

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: I 2909/2006

In the matter between:

DIETMAR DANNECKER

PLAINTIFF

and

LEOPARD TOURS CAR & CAMPING HIRE CC

1st DEFENDANT

BARBARA HAUSNER

2nd DEFENDANT

MANFRED HAUSNER

3rd DEFENDANT

Neutral citation: *Dannecker v Leopard Tours Car & Camping Hire CC and Others* (I 2909/2006) [2022] NAHCMD 658 (5 December 2022)

Coram: SCHIMMING-CHASE J

Heard: 6 July 2022

Delivered: 5 December 2022

Flynote: Costs — Taxation — Review of taxation — Purpose of costs — Indemnification of successful party.

Costs - Taxation - Review of taxation - Taxing Master functionary in taxation - Court reluctant to interfere unless Taxing Master has exercised discretion improperly, has not brought his or her mind to bear upon the issue, or has based his decision on wrong principles.

Summary: The parties in this matter have since October 2006, been embroiled in litigation resulting from the rental of a 4x4 vehicle from the defendants, by the plaintiff while on safari in Namibia. This vehicle became damaged when the plaintiff attempted to cross a river.

The plaintiff claimed that the defendants misrepresented to him that the vehicle was insured, resulting in him having to pay for the damage to the vehicle, on the basis that the risk occurring was not covered.

The court handed down judgment on 5 December 2016, and held that the plaintiff made out a case that the second and third defendants represented to him that he enjoyed insurance during the period of rental of the vehicle.

It was further held that the plaintiff also bore the onus to prove that the negligent conduct on his part was not responsible for the loss, but for the misrepresentations, and the plaintiff failed to discharge his onus in that respect. The court further found that the plaintiff had also established an alternative claim of unjust enrichment, but only against the first defendant, a close corporation as the plaintiff failed to allege and prove personal liability of the second and third defendants. The plaintiff was thus only partially successful, and was ordered to pay the costs of the second and third defendants for the portion of the claim that he lost.

At taxation, the parties settled a substantial portion of the bill, save for a number of items to be decided on by the Taxing Master. The main objection of the plaintiff related to two main issues. Firstly, the translator's fees, where the plaintiff argued that the expenses of a translator are attorney-client fees. In the alternative, that the translation fee was too high in the circumstances. Secondly, the instructed counsel's fee. The plaintiff argued that the maximum amounts set in the tariffs in the High Court Rules, was allowed for instructed counsel's fee for various attendances by instructed counsel in preparation for and appearance at the trial, which was not justified considering the quantum of the claim.

Held that, the Taxing Master is the functionary enjoined with the obligation to ensure that only the costs, charges and expenses as appear to him or her to have been necessary or

proper for the attainment of justice or for defending the rights of any party, are allowed.

Held that, the Court will on review allow the Taxing Master a significant degree of appreciation in the exercise of his or her discretion. The court will only interfere with the Taxing Master's rulings, if he or she has not exercised the discretion judicially, that is if it is exercised it improperly, or if he or she has not brought their mind to bear upon the question, or has acted on a wrong principle.

Held that, the Taxing Master's decision on the objectionable items are upheld, as the discretion was not capriciously exercised.

ORDER

1. The taxation review fails and the Taxing Master's *allocatur* dated 6 May 2020 is upheld.
2. The plaintiff is ordered to pay the costs of the second and third defendants.

JUDGMENT

SCHIMMING-CHASE, J:

[1] The plaintiff, aggrieved by a number of rulings made by the Taxing Master during the taxation of a bill of costs, is seeking to have them reviewed under Rule 125 of the High Court Rules. Only certain of the items taxed in terms of the *allocatur* issued and dated 6 May 2020, are objected to by the plaintiff.

[2] The first defendant is a duly registered close corporation involved in the car rental business and the second and third defendants, who are husband and wife, jointly own the first defendant. The plaintiff, a Swiss national, concluded an agreement with the first

defendant, represented by the second and third defendants, for the rental of a 4x4 vehicle for use while on safari in Namibia. This vehicle became damaged when the plaintiff attempted to cross a river with the aforesaid vehicle.

[3] The plaintiff instituted action against the defendants during October 2006, claiming that the defendants misrepresented to him that he had insurance when in reality he did not, resulting in him having to pay for the damage to the vehicle, on the basis that the risk occurring was not covered. The plaintiff sought to recover the amounts he paid from the second and third defendants, alleging that they represented that they were a partnership, and further that they breached the Close Corporations Act 26 of 1988, and the Short-Term Insurance Act 4 of 1998. The plaintiff accordingly sued the first defendant, alternatively the second and third defendants, jointly and severally for the amount of N\$ 168 963.41, being the monies that he paid in respect of damage caused to the rental.

