

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00002

In the matter between:

HOLLARD INSURANCE COMPANY OF NAMIBIA LIMITED	1ST APPLICANT
HOLLARD LIFE NAMIBIA LIMITED	2ND APPLICANT
SANLAM NAMIBIA LIMITED	3RD APPLICANT
SANTAM NAMIBIA LIMITED	4TH APPLICANT
QUANTA INSURANCE LIMITED	5TH APPLICANT
TRUSTCO INSURANCE LIMITED	6TH APPLICANT
KING PRICE INSURANCE COMPANY OF NAMIBIA LIMITED	8TH APPLICANT
CORPORATE GUARANTEE AND INSURANCE COMPANY OF NAMIBIA LIMITED	9TH APPLICANT
OUTSURANCE INSURANCE COMPANY OF NAMIBIA LIMITED	10TH APPLICANT
NEDNAMIBIA LIFE ASSURANCE COMPANY LIMITED	11TH APPLICANT
BONBEN ASSURANCE NAMIBIA LIMITED T/A	

**BONLIFE
OLD MUTUAL LIFE ASSURANCE COMPANY
(NAMIBIA) LIMITED**

12TH APPLICANT

13TH APPLICANT

and

**MINISTER OF FINANCE
NAMIBIA NATIONAL REINSURANCE
CORPORATION**

1ST RESPONDENT

2ND RESPONDENT

Neutral citation: *Hollard v Minister of Finance* (HC-MD-CIV-MOT-REV-2017/00002)
[2020] NAHCMD 32 (31 January 2020)

Coram: CLAASEN, J
Heard: 4 SEPTEMBER 2019
Delivered: 24 JANUARY 2020
Reasons: 31 JANUARY 2020

Flynote: Costs – Taxation – Review of taxation by the court - Rule 75 - Rule 125(1) of the rules of court constitutes the basis for taxation of a bill of cost by the taxing officer and it also refers to rule 125(7) - Rule 125(7) envisages departure from the fairly rigid and prescriptive scales when in the discretion of the taxing officer exceptional and extraordinary cases present themselves where the strict adherence will be inequitable –

The taxing officer has to strive towards a balance between indemnifying the successful party and remaining within reasonable boundaries, whilst being mindful that if rule 125(7) finds application, he or she has latitude to permit fees over the tariff.

Court held that taxation review succeeds – Matter referred back to taxing officer to exercise her discretion accordingly -

Summary: The applicants were dissatisfied with the allocation by the taxing officer that disallowed the hourly rate charged by the senior instructed counsel on the basis that there can be no deviation from the tariffs –

The applicants approached the court on the basis that the matter was exceptional and extraordinary and therefore justified a deviation from the tariffs in terms of Rule 125(7) –

Court held the enabling provision requires adherence to the prescribed tariff but it also permits a degree of flexibility to the taxing officer in deserving cases as it has to be read with rule 125(7).

Court held on the papers of the taxing officer there is no basis on which I could find that the taxing officer applied her discretion judiciously.

Taxation review succeeds and matter is referred back to the taxing officer.

ORDER

1. The review application succeeds.
2. The determination by the taxing officer that she has no discretion to permit a fee for senior counsel above the prescribed N\$ 1800.00 per hour is reviewed and set aside.
3. It is declared that the taxing officer has a discretion in terms of rule 125(7) to allow an amount higher than the prescribed fees of N\$ 1800.00 in deserving cases.
4. The matter is referred back to the taxing officer to exercise her discretion in terms of rule 125(7) after having asked for and received submissions from the respective parties to enable the taxing officer to determine fees that are fair and equitable.

JUDGMENT

CLAASEN, J

Introduction

[1] This matter emanates from an administrative review instituted by several insurance corporations against the implementation of a compulsory cession of a certain percentage of the value of each insurance contract by registered insurers or registered reinsurers to the second respondent.

[2] Though the principal legislation, The Namibia National Reinsurance Corporation Act 22 of 1998 was passed 2 decades ago, the enforcement of the above system was promulgated only during October and December 2016 in Government Notices 266, 267 and 291. Quite a few insurance companies were dissatisfied with the scheme and launched an administrative review against it.

[3] Subsequently thereto the said notices were withdrawn. On 17 May 2017, the applicants herein obtained a cost order in their favour that first and second respondents must pay the applicants' cost of one instructing and two instructed counsel, jointly and severally, the one paying the other to be absolved.

