NOT REPORTABLE

Case no: Poca 9/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARTIN SHALI **APPLICANT**

and

THE PROSECUTOR-GENERAL **RESPONDENT**

Neutral citation: *Shali v The Prosecutor-General (POCA 9/2011) [2012] NAHCMD 44 (31 October 2012)*

CORAM: **SMUTS, J**

Delivered on: 31 October 2012

JUDGMENT

SMUTS, J.:

[1] This court directed that the respondent pay the applicant's costs in respect of the latter's success in an application. The costs order included the costs occasioned by the employment of two instructed and one instructing counsel.

[2] The matter proceeded to taxation. The respondent objected to certain items in the applicant's bill. The taxing master partially upheld some objections and did not agree

with others. The respondent was however dissatisfied with the rulings of the taxation master in respect of 37 items and gave notice to the taxing master to state a case for decision in terms of rule 48(1), specifying the grounds of objection in respect of the items in question. The taxing master prepared a stated case and each of the parties thereafter filed their written submissions as contemplated by rule 48. The taxing master did not provide any further report and neither party requested to be heard in chambers or for the matter to be heard in court.

[3] In the respondent's contentions which were provided after the taxing master had prepared the stated case, the dispute narrowed to 22 items by reason of the fact that the respondent abandoned the review in respect of 15 items raised in the original notice. Before the items are dealt with individually or, where justified, as grouped together, it is appropriate first to refer to the principles governing reviews of taxations. It has been repeatedly held that a court would not interfere with the exercise of a taxing master's discretion unless that discretion has not been exercised judicially and has been exercised improperly where for instance facts were disregarded which should have been considered or matters considered which were not proper to have been considered, and furthermore where the taxing master failed to bring his or her mind to bear on the question in issue or has acted upon a wrong principle or where the opinion of the taxing master was clearly wrong[1].

[4] Rule 70 confers upon the taxing master the power to award costs "as appear to him or her to be necessary or proper for the attainment of justice or for defending the rights of any party." In exercising this discretion, the taxing master is take into consideration the fundamental rule that a successful party is entitled to his or he costs and that the purpose of taxation is, as specified in rule 70, for the successful party to secure a "full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence".

[1]Visser v Gubb 1981(3) SA 753 (C) at 754H – 755C and the authorities usefully collected there.

[5] I turn now to deal with the items which have given rise to the respondent's dissatisfaction with the taxing master's ruling.

Items 44 - 47 and 49 - 61

[6] These items relate to a second application brought by the respondent on 20 January 2012 against the applicant on an ex parte basis pursuant to the provisions of the Prevention of Organised Crime Act, 29 of 2004. This second application was for forfeiture of certain assets and for condonation. The respondent contended at the taxation that this application did not form part of the applicant's urgent application in respect of which costs were awarded to the applicant. As the second application was an ex parte application, the applicant did not participate in it. It was accordingly contended by the respondent that the items would constitute pre-litigation costs which could not be recovered on a party and party basis and not necessary for the attainment of justice on the part of the applicant.

[7] The taxing master found that these costs were justified because the applicant's legal practitioner was required to search for the documents at court and acquaint himself with the facts of the second application in order to bring the urgent application. The applicant's legal practitioner supported the taxing master's ruling. He submitted that it was necessary for consultations to have occurred concerning the changed circumstances of the further preservation application and the application for condonation. It was further submitted that even if these attendances constituted pre-litigation costs, the taxing master exercised his discretion properly in line with authority. Reference was made to Robinson v Teuves NO[2] where it was held that if a party could show that professional work, although done with the purpose of an anterior enquiry, was likely to be of direct use and service in an ensuing action, the taxing master would be justified in treating those costs as being properly incurred for the attainment of justice within the meaning of rule 70(3).

[2] 1974(1) SA 559 C

[8] It would seem to me that the taxing master was justified in considering that the costs fell within that category and that it was reasonably necessary for the applicant's legal practitioner to perform the services listed in these items. The review in respect of these items fails.

Items 74 -78

[9] These items were listed in the respondent's notice in terms of rule 48. They were not abandoned in the written contentions made by the respondent. No submissions were however advanced in relation to them in the respondent's written contentions. These items relate to consultations of the applicant's instructing legal practitioner with counsel which were taxed down in respect of the time claimed. They also include a single item in respect of perusal of the affidavit, as drafted and settled by counsel. It was submitted on behalf of the applicant that these consultations were necessary to prepare the urgent application. That application succeeded and a costs order was granted.

[10] I can find no fault with the exercise of the taxing master's discretion to allow the reasonable costs of consultations where in the exercise of his discretion he reduced the number of hours for consultations held from 25 hours to 17 hours. I also see no reason why the applicant's instructing counsel should be disentitled to a perusal fee in respect of the final draft affidavit as settled by counsel.

Item 119

[11] This item, being the attendance to prepare sort and arrange two sets of documents in lever arch file for counsel, was objected to in the respondent's notice in terms of rule 48. This objection was not abandoned in the respondent's written contentions but no submissions have had been advanced concerning it. I see no reason why the taxing master's decision to allow this item should be interfered with.

