



**REPORTABLE**

CASE NO: SA 32/2018

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**RONALD MOSEMENTLA SOMAEB**

**Applicant**

and

**STANDARD BANK NAMIBIA LTD**

**Respondent**

**Coram:** MAINGA JA

**Heard:** In chambers

**Delivered:** 29 November 2019

**Summary:** This is an application for review of the Taxing Master's decision to tax the bill of costs of the respondent without a court order awarding costs in favour of the respondent.

The applicant filed his notice of appeal on 20 June 2018 in this court against the ruling of Angula DJP, in which he refused to recuse himself on 19 June 2018 from case number 2017/00202 in the High Court. The respondent filed notice to oppose the appeal. The applicant failed and/or neglected to prosecute his appeal. On 24 September 2018, the Registrar of this court addressed a letter to the applicant, informing him that his appeal had lapsed due to non-compliance with rules 8 and 14 of the Supreme Court Rules and as a result, the appeal was

deemed to have been withdrawn. Pursuant to the Registrar's letter to the applicant, the respondent submitted a bill of costs between party and party for taxation pertaining to all costs it incurred as a result of the appeal filed by the applicant. A notice of taxation was accordingly served on the applicant and filed with the Registrar of this court on 18 March 2019. The taxation was set down for 26 March 2019. On 26 March 2019 before the taxation took place, the applicant filed a document headed 'Notice of Taxation'. This document urged the Taxing Master not to tax the bill of costs. After hearing submissions from the parties, the Taxing Master ruled that he would proceed with the taxing of the bill of costs. The applicant expressed his disapproval of the ruling made by the Taxing Master and elected to leave the hearing. Before he left, the Taxing Master informed him that the taxation would continue in his absence. The bill was then taxed in the absence of the applicant and an *allocatur* was filed by the Taxing Master. As a result of the *allocatur* taxed and allowed by the Taxing Master, the applicant filed a 'Notice of Review of Taxation in terms of rule 25(2) and (3)' on 23 April 2019. The applicant's attack on the Taxing Master's ruling does not turn on his ruling in respect of the various items he taxed, but hinges on the fact that the entire taxation procedure and process was flawed. The second attack was that he requested for the transcript of the taxation proceedings, which he was denied as there was no transcript because the Taxing Master is not obliged to record taxation proceedings. The Taxing Master, in terms of rule 25(3) furnished a report to the court for the decision of a judge in terms of rule 25(5) of the Rules of this court.

*Held* that rule 25(3) and (4) of this court presupposes that a party must direct his/her dissatisfaction at an item or part of an item which was objected to or disallowed by the Taxing Master of his/her own accord.

*Held* that the applicant's objections are not covered by rule 25(3) and (4) and therefore the review notice is invalid. The applicant's review application also does not meet the Supreme Court's general powers in cases where it is sitting as a court on review as is contemplated in s 20 of the Supreme Court Act 15 of 1990, as the notice is not in the form of an affidavit.

*Held* that where an item contemplated in rule 25 has not been objected to, rule 25 cannot be employed to review the *allocator* or an item therein.

*Held* that rule 25 is silent on whether there must be a court order in place awarding costs to a party before a bill can be taxed.

*Held* that the Taxing Master was correct in taxing the bill of the respondent as the respondent incurred costs in the appeal, notwithstanding the absence of a costs order in favour of the respondent. Case on point is *Thorne v Retail Inquiry Bureau Ltd and Another* 1936 TPD wherein it was held that the Supreme Court has jurisdiction to review the taxation of a party and party bill of costs, although the taxation has not been pursuant to an order of court as to costs. The only items in the bill of costs frowned upon was the inclusion and taxing of costs in opposition incurred in connection with the taxation of the bill of costs. That is a function of the trial court to decide whether or not such costs should be included in the judicial costs and be incorporated in the party and party costs. *Mouton and Another v Martine* 1982 (4) SA 280D+CLD. The usurpation of the function of the court by the Taxing Master condoned and the costs which are only N\$345 allowed.

