CORAM: FRANK AJA

Heard: IN CHAMBERS

Delivered: 16 November 2022

Summary: The applicant in the present case sought to review the taxing master's *allocatur*. The issue on review is the amounts allowed in respect of two instructed legal practitioners of the applicant (as expressly sanctioned by a costs order of this Court). Applicant's complaint is that the fees were substantially reduced – amounting to a non-adherence to the notes in the tariff which entitles the taxing master to allow amounts in his discretion when there are extraordinary

or exceptional circumstances so as to ensure just recompense to a party in line with the principle of full compensation to a party of necessary and reasonable expenses.

At the taxation, the taxing master explained to the legal practitioners of the parties that he would deal with the instructed legal practitioners' fee as indicated in the judgement of *Afshani & another v Vaatz* (in that he apply an hourly rate of N\$1500 and N\$1800 in respect of the junior instructed legal practitioner and the senior instructed legal practitioner respectively). At the time, no objection was raised in respect of the amounts determined by the taxing master.

The taxing master contended that the general rule stated that objections at the taxation stage are a prerequisite for the bringing of a review of an *allocatur*. The court, at present, was required to determine whether there are circumstances where such general rule does not apply, and whether the present case is such a case. And to further determine whether the taxing master took into consideration the fact that instructed legal practitioners are entitled to fees for 'court appearance' which are not the same as fees for 'court attendance.'

Held, while the taxing master cannot be faulted for using his discretion, he failed to adhere to the approach spelled out in the *Afshani* case when it comes to appeals.

Held, it follows that the approach by the taxing master in the taxation of the fees of the instructed legal practitioners was fatally flawed as he never attempted to determine the reasonable composite fees for their appearances in the appeal but simply cut down the hours of their claim.

Held also that, despite the present circumstances where the applicant's objections were considered without being previously raised at the taxation, the Court cautioned legal practitioners that this should not be seen as a green light to seek reviews of items in bills of costs where they were not objected to at the taxation.

Held, the taxation review succeeds and the taxing master's *allocatur* is set aside and substituted in the sum of N\$ 64 942,50.

REVIEW JUDGMENT

FRANK AJA

[1] The applicant seeks to review the taxing master's *allocatur*. The bone of contention is the amounts allowed in respect of two instructed legal practitioners of the applicant. I should mention in passing that the costs order of this court expressly sanctioned the use two instructed legal practitioners and this is thus not an issue.

[2] The complaint is directed at the fact that the fees were substantially reduced which is alleged to be a non-adherence to the notes in the tariff which entitles the taxing master to allow amounts in his discretion when there are extraordinary or exceptional circumstances so as to ensure just recompense to a party in line with the principle of full compensation to a party of necessary and reasonable expenses. For this stance reliance is placed on the complexity of the matter seeing the nature of the legal questions involved.

[3] It is necessary to sketch some background to the taxation which forms the subject matter of this review for reasons that will become apparent below.

[4] The parties entered into a lease agreement which respondent purported to cancel. Applicant regarded this act by the respondent as a repudiation of the

contract and sued the respondent for damages. After the pleadings had closed in this damages claim, respondent brought an application to amend its plea. The amendment was objected to by the applicant. The objection to the proposed amendment raised issues of *functus officio*, the application of the *Turquand* rule, authority, the effect of s 63(2)(b) of the Local Authorities Act 23 of 1992 and the application or otherwise of the approach of *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 22 (SCA).

[5] The High Court dismissed the application for amendment holding that a previous intended amendment that was not proceeded with meant that the respondent was *functus officio* and could not raise it again, that the respondent could not rely on non-compliance with internal procedures in view of the deeming provision s 31A of the Local Authorities Act where the agreement was signed by the functionaries mentioned in this section and also that the principle in *Oudekraal* was applicable. The respondent noted an appeal to this Court (the first appeal). For the purpose of the first appeal heads of argument were filed on behalf of the applicant which engaged a legal practitioner and two instructed legal practitioners to act on its behalf. These instructed legal practitioners filed heads of argument in respect of the appeal as required by the Rules of this Court in which they dealt with all the issues raised above, as they had to as the court *a quo* found in favour of the respondent on all those issues. In addition, a point *in limine* was raised to the effect that the respondent did not have an appeal as of right but had to obtain leave to appeal as the refusal of an amendment did not amount to a final judgment on the merits. This point *in limine* was upheld and the appeal was struck from the roll with costs inclusive of the costs of one instructing legal practitioner plus two

instructed legal practitioners. The hearing of the first appeal took place on 13 June 2018.

[6] Respondent then approached the High Court for leave to appeal which leave was granted and in this manner this appeal (ie the second appeal) came to be heard. Unfortunately for the respondent the appeal was dismissed with costs inclusive of the costs of one instructing and two instructed counsel.