[4] The trial took approximately 22 days.¹

[5] An application for absolution from the instance was made during these proceedings which was heard on 26 February 2014, 13 March 2014, and 4 August 2014, and which was dismissed on 20 February 2015.

[6] After conclusion of the evidence, this court handed down an extensive judgment on 5 December 2016. It was held that the plaintiff made out a case that the second and third defendants represented to him that he enjoyed insurance, and that the defendants assumed to have offered insurance to cover loss arising from the plaintiff's driving of the vehicle. It was further held that the plaintiff bore the onus to prove that the negligent conduct on his part was not responsible for the loss, but for the misrepresentations, and the plaintiff failed to discharge that onus.

[7] This court further found that the plaintiff had also established an alternative claim of unjust enrichment, but only against the first defendant, a close corporation as the plaintiff failed to allege and prove personal liability of the second and third defendants

¹ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016).

either under the Close Corporations Act, or the Short-Term Insurance Act.

[8] The order set out below was made

1. The plaintiff's claim against second and third defendants in their personal capacities is dismissed with costs, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.

2. Plaintiff's claim against the first defendant succeeds in part and the first defendant is ordered to pay the amount of N\$168 963.41 less 15% to the plaintiff.

3. Plaintiff is awarded interest on the amount of N\$168 963.41 less 15% at the legal rate of 20% per annum calculated from the 3rd of July 2006 to date of payment.

4. In respect of the order in paragraph 2 above, the plaintiff is awarded costs of suit against the first defendant consequent upon the employment of one instructing and one instructed counsel.

5. Plaintiff's claim against first, second and third defendants for the recovery of N\$28 653 is dismissed.'

[9] As part of its review grounds against the Taxing Master's ruling, the plaintiff has in essence two main bones of contention. Firstly, the plaintiff takes issue with the translator's fees, specifically dealt with in items 130, 166, 506, 529, and 557 of the bill of costs. The objection is that the expenses of a translator are attorney-client fees, because the translations were not made from German to English, but from English to German, merely to accommodate the second and third defendants who are German speaking. In the alternative, it was argued that the translation fee was too high in the circumstances.

[10] The second objection relates to instructed counsel's fee. In this regard the plaintiff's issue lies with the fact that the maximum amounts set in the tariffs in annexure E to the High Court Rules was allowed for instructed counsel's fee for various attendances by instructed counsel in preparation for, and appearance at the trial, when the value of the case was a mere N\$168 963,41. The plaintiff also took issue with

reservation fees of instructed counsel allowed by the Taxing Master for appearance for purposes of arguing simple interlocutory applications. The plaintiff argued that the Taxing Master misdirected herself by allowing the highest tariff permitted in paragraph 2 of annexure E for work undertaken by counsel in defence of this matter. The general principles relating to the time necessarily taken, the nature of the subject matter in dispute, the amount in dispute, and the seniority of the practitioner were reiterated. In respect of the seniority consideration, it was submitted that a senior legal practitioner should take less time for the same work.

[11] The plaintiff also argued that, under the issue of counsel's fees, the second and third defendants should only receive half of the fees, being their rightful *aliquot* share. As I understood the argument, the plaintiff's issue is that the defendants were all represented by the same legal team. From the order of court, the plaintiff's claim succeeded against the first defendant, and he was awarded costs, such costs to include the costs of one instructing and one instructed counsel. Therefore, as regards the plaintiff's claim, one half of the costs should be deducted due to his success against the first defendant, as it were, and the other half should be the amount that should be his loss against the second and third defendants in their personal capacities. In other words, only half of the costs listed in the bill of costs should be treated as costs incurred by the first defendant, in respect of which the plaintiff has been successful, and the other half of the costs should be treated as being costs owed to the second and third defendants who were always treated as partners in these proceedings as they were sued jointly and severally.

[12] The defendants' position is that the Taxing Master properly exercised her discretion in line with judicially accepted principles, and that her rulings on the various items in dispute should be upheld. With respect to the plaintiff's argument on the *aliquot* share of counsel's fees, the defendants indicate that this was not argued at all at the taxation. Since this argument is being raised for the first time, the court should not consider it.

[13] In her stated case in terms of rule 75(4), the Taxing Master pointed out that the parties initially agreed to engage each other privately to seek agreement on their respective bills of costs, and returned for taxation only on those items on which

agreement could not be reached, which related to instructed counsel's fees and translation fees. Formal taxation in respect of the remaining items in dispute took place on 10 March 2020, and was finalised on 19 March 2020. The *allocatur* was issued on 6 May 2020.

