REPORTABLE

CASE NO: SA 53/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL **Applicant**

and

ATLANTIC OCEAN MANAGEMENT (PTY) LTD **First Respondent**

FISH SPAIN S. L. **Second Respondent**

Coram: FRANK AJA
Heard: **IN CHAMBERS**
Delivered: **9 April 2024**

Summary: This is a review application pursuant to rule 25 of the Rules of this Court against the taxing master's *allocatur*. The applicant attacks the awards allowed in respect of three items in the bill of costs (ie items 23, 24 and 25). The taxing master alleges that the applicant's representative at the taxation of the bill of costs simply sought clarity and queried the items and did not formally object to any of them. The general warning for legal practitioners attending taxations as stated in *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* (SA 70-2019) [2022] NASC (16 November 2022) applies in that, lawyers attending taxations must

be properly prepared and must make their objections in such a manner that the taxing master notes them and makes a ruling in respect of each objection or run the risk that the matter will not be reviewable because no proper objection was raised against the taxing of the items sought to be reviewed.

For purposes of this review application, this Court accepts that the 'queries' raised by applicant's legal representative were intended to be objections and the acceptance by the taxing master of the explanations provided by junior counsel for the first respondent amounted to rulings in respect of the objections.

Held that, taxation ensures that the successful party is reimbursed for all reasonable charges and disbursements which may fairly be claimed against the unsuccessful party (Annexure 'A' (Note I) of the Rules of this Court refers). This means that the unsuccessful party should not be oppressed by having to pay an excessive amount of costs.

Held that, to simply refer to the voluminous nature of the record to justify a fee for four days work, as if junior counsel had to read the record for the first time is not correct or acceptable – *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* and *J D van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) refers. Junior counsel on appeal was also junior counsel in the court *a quo*. He did not have to study the record afresh. Counsel simply had to refresh his mind with reference to a record he had studied and had been involved in in the court *a quo*. It thus follows that the taxing master must ensure that the fee charged is in proportion to the value of services indeed rendered.

Held that, in terms of a costs order, a party is entitled to recover, against another party, costs that are necessary and reasonably incurred in relation to the process that must be followed to note and prosecute an appeal as spelt out in the rules of court (and not necessarily all costs in connection with a litigation). The 'contextualization' exercise is so far outside the scope of what is normally done when appearing on appeal that it cannot be regarded as costs that can be recovered on a party-and-party basis.

The taxation review succeeds.

REVIEW JUDGMENT

FRANK AJA

[1] The current respondents instituted an application in the High Court for the rescission of a preservation order granted to the Prosecutor-General (PG) in respect of the 'positive balance in the foreign custom currency account' held at a local bank in the name of Atlantic Ocean Management (Pty) Ltd (Atlantic Ocean). The application was successful and this judgment of the High Court can be found in the Namibian law reports, cited as *Atlantic Ocean Management Group (Pty) Ltd & another v Prosecutor-General* 2017 (4) NR 939 (HC). As is evident from this case, Atlantic Ocean was represented in the High Court by two instructed counsel.[1]

[2] The PG, not satisfied with the judgment of the High Court, appealed against it to this Court. On appeal, this Court dismissed the appeal and upheld the judgment of the High Court. This judgment is also reported in the Namibian law reports and it is cited as *Prosecutor-General v Atlantic Ocean Management (Pty) Ltd & another* 2019 (4) NR 1031 (SC). From this judgment it is clear that the same two instructed counsel who appeared for Atlantic Ocean in the High Court also appeared for them in this Court.[2] This Court's order reads as follows:

> 'The appeal is dismissed with costs, which include the costs of one instructing and two instructed counsel, where engaged.'

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[1] Paragraph 26.
[2] At 1034D.

[3] Atlantic Ocean submitted their bill of costs for taxation in respect of the appeal and the taxing master issued an *allocatur* in the amount of N$376 353,88. The PG is dissatisfied with this *allocatur* and seeks a review thereof pursuant to rule 25 of this Court. The PG attacks the awards allowed in respect of three items in the bill of costs namely items 23, 24 and 25. These items all relate to the fees charged by the junior instructed counsel involved.

[4] Item 23 in the fees charged by junior counsel to draft the heads of argument is presented in the bill of costs as follows:

> 'Attend: do draft heads of argument (41 hours) in the amount of N$55 350.00.'

[5] Item 24 is stated in the bill of costs as follows:

> 'Do draft contextualization of relevant case law in the amount of 67 500.00.'

[6] Item 25 is stated in the bill of costs as follows:

> 'Consult (senior counsel) and settle contextualization of relevant case law (5 hours) in the amount of N$12 100.'