*Held* that litigants are discouraged from filing appeals at this court and not prosecuting the same to finality, particularly those filed with the sole purpose to delay execution of the judgment.

There being nothing to review, the review application is dismissed and no order as to costs.

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### REVIEW JUDGMENT

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MAINGA JA:

### Introduction

[1] This is a review of taxation lain before me in chambers in terms of rule 25 of this court. The applicant was the appellant in case number SA 32/2018 in this court.

### Background

[2] The applicant, Mr Ronald Mosementla Somaeb, filed Notice of Appeal on 20 June 2018 in the Supreme Court against the ruling of the learned Angula DJP in which he refused to recuse himself on 19 June 2018 from case number 00202/2017 in the High Court.

[3] The respondent filed notice of opposition to the appeal.

[4] The applicant thereafter failed and/or neglected to prosecute his appeal. On 24 September 2018, the Registrar of this court addressed a letter to him, informing him that his appeal had lapsed due to non-compliance with rules 8 and 14 of the Supreme Court Rules (the Rules) and as a result, the appeal was deemed to have been withdrawn.

[5] Pursuant to the Registrar's letter of 24 September 2018 to the applicant, the respondent submitted a bill of costs between party and party for taxation pertaining to all costs it incurred as a result of the appeal filed by the applicant. A notice of taxation was accordingly served on the applicant and filed with the Registrar of this court on 18 March 2019. The taxation was set down for 26 March 2019.

[6] On 26 March 2019 before the taxation took place, the applicant filed a document headed 'Notice of Taxation'. This document, in particular paragraph 6, thereof urged the Taxing Master not to tax the bill of costs so provided by the respondent and that paragraph reads:

'6.1 The Suprem[e] Court has never awarded cost order against the Appellant;

6.2 The appeal is about the Honourable Justice Angula's refusal to recuse himself and has nothing to do with Behrens & Pfeiffer client Standard Bank Namibia Limited; and

6.3 I am not liable to pay any costs to Behrens & Pfeiffer Law Firm.'

[7] At the taxation hearing, the applicant was present in person, with Mr Behrens representing the respondent and Mr Libana, the Assistant Registrar of this court as the Taxing Master. At the commencement of the hearing, the Taxing Master referred to the applicant's 'Notice of Taxation' and asked him to make submissions thereon but he referred the Taxing Master to the same document he filed that morning of taxation. Thereafter, Mr Behrens made his submissions. The Taxing Master ruled that he would proceed with the taxing of the bill of costs.

[8] The applicant expressed his disapproval of the ruling made by the Taxing Master and elected to leave the hearing. Before he left, the Taxing Master informed him that the taxation would continue in his absence.

[9] The bill was then taxed in the absence of the applicant and an *allocatur* was filed by the Taxing Master. As a result of the *allocatur* taxed and allowed by the Taxing Master, the applicant filed a 'Notice of Review of Taxation in terms of Rule 25(2) and (3)' on 23 April 2019. The applicant's attack on the Taxing Master's ruling does not turn on his ruling in respect of the various items he taxed, but he makes a general statement: 'I am dissatisfied with the Taxing Masters decision on the entire taxation procedure and process.' The second attack was that he requested for the transcript of the taxation proceedings, which he was denied and that there was no transcript as the Taxing Master is not obliged to record taxation proceedings.

[10] The respondent filed opposing documents to the applicant's review application on 26 April 2019. Briefly, the respondent's contentions were that there was nothing wrong with the Taxing Master's decision to tax the costs of the respondent. In support of its case, the respondent referred to the authors *Kruger and Mostert* who refers to *Horak* where he states that 'when the case does not come before a court, a bill cannot be taxed in a matter in respect of which legal work was done but in which no documents were filed with the registrar.'<sup>1</sup> (own emphasis). The respondent further states that documents were filed with the Registrar in respect of the appeal and just because the applicant allowed the appeal to lapse, does not mean that no costs were incurred and that a court order is always required to tax costs.

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<sup>1</sup> *Kruger, A. and Mostert, W.* (2010) Taxation of costs in the Higher and Lower courts: A Practical Guide. Durban, LexisNexis at p 32.