[14] The Taxing Master further pointed out that when the request for a stated case was made, the plaintiff raised additional objections that were not previously raised or dealt with at the taxation. Those items were listed in the stated case.²

[15] Rule 125(3) provides that the Taxing Master must allow such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, with a view to awarding the party who has been awarded an order for costs a full indemnity for all costs necessarily incurred by him or her in relation to his or her claim or defence.³

[16] In terms of rule 125(3), a party dissatisfied with the ruling of the Taxing Master may request the Taxing Master to state a case for the decision of a Judge in respect of such ruling. This can only be done where an item or part of an item was objected to or 'disallowed by the Taxing Master on his or her own accord ...'. When an item is not objected to at the taxation, an objection cannot be raised afterwards.⁴

[17] The general principle to be applied in these matters is that the court must be satisfied that the Taxing Master was clearly wrong, before it will interfere with a ruling made by him or her. The matter must differ so materially from the Taxing Master's view as to initiate the ruling, therefore courts are slow to interfere with a Taxing Master's ruling.⁵

[18] Turning to the items that form the subject matter of the plaintiff's review. Items 160

² Specifically items 317, 357, 386, 416, 442, 570, 574, 575, 590, and 632.

³ *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) para 27.

⁴ See also *Dietmar Dannecker v Leopard Tours Car & Camping Hire CC* (SA 79/2016) para 8.

⁵ *Johannesburg Consolidated Investments Co v Johannesburg Town Council* 1903 TS 111; *Pinkster Gemeente van Namibia v Navolgens van Christus Kerk SA* 2002 NR 14 (HC) at 17F-G; *President of South Africa and Others v Gauteng Lion Rugby Union and Another* 2002 (2) SA 64 (CC) at para 14; See also *Damaseb DCJ Court-Management Civil Procedure of the High Court Juta* (2020) at 362-363.

(8 and 9), 253 and 664 (6), dealt with the fees of instructed counsel.

[19] Item 160 (8 and 9) relate to separate fees apparently charged by instructed counsel for appearances at court on the same day, one being a reservation fee for 'Attending court on trial', and a fee for attending court on argument in relation to an application to compel further discovery and further particulars for trial. The plaintiff's issue is with the charging of a reservation fee for an interlocutory application. The defendants submit that the Taxing Master acted within her powers to allow a day fee. The Taxing Master states that she allowed both fees, guided by the High Court tariffs annexure E, Section B that makes provision for a day fee for instructed counsel. This is the extent of the information provided by the Taxing Master in the stated case.

[20] The bill of costs reveals that on 2 November 2009, the defendants' instructed counsel received an application to compel launched by the plaintiff, which was refused on 3 November 2009. It appears from the bill of costs that the interlocutory application scuppered the trial initially set down for that week. The bill of costs reveal further show that from 29 October 2009, trial preparation was being charged for by instructed counsel, and on 3 November 2009, counsel attended to appear for trial, and also to deal with what appears to have been a belatedly launched interlocutory application by the plaintiff, which was unsuccessful.

[21] Therefore the reservation fee was for attendance for trial purposes, which counsel is entitled to in terms of annexure E, section B, and counsel also prepared for, and argued the interlocutory application for which a fee was charged. This is to my mind not a duplication. The Taxing Master allowed what counsel was entitled to in the circumstances. Insofar as seniority is concerned, the amount of N\$14 000 falls within the amount that counsel can charge per day for trials in the High Court Tariffs. The Taxing Master's acceptance of the fees and the amounts charged in item 160 (8 and 9) is reasonable in the circumstances, and her ruling is upheld.

[22] As regards item 253, the plaintiff's objection is to the amounts charged by counsel for drafting heads of argument, preparation, and for attending court on 27 October 2010, to argue another unsuccessful interlocutory application launched by the plaintiff, which amounts the plaintiff submits were too high. The Taxing Master correctly taxed down

almost all the items contained in instructed counsel's invoice. To my mind, the Taxing Master applied her mind and her decision is similarly reasonable. The Taxing Master's ruling on this item is similarly upheld in the circumstances.

[23] Turning to item 664, the item relates to instructed counsel's reservation fee for attending court on continuation of trial, being a one day fee in the amount of N\$18 000. It is to be noted that counsel's fees charged for final preparation of heads of argument, research, and preparation for closing submissions, were considerably taxed down by the Taxing Master. The plaintiff's gripe is with the maximum amount allowable by the Tariffs being charged, which, it is argued, should have been reduced as the parties were eventually in court only for a period of 3 hours. This time period is not disputed by the defendants. The Taxing Master allowed the maximum amount of N\$18 000 guided by the tariffs.