[7] The objection on behalf of the PG in respect of item 23 is that the time spent on the drafting of the heads of argument was 'excessive in the context of the issues dealt with in the heads'. In response it is contended on behalf of Atlantic Ocean that the time spent was reasonable considering the record comprised of 9 volumes amounting to 940 pages. Further, that the heads and accompanying bundle of

authorities filed on behalf of the PG had to be considered and when regard is had to the length of the heads of argument eventually filed on behalf of Atlantic Ocean, then there was no basis not to allow this item.

[8] In respect of item 24 the stance of the PG is simply that no provision is made for a 'contextualization' exercise in the rules. The heads of argument must include reference to the relevant case law applicable. In respect of item 25, the PG submits that this consultation can only relate to and constitute legal practitioner-and-client-costs and presumably not party-and-party costs. In respect of items 24 and 25, the stance of Atlantic Ocean is also that these were reasonable charges. According to it item 24 claims 50 hours spent to prepare a document titled 'summaries of the applicable case (law) amounting to 55 pages . . . for the purposes of assisting the court in argument'. That this document assisted the court at the hearing is stated to be 'evident from the judgment itself'. Item 25 is then the result of the exercise undertaken in item 24 which Atlantic Ocean maintained was also reasonable.

[9] The taxing master states that the legal practitioner for the PG at the taxation of the bill of costs did not formally object to any of the items. According to him, when it came to item 23, she wanted clarity as to why the heads of argument drafted by junior counsel took four days. Junior counsel involved gave an explanation and she left it at that. The taxation moved on to item 24. She again simply queried whether the 'contextualization' was necessary and why the PG would be liable for such costs where such exercise was not contained in the rules of the court. Once again junior counsel explained to her that it was for the assistance of the court and that the judges appreciated it and she once again left it at that. According to the taxing

master when it came to item 25, as it was agreed that as the ‘contextualization’ assisted the court, he accepted this item and, ‘nobody raised any objection or said it is an attorney-and-client costs’.

[10] On behalf of the PG it is maintained that counsel acting on her behalf at the taxation did not merely query the mentioned items but objected against them and the objections made are reiterated and it is pointed out that the ‘contextualization’ exercise followed on the heads of argument where Atlantic Ocean’s case should have been set out and presumably ‘contextualized’.

[11] It is unfortunate that this dispute arises on the papers. I can only assume that the legal practitioner acting on behalf of the PG was not assertive enough in making it clear that she did not accept the explanations proffered by junior counsel on behalf of Atlantic Ocean. I simply do not accept that the taxing master would state that there was no objection if he thought there was. He was clearly of the view that his position stated in this regard was a correct factual view as there are no notes on the bill of costs recorded or relating to any objection to the mentioned items which there would have been had he thought the explanations of junior counsel from Atlantic Ocean were not acceptable to the legal practitioner acting for the PG.

[12] Where there is no objection taken at taxation in respect of any item of a bill of costs, a party will normally not be allowed to review such bill, especially where a lawyer represented such party whom the taxing master is entitled to assume had prepared for the taxation. This is so because a lack of objection to any item in the bill of costs is then clearly indicative of the fact that the ruling made by the taxing master

in respect of such item is not disputed. Thus the normal rule is where there is no objection made, no right to review arise.[3]

[13] I will however for the purposes of this review accept that the 'queries' raised on behalf of the PG were in fact intended to be objections and that the acceptance by the taxing master of the explanations provided by junior counsel for Atlantic Ocean amounted to rulings by him in respect of such objections. I must however again repeat the warning expressed in *Municipal Council of Windhoek* that lawyers attending taxations must be properly prepared and must make their objections in such a manner that the taxing master note them and make a ruling in respect of each objection or run the risk that the matter will not be reviewable because no proper objection was raised against the taxing of the items sought to be reviewed.

[14] What is in any event clear is that the taxing master clearly heard the 'queries' raised with regard to items 23, 24 and 25 and the fact that he, subsequent to the explanations of junior counsel in this regard, did not see the need to take the matter any further and thus implicitly accepted such explanations when he approved them. In essence he, by necessary implication, ruled that the reasons advanced by junior counsel for Atlantic Ocean were satisfactory and hence there was nothing more for him to ask or follow-up on.