Item 135

[12] This item related to an attendance to index the instructing legal practitioner's own set of papers. It was taxed down from N$840 to N$280. The respondent submitted that it constituted attorney client costs and cannot reasonably be claimed in a party and party taxation. In my view this item was correctly allowed by the taxing master. Without taking such a step, an instructing legal practitioner would not be in a position to properly contribute at a hearing of the matter.[3]

Item 155

[13] This item was likewise included in the respondent's notice in terms of rule 48 but no written submissions were included in the contentions subsequently provided concerning this item. Nor was the review in respect of this item formally abandoned. It relates to instructing counsel attending at court to update an index. Only 30 minutes for this attendance were claimed. It would appear to have been taxed in that amount. I certainly am not able to find fault with the exercise of the taxing master's discretion to allow this attendance.

Items 184 and 186

[14] These two items involve substantial amounts. They relate to the attendances of senior and junior instructed counsel respectively. The respondent objected to them on two grounds. Firstly, the respondent contended that the hours claimed by both senior and junior counsel were unreasonable and unjustified. In the second instance it is submitted that the hourly fee allowed for senior counsel is unreasonable. Counsel claimed 75 and 78 hours of preparation respectively prior to the hearing and a further two days in respect of the hearing itself. The hours are specified in like fashion, and span several days. They are in 3 phases. They include extensive consultations with the instructing counsel and the preparation of the notice of motion and founding affidavit

[3]Monja v Pretoria City Council 1980(1) SA 103 (T)

and travelling to and from Windhoek for the purpose of those consultations. Secondly, further attendances related to studying the opposing affidavit and counter application, consultations and preparing, revising and finalising a replying affidavit. In the third instance, further attendances related to extensive research and preparing, revising and finalising heads of argument. In addition to these, two further days were claimed by counsel in respect of the hearing.

[15] I first deal with the objection to the amount taxed in respect of senior counsel's hourly rate. The hourly rate claimed in the bill was N$3 600. The taxing master taxed that down to N$2 800. Taking into account counsel's seniority and acknowledged expertise in the area of endeavour, I can find no fault with the exercise of the taxing master's discretion to tax down the rate claimed to N$2 800 as being reasonable and justified in the circumstances.

[16] The taxing master taxed senior counsel's bill at the rate of N$2 800 per hour for 75 hours for the initial three phases and using this rate as well for the two further days in respect of the hearing on a basis of 8 hours per day. Having considered the papers in the matter, I can find no fault with the amount of time taken for the purpose of preparing heads of argument, being 16 hours. The amount of time taken for the initial consultations and preparing the founding affidavit and the notice of motion being 41 hours including travelling time and the preparation of the replying affidavit being 18 hours would appear to me to be unreasonable and overcautious and excessive in the circumstances. Having regard to the issues raised in the matter and the papers themselves, I would consider that the taxing master should have disallowed 9 hours from the 41 hours for the initial phase and 6 hours in respect of the preparation of the replying affidavit. To permit for the 32 hours and 12 hours respectively for those exercises would in my view be reasonable and justifiable in the context of the litigation. The taxing master should thus have disallowed a total of 15 hours of the attendances claimed by senior counsel as well as 15 hours of the attendances claimed by junior counsel.

[17] Two days were claimed in respect of each counsel for the hearing. This is because counsel needed to travel to and from Cape Town. The point is taken by the respondent that these costs should not be allowed in respect of junior counsel given the fact that local junior counsel could have assisted senior counsel in the matter and there would then have been no reason for the incurrence of the extra day of fees in respect of junior counsel for the purpose of travelling to and from Cape Town. There is in my view merit in this point. It would in my view be unreasonable and unjustified for the travelling costs of junior counsel to be allowed, when briefed with senior counsel, as a party and party costs in these circumstances. It follows in my view that the costs in respect of junior counsel for the second day of the hearing should have been disallowed for this reason.

[18] In the applicant's written submissions, it is contended that the taxing master was clearly wrong to have only allowed junior counsel's fees at one third of those charged by senior counsel. Whilst it was correctly pointed out that junior counsel would be entitled to 50% of the fees of senior counsel as between party and party, this point is however not well taken on the facts of this taxation. Junior counsel however only claimed one third of senior counsel fees. The taxing master granted that which was claimed. He was accordingly not unjustified or unreasonable in doing so. The amount claimed by junior counsel was even further reduced by him in line with a cost estimate provided. The taxing master however allowed junior counsel's fees at a sum in excess of the fee estimate thus claimed and charged by junior counsel. As a consequence, an amount N$12 600 was incorrectly taxed on to the bill. In view of my conclusion that the taxing master should have disallowed certain of junior counsel fees, this issue could no longer arise and the amount thus incorrectly taxed on would fall away.

[19] It would follow that senior counsel's fees should have been disallowed by the amount of 15 hours at N$2 800 per hour in a total amount of N$42 000 and that junior counsel's fees should have been disallowed by an amount of 15 hours at N$1 200 per hour in an amount of N$18 000, as well as a further day fee, taxed at N$12 000, in

respect of the second day for the hearing. The total amount which should thus have been taxed off the bill amounts to N$72 000.

[20] It would follow that the respondent has been successful in part in respect of the review of the taxation of the several items originally raised. But the respondent does not ask for the costs of this review and I accordingly make no order as to costs.

[21] In the result the applicant's objection to certain of the hours claimed in respect of items 184 and 185 is to the extent set out above upheld. There is no order as to costs.

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DF SMUTS

Judge