[24] It is not disputed that each of the instructed counsel involved in this matter each had a minimum of 20 years' experience. Also, it is noted that counsel's fee in 2009 was N\$10 000 for the day (item 160), and had increased to N\$18 000 by 2016 (item 664), some seven years later, given that the trial ended on 14 March 2016. It may well be that the amount allowed was a bit high, given the time frame, however the Taxing Master's discretion was not capriciously exercised. Again, I have no reason to interfere with the Taxing Master's decision to allow the fee, her ruling was properly considered in the circumstances and is upheld.

[25] A final note about the amounts charged in view of the amount of the claim, and the argument that only half of counsel's costs should be allowed, because the plaintiff succeeded against the first defendant.

[26] The plaintiff pursued this amount of N\$168 693,41 for a period of over 7 years, encompassing a number of interlocutory skirmishes and a particularly lengthy trial. The plaintiff's counsel now contends that the value of the claimed amount should feature in the rates of counsel. This is not a case for reducing fees on those grounds.

[27] Also, and as regards the *aliquot* share of costs now sought (as the review of taxation relates to the costs of the second and third defendants only), the plaintiff

succeeded against the first defendant and was in a position to tax costs in his favour for his success. The second and third defendants were sued jointly and severally. They were also the owners of the first defendant. I do not think that the day fee would be any less, whether one, or two, or three defendants were represented. Preparation and argument would essentially be the same.

[28] The defendants assert that the issue of an *aliquot* share was not raised at taxation of the bill of costs. This is not disputed by the plaintiff, however Taxing Master unfortunately does not confirm in her stated case that the issue was not argued before her, which would have assisted the court, especially as she set out in full the items where objections were made by the plaintiff that were not placed before her at the taxation. All that she states is that the day fee of counsel was accepted. This is why this item was dealt with herein.

[29] I now deal with the amounts allowed for the translator. In this regard it is not in dispute that the defendants are German speaking, and that translation would be necessary in order for the defendants to defend a case where they were sued *inter alia* in their personal capacities, and where they had to provide *viva voce* evidence. The plaintiff argues that translation fees are attorney-client costs, and further that the fees are too high, because the maximum that should be allowed for the translation should not be more than what a lawyer gets to draw the same document from scratch. No authority was placed before court by the plaintiff for this contention.

[30] The Taxing Master allowed the fee and stated that it was important documentation to be translated and that it was useful in the case.

[31] In the matter of *Owen v Owen*,⁶ Friedman J stated the following regarding the expenses of a private detective (by way of example):

'Provided the Taxing Master is satisfied in the exercise of his discretion that the charges have been reasonably incurred in order to enable the party concerned to properly present his case there is no reason why the Taxing Master should not allow expenditure incurred in obtaining the services of a private detective whose mandate is to obtain evidence for use I the trial. (Cf *Mzamo*

⁶ *Owen v Owen* 1979 (2) SA 568 (CC).

and Another NNO v Taxing Master and Another 1978 (3) SA 228 (E) at 230 where the Taxing Master allowed the costs of a private detective engaged to investigate the facts pertaining to a collision in which the plaintiff had been injured and to ascertain the identity of whatever eye witnesses there might have been.)

The Taxing Master in the present case considered the charges in question to have been necessarily incurred in relation to the plaintiff's action and he considered the charges themselves to have been reasonable. I can see no warrant for interfering with the decision thus reached by the Taxing Master in the exercise of his discretion.'

[32] To my mind, the Taxing Master considered the charges of the translators to have been necessarily incurred and reasonable. The invoice of Mr Nolting, a sworn translator dated 12 October 2009, at N\$96 per 100 words is to my mind reasonable, so too is the translation fee dated 11 November 2009. The translation fee of Mrs Leinberger, a sworn translator, four years later at N\$200 per 100 words is significantly higher, but a surcharge for urgency was added *ex facie* her invoice. The rate is also not unreasonable. The Taxing Master's ruling to allow translation fees in the amounts claimed on items 130, 166, and 529 is accordingly upheld.

[33] In light of the foregoing the following order is made:

1. The taxation review fails and the Taxing Master's *allocatur* dated 6 May 2020 is upheld.
2. The plaintiff is ordered to pay the costs of the second and third defendants.

EM SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF A Vaatz
Of A Vaatz & Partners, Windhoek.

DEFENDANT M Boonzaaier
Instructed by Erasmus & Associates, Windhoek.