[7] For the purposes of the second appeal, the heads of argument used in the first appeal were essentially reiterated save for that portion that related to the need to obtain leave to appeal. The same instructed legal practitioners were used by the applicant to, in essence, come and present argument on the same basis that they would have presented had the first appeal not been struck from the roll.

[8] At the taxation, the taxing master explained to the legal practitioners of the parties, both of whom were represented, that he would deal with the instructed legal practitioners' fee as indicated in the judgment of *Afshani & another v Vaatz*¹ and in his discretion apply an hourly rate of N\$1500 and N\$1800 in respect of the junior instructed legal practitioner and the senior instructed legal practitioner respectively. Thereafter the taxing master commenced to deal with the bill of costs on an item per item basis. No objection whatsoever was raised in respect of the amounts determined in this manner by the taxing master. It was only afterwards that the objections were raised by the applicant.

¹ *Afshani & another v Vaatz* NO 2007 (2) NR 381 (SC).

[9] The taxing master points out that in circumstances where a legal representative does not object to an item that no objection can be raised subsequent to the taxation. This is indeed the general principle. Where the legal representative of a party, attends a taxation one can assume that such practitioner had prepared for the taxation and will object where he or she is not satisfied with the way the taxing master deals with an item. Failure to do so is clearly indicative that the taxing master's determination is not disputed or at the very least that such party abides by that decision.²

[10] The question thus arises whether there are circumstances where the above general rule does not apply and whether the present case is such a case. According to the objection whereas the legal representative accepted that the principles in *Afshani* would apply it was accepted on the 'basis that the taxing master understood the law correctly'. This is stated after the event and after the legal representative has studied *Afshani*. Issues are now raised, according to him, that the taxing master did not apply *Afshani* correctly. This, I am afraid, amounts to saying the applicant's legal practitioner was not properly prepared for the taxation and hence did not realise that the taxing master misapplied the principles stated in *Afshani* and hence did not object, but after the event, and being dissatisfied with the *allocatur*, he has studied *Afshani* and realised that he should have objected to certain items.

² *Dannecker v Leopard Tours Car and Camping Hire CC* (SA 79/2016) [2020] NASC (17 September 2020). Also see *Namibia Financial Institutions Supervisory Authority v Christian t/a Hope Financial Services (2)* (SA 36 of 2016) [2020] NASC 58 (20 October 2020) para 9.

[11] I have a little doubt that there will be exceptions to the general rule that objections at the taxation is a prerequisite for the bringing of a review of an *allocatur*. This Court can, after all, interfere where it is satisfied that the taxing master was clearly wrong when he made a specific ruling.³

[12] Applicant in its objections raised the issue that the taxing master did not appreciate the fact that the instructed legal practitioners are entitled to fees for 'court appearance' which is not the same as for fees 'court attendance.'

[13] Because I also had concerns in this regard I requested the taxing master 'for a detailed response to the matters raised by the applicant in its objection' which included the issue mentioned above. The taxing master however did not deal with the issue front on but referred to the fact that he did 'determine an appropriate hourly rate, reduced the number of hours claimed and taxed according to the Rules of the Supreme Court'.

[14] The issue raised is one that relates to an important general principle in respect of appeals heard to litigants in this Court and is not of importance only to the parties in this matter. I am of the view that it should be dealt with so as to set the tone for all further taxations in this Court. In the circumstances, the objections of the applicant will be considered despite not been raised at the taxation. I want to caution legal practitioners however that this should not been seen as a green light to seek reviews of items in bills of costs where they were not objected to at the taxation. Without some compelling reasons, such reviews will not be entertained

³ *Hameva & another v Minister of Home Affairs, Namibia* 1997 (2) SA 756 (SC) and *Ocean Commodities Inc. v Standard Bank of South Africa Ltd* 1984 (3) SA 15 (A) at 18E-F.

and where such reviews relates to anything that is of importance only to the parties to the particular bill of costs it will certainly not be a sufficient reason to deviate from the general rule.

[15] From the perusal of the invoices of the instructed legal practitioners, it is clear that what the taxing master did was to take the hours claimed by them for 'preparation of the heads of argument', 'perusal of the respondent's heads of argument, research and preparation for hearing' and 'appearance in the Supreme Court to argue the matter' and to reduce such hours quite substantially (for example from 25 hours to 11 hours in the case of the senior instructed legal practitioner). The accepted hours were then simply multiplied by the accepted rate namely N\$1500 or N\$1800 and this was the amount allowed in respect of fees of the instructed legal practitioners.