[4] The parties appeared before the taxing officer and an allocatur was issued on 20 October 2017. The applicants were not satisfied with the ruling and on 10 November 2017 filed a review for taxation of costs in terms of rule 75 of the Rules of the High Court. The taxing officer complied and filed a stated case on 20 June 2018 with the record. The respondents did not file any submissions on the matter.

Grounds of review

[5] The applicants objected against items 63 to 117, excluding items 72, 73, 74, 97, 98, 106, 107, and 105.

[6] The objection in respect of all the items relate to the hourly rate of N\$ 3000.00 charged by the senior instructed counsel. The Taxing Officer disallowed the rate and taxed it down to N\$ 1800.00 per hour for the senior instructed counsel and N\$ 900.00 for the junior instructed counsel.

[7] The applicants grounded their review on the basis that the matter was exceptional and extraordinary and therefore justified a deviation from the tariffs. It was motivated with factors placed before the taxing officer such as complexity, the nature of the matter insofar as it entailed change and impact on the insurance industry as a whole, extra research and consultation were necessary and that the matter cannot be treated like a run of the mill motor vehicle accident case.

[8] The applicants' contention was that the taxing officer agreed that the matter was complex but failed to appreciate that she had a discretion in terms of rule 125(1) and rule 125(7) to depart from the prescribed tariffs. The argument was thus that the taxing officer was wrong in maintaining that there can be no departure from the prescribed tariff.

Taxing officer's ruling

[9] The sum of what is contained in the stated case by the taxing officer is rather scant. There is only one sentence in paragraph 4 that refers to the reasoning in the matter by the taxing officer. Therein it is stated that, the taxing officer's discretion applied to paragraph 5 of Section A and the maximum tariffs in Section B of Annexure E

to rule that the maximum rate for the instructed legal practitioner shall be N\$ 1800-00 per hour and N\$ 900-00 per hour for the second instructed legal practitioner as per party and party scale. Nothing else was stated in elaboration of the matter.

The issue

[10] The applicants made it clear that there is no qualm with the taxing officer's fixing of the junior counsel's fee at the rate of half of the senior counsel's fee, which provision is contained in paragraph 5 of Section A of Annexure E to the Rules of the High Court.

[11] The issue before the court is whether the taxing officer has a discretion on a party and party basis to go higher than the maximum hourly fee for senior counsel which is set at N\$ 1800-00 in Section B of Annexure E.

The applicable principles

[12] Rule 125(1) of the rules of court constitutes the basis for taxation of a bill of cost by the taxing officer. The rule provides as follows:

'The taxing officer is, subject to rule 124, competent to tax a bill of costs for services actually rendered by a legal practitioner in connection with litigious work of the court and he or she must tax such bill, subject to subrules (7), (8) and (11), in accordance with the provisions contained in Annexures D and E, except that the taxing officer may not tax costs in instances where some other officer is empowered to do so.'

[13] It is apparent that this rule incorporates rule 124, the tariffs in Annexures D and E as well as subrules (7), (8) and (11) as criteria that the taxing officer must follow in the exercise of awarding cost.

[14] Subrule 125(7) provides:

'The taxing officer may at any time depart from any of the provisions on tariffs in this rule in extraordinary or exceptional cases when strict adherence to the provisions would be inequitable and unfair.'

Disposal

[15] The general starting point is that a taxing officer has in the execution of his or her duties the discretion to permit costs that are necessary, proper and reasonable for the attainment of justice or for a party who defended the matter.

[16] Though the enabling provision requires adherence to the prescribed tariff it also permits a degree of flexibility to the taxing officer in deserving cases. Rule 125(7) envisage departure from the fairly rigid and prescriptive scales only when in the discretion of the taxing officer exceptional and extraordinary cases presents themselves where the strict adherence will be inequitable.

[17] I find the following statement by J Steyn in *Van Rooyen vs Commercial Union Assurance Co of South Africa Ltd*¹ relevant to the issue:

“Duly promulgated Rules of Court have the force of law and must be obeyed. But the obedience must be in context, and where a discretion is conferred by the Rules as to the mode of their implementation, and where a particular standard or tariff is provided as a guide and not as an absolute or unqualified measure or injunction, such obedience is in itself also flexible and related to the facts or the circumstances in respect whereof the discretion is to be exercised or the “guide” applied.”