[15] For the reasons set out below I am of the view that the explanations offered by junior counsel are not convincing to such extent that the taxing master should

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[3] *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* (SA 70-2019) [2022] NASC (16 November 2022) para 9.

have accepted them at face value. In fact, I am of the view that he was clearly wrong to accept them unqualifiedly.[4]

[16] Taxation must ensure that the successful party is reimbursed for all reasonable charges and disbursements which may fairly be claimed against the unsuccessful party. In terms of annexure 'A' (Note I) of the rules of this Court which deals with the fees of legal practitioners what is sought to be attained is a 'full indemnity for all costs reasonably incurred' in respect of 'costs, charges and expenses' that was 'necessary or proper for the attainment of justice' and not the costs incurred through 'over caution' 'or by payment of a special fee to an instructed legal practitioner or by other unusual expenses'. It must also be kept in mind that the unsuccessful party should not be oppressed by having to pay an excessive amount of costs.[5]

[17] When it comes to the heads of argument, it must be remembered that junior counsel was also junior counsel in the court *a quo*. Apart from the documentation relating to the noting of the appeal and events thereafter in the record which are of a procedural nature, and which have no bearing on the merits of the appeal and furthermore would not even constitute one of the volumes of the record of the appeal counsel had, at least once before, perused what is essentially now the record, and worked through it for purposes of the hearing *a quo.* He thus did not have to study the record afresh. He simply had to refresh his mind with reference to a record he had studied and had been involved in previously when he appeared in the High

[4] *Legal and General Assurance Society Ltd v Lieberum N.O. & another* 1968 (1) SA 473 (A) at 476 and 478, *Rocky & Witherow (Pty) Ltd v Taxing Master & another* 1970 (1) SA 702 (N) at 703 and *Municipal Council of Windhoek* para 11.
[5] *Openshaw v Russell* 1967 (4) SA 344 (E) at 346.

Court. He was further in possession of heads of argument, the preparation of which he was involved in for the court *a quo*. In these circumstances, to simply refer to the voluminous nature of the record to justify a fee for four days, as if he had to read it for the first time, was not correct. As pointed out in *Municipal Council of Windhoek*, to simply calculate fees on the basis of time worked is not correct, and unacceptable. One must ensure that the fee charged is in proportion with the value of services indeed rendered. I can only reiterate again the comments in this regard made in *J D van Niekerk en Genote Ing v Administrateur, Transvaal*:[6]

> 'I am in any event of the view that the way the fee was calculated, namely so much per hour, inapposite to the determination of advocate's fees for services of this nature. It places a premium on slow and inefficient work and leads to asking of a fee that is totally out of proportion with the value of the services that are indeed rendered.'

Here it must be borne in mind that if the judgment *a quo* is compared with the one of this Court, it is clear that both courts grappled with the same issues and the use of the heads of argument of the High Court as a template for the heads of argument in this Court which has made the task of the junior much less onerous.

[18] In view of what I have stated above, I am of the opinion that item 23 in the bill of costs should be reduced by 50 per cent, ie from N$55 350 to N$27 675.

[19] As far as items 24 and 25 are concerned I must express surprise that this was claimed from the PG in the bill of costs. The 'contextualisation' of the case should have appeared from the heads of argument filed for this Court if this was indeed

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[6] *J D van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 601H-602B.

needed. This exercise is simply not provided for in the rules. To simply assert that this assisted the court and that it is evident from the judgment is neither here nor there. Firstly, I could not find any reference in the judgment to support this assertion and secondly, what assists the court is spelled out in the rules relating to the process that must be followed to note and prosecute appeals (eg. noting of appeals and what such notice must contain, filing of the record and what the record should contain and the filing of heads of argument and bundle of authorities). These are the necessary and reasonable costs that can be recouped in terms of a costs order. A party is entitled against another party in litigation to recover reasonable costs incurred and not necessarily all costs in connection with a litigation. One would hope that authorities cited in the heads of argument would be done in the context and to embark on a 'contextualization' exercise is so outside the scope of what is normally done when appearing on appeal that it cannot be regarded as costs that can be recovered on a party-and-party basis. This may conceivably be regarded as legal practitioner-and-client costs but it is not necessary to decide this issue for the purposes of this application.[7]

[20] It follows that items 24 and 25 of the bill of costs should have been wholly disallowed.

[21] In the result the *allocatur* must be reduced by one half in respect of item 23, ie from N$55 350 to N$27 675, by N$67 500 in respect of item 24 and N$12 100 in respect of item 25. This is a total of N$216 275. This means that the current total of the *allocatur* of N$376 353,88 needs to be reduced to N$160 353,88 (N$376 353,88 – N$216 275).

[7] *Magwill Carriers (Pty) Ltd v National Transport Commission & another* 1982 (1) SA 166 (T) at 169.

[22] I thus make the following order:

(a) The taxation review succeeds.

(b) The taxing master's *allocatur* is set aside and substituted with the following:

'Taxed and allowance in the amount of N$160 353,88.'

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FRANK AJA

REPRESENTATION

APPLICANT:	W R Uakuramenua Government Attorney
FIRST RESPONDENT:	S J Jacobs Instructed by Van der Merwe-Greeff Andima Inc.