[16] The reduction in the hours claimed is commendable in view of the fact that the heads of argument were, in essence, a rehash of the previous heads of argument that were used in the first appeal and the research and preparation could not have been much more than refresher of what was already done and billed for in the first appeal. I can only reiterate the comments made in *J D van Niekerk en Genote ING v Administrateur, Transvaal*⁴:

'I am any event of the view that the way the fee was calculated, namely so much per hour, inapposite to the determination of advocate's fee for services of this nature. It places a premium on slow and inefficient work and leads to the asking of

⁴ *J D van Niekerk en Genote ING v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 601H-602B. See also *Scott & another v Poupard & another* 1972 (1) SA 686 (A) at 690C-D

a fee that is totally out of proportion with the value of the services that are indeed delivered’.

In the Namibian context, the reference to advocates must be read to refer to instructed legal practitioners.

[17] Whereas instructed legal practitioners may bill for their services using an hourly rate, the taxing master must ensure that what is taxed is a reasonable amount for the services delivered and hence the hours claimed must not simply be accepted on face value. As pointed out the taxing master did use his discretion in the present matter and he cannot be faulted in this regard.

[18] What the taxing master, in focussing on the hours claimed, failed to do was to adhere to the approach spelled out in the *Afshani* case when it comes to appeals.

(a) ‘. . . the first day fee, should only include . . . a combined fee for preparation, drawing heads of argument and appearance in Court.’⁵

(b) There is a difference between attendance and appearance –

‘The preparations for and work involved in an “appearance” at the hearing of an appeal are significantly more extensive and complex than that which an “attendance” only require – or so one would hope!’⁶

[19] The fact that the preparations of heads of argument is to be regarded as being part of the first day fee for an appeal was dealt with as follows in *Ocean*

Commodities:⁷

⁵ *Afshani* at 392B-C.

⁶ *Afshani* at 389E-F.

⁷ At 19C-E.

'Heads of argument are drawn when counsel has done his research and prepared for the appeal. They reflect the result of that research and preparation and, if counsel should thereafter, due to the lapse of time, regard it as necessary to consider them again, the extra work involved will normally not be so substantial as to warrant a separate fee. A Taxing Master could, of course, depending on the circumstances, and if persuaded that the extra work was such as to warrant his doing so, make allowance for that work when determining a composite fee for the whole of the appeal.'

[20] It follows that the approach by the taxing master in the taxation of the fees of the instructed legal practitioners was fatally flawed as he never attempted to determine the reasonable composite fees for their appearances in the appeal but simply cut down the hours of their claim and in fact allowed only three hours in respect of their appearances.

[21] It follows that a day fee should have been allowed to the instructed legal practitioners for their appearances at the hearing which would have included the fees for their heads of argument and their preparation. On the fees accepted by the taxing master this would have been N\$15 000 and N\$18 000 respectively. Furthermore, seeing the time lapse between the first appeal and the second appeal, a refresher should have been allowed to them in respect of the preparing for the second appeal. In my view, another half day would be reasonable, ie a further N\$7500 and N\$9000 respectively. (I should point out that refreshers are not granted as a matter of course in appeals).⁸

⁸ See *Ocean Commodities* at 19E-N.

[22] I have pointed out that the registrar accepted certain rates for the purpose of the taxation. Whereas I am not that concerned about the rate of N\$1500 per hour for the junior instructed legal practitioner, I am not sure that the rate accepted in respect of the senior instructed practitioner is a reasonable one. I suspect it is too low. I however, not having to deal with taxations on a daily basis, I am unable to express a definite view on this matter. I would however suggest that the taxing master revisit this issue and adjust the rate to reflect the reasonable marker rate for the services rendered by instructed legal practitioners in appeals.

[23] The taxing master, based on the hourly rates accepted by him, allowed the fees of the junior instructed legal practitioner in the amount of N\$10 500 and in respect of senior instructed legal practitioner in the amount of N\$19 800 (he also allowed the latter disbursements in the amount of N\$88,50). The difference between what was allowed and what should have been allowed is as follows. In respect of the junior instructed legal practitioner, it is N\$12 000 (N\$15 000 + N\$7 500 – N\$10 500). In respect of the senior instructed legal practitioner it is N\$7200 (N\$18 000 + N\$9000 – N\$19 800) to this latter amount the disbursements allowed must be added back. It follows that the *allocatur* should thus have been issued with an additional amount of N\$19 288,50 added to it (N\$12 000 + N\$7200 + N\$88,50).

[24] As no costs are sought in the review, no cost order will be made.

[25] In the result the *allocatur* that was issued in the amount of N\$45 660,52 should be altered to read N\$64 942,02 (N\$45 660,52 + N\$19 288,50). I thus make the following order:

(a) The taxation review succeeds.

(b) The Taxing Master's *allocatur* is set aside and the following is substituted for it:

'Taxed and allowed in the sum of N\$64 942,50.'

FRANK AJA

APPEARANCES

APPLICANT:

R Mondo

Instructed by Nixon Marcus Public Law
Office

RESPONDENT:

B Iita

Instructed by Nambahu Associates