[18] In regard to an equivalent provision in the Uniform Rules, in *Coetzee v Taxing Master South Gauteng High Court and another*² J Sutherland stated that:

“Evidently the wide discretion conferred in rule 70(5) is the true fount for any ‘application of the mind’ by a taxing master to the task of fixing a fee. Importantly, so it seems plain to me, the text of the subrule expresses a very clear structure to the approach licensed

¹ 1983 (2) SA 465 (O)

² 2013 (1) SA 74 GSJ

by the subrule; i.e. the tariff is the default position, which may be departed from under the conditions prescribed, i.e. 'extraordinary or exceptional cases...'

[19] The question then arises as to the meaning of the criteria of extraordinary and exceptional. The Concise Oxford English Dictionary³ defines the meaning of "exceptional" as "unusual; not typical."

[20] Black's Law Dictionary⁴ ascribes the following meanings to 'extraordinary', "out of the ordinary, exceeding the usual, average or normal measure of degree, beyond or out of the common order or rule; not usual, regular or of a customary kind; remarkable; uncommon; rare".

[21] It is implicit in rule 125(7) that a party who intends to rely on this provision has a duty to present relevant factual and legal issues to the taxing officer. During the taxation such an applicant has to tender sufficient reasons in order to satisfy the criteria as set out in this rule. In turn a taxing officer has to cumulatively evaluate the relevant factors and may depart from the tariffs in extraordinary or exceptional cases wherein strict adherence to the tariffs will be inequitable.

[22] This does not mean that the tariffs and the principle of reasonable and necessary costs are taken out of the equation. The taxing officer has to strive towards a balance between indemnifying the successful party and remaining within reasonable boundaries, whilst being mindful that if rule 125(7) finds application, he or she has latitude to permit fees over the tariff. I find the statement in *Cobb v Levy*⁵ at p 464H and 465A apposite here:

"Where a person is enjoined by statute to exercise a discretion, he ought not to preclude himself from doing so by following a rigid preconceived policy.

³ Stevenson & Waite Concise Oxford English Dictionary 12th ed, Oxford University Press. (2011)

⁴ Nolan & Connolly Black's Law Dictionary Abridged 5th ed, West Publishing Co. (1983)

⁵ 1978 (4) SA 459 (T)

[23] In turning to the nature of the case at hand, I consider this matter as an exceptional case in that it was a first impression case in respect of the implementation of the system of the compulsory cession of the respective specified values of each insurance contract by registered insurers and re-insurers. In that sense the scope of the issues were complex and called for labour by counsel that goes beyond what is done for a run of the mill case. This may include items such as, research of comparable statutes and resource material or consult authorities in jurisdictions that has implemented similar legislation. These items do not constitute an exhaustive list.

[24] I heed to the guidance by the Supreme Court in *Afshani v Vaatz*⁶ that reviewing courts should not readily interfere with the discretion of a taxing officer, unless he or she has not exercised his discretion judicially but has done so improperly or has not brought his or her mind to bear upon the question or has acted on a wrong principle.

[25] From the record and stated case it appears that the matter was approached on the basis that there can be no departure from the tariffs. Judging from the taxing officer's own papers it does not reflect that there was an appreciation of the issues in the matter. Thus there is no basis on which I could find that the taxing officer applied her mind to the evidence presented and exercised her discretion judicially.

[26] Based on the foregoing I make the following order:

1. The review application succeeds
2. The determination by the taxing officer that she has no discretion to permit a fee for senior counsel above the prescribed N\$ 1800.00 per hour is reviewed and set aside
3. It is declared that the taxing officer has a discretion in terms of rule 125(7) to allow an amount higher than the prescribed fees of N\$ 1800.00 in deserving cases.
4. The matter is referred back to the taxing officer to exercise her discretion in terms of rule 125(7) after having asked for and received submissions from the

⁶ SA 01-2004 [2007] NASC 18 October 2007

respective parties to enable the taxing officer to determine fees that are fair and equitable.

**C Claasen
Judge**

APPEARANCES:

APPLICANTS

R Heathcote

Instructed by:

Van Der Merwe-Greeff Andima Inc.