[11] The Taxing Master, in terms of rule 25(3), furnished a report to the court for the decision of a judge in terms of rule 25(5) of the rules of this court. In the stated case, the Taxing Master made the following contentions:

1. the applicant has filed many appeals in this Court and has no interest in prosecuting same, therefore he uses it as a tactic to delay justice.
2. His objection to the taxing of the bill was filed before the bill was taxed.
3. His objection was framed according to his own style, not considering the Rules of this Court.

[12] The Taxing Master further states that the applicant filed an appeal and failed to prosecute the same and therefore rule 9 dictates that such appeal is deemed to have been withdrawn. He further contends that the applicant failed to tender costs as per the practice. He emphasized, the point that the applicant (who appears to be well known by the Taxing Master) has the habit of filing notices of appeal just to delay justice – he has no intention of prosecuting the appeals he files. He referred to rule 25(3) *verbatim* and states that the appellant's objection was filed before the bill was taxed contrary to the Rules. He states that the applicant's objection is that the costs so taxed were allowed without an order of costs against him by this court and that there was no transcription of the taxation proceedings. The Taxing Master contends that once the applicant had filed the notice to appeal and the opposing party is served with the notice, that would trigger consultations and filing of opposing papers, in the process incurring costs.

Once the appeal was deemed to have been withdrawn, it was procedurally finalised. He further explained what transpired at the taxation proceedings and that the respondent incurred costs as contained in its bill of costs. He further contends that rule 25(1) does not expressly provide that a court order is required to tax costs, but provides that 'the registrar in his or her capacity as, Taxing Master must tax costs incurred in an appeal or application. . . .' He concluded his contentions by stating that his ruling was to tax the bill of costs and did tax item by item and made sure that only fees which were reasonably incurred were allowed.

[13] The question which immediately arises is whether the applicant had the right to require from the Taxing Master for a stated case, when on his own volition abandoned the taxation, did not object before the Taxing Master to any of the items as contained in the bill of costs, when regard is had to rule 25(3) and (4) of this court.

Subrules 3 and 4 of Rule 25 provide:

(3) A party dissatisfied with a ruling of the taxing master in respect of an item or part of an item, which was objected to or disallowed by the taxing master of his or her own accord, may, within 21 days of the issuance of a taxing masters certificate, require the taxing master to state a case for the decision of a judge.

(4) The case referred to in subrule (3) must –

(a) indicate each item or part of an item, together with the grounds of objection advanced during the taxation; and



- (b) embody any relevant findings of facts by the taxing master in the stated case.'

[14] The rule speaks for itself, the dissatisfaction should be directed at an item or part of an item which was objected to or disallowed by the Taxing Master of his or her own accord. Applicant walked out of the taxation for reasons not provided in his notice of review of the taxation in question. The Taxing Master states that his objection was filed even before the bill was taxed, to use the words of the Taxing Master, 'in his own style of disregarding the rules of this court.' The Taxing Master then further states that applicant's objection is that the costs that were to be taxed were not sanctioned by a court order or in the words of applicant, this court did not award costs against the applicant or in favour of *Messrs Behrens & Pfeiffer Law Firm* and that the applicant wanted the transcript of the taxation proceedings.

[15] With respect, the objections are not covered by rule 25(3) and (4). That alone renders the review notice invalid. Let alone the fact that applicant for reasons unknown, walked out of the taxation proceedings, therefore did not object to any of the items in the bill of costs. I must be quick to say there is a conflict of judicial opinion as to whether or not in invoking the provisions of rule 25, one must first object to the item concerned before the Taxing Master. It has been held that objection at the taxation to the taxing off or taxing down of any item is not a pre-requisite to bringing the matter on review.<sup>2</sup> In the *Buonanno* matter the reasoning behind Caney J referring to the case of *Tempelhoff v Aberdeen Municipality*<sup>3</sup>, is that 'it would be a gross hardship if the applicant were denied the advantage of the

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<sup>2</sup> *Buonanno v The Taxing Master* 1965 (2) SA 653 (NPD) at 654C-D.

<sup>3</sup> 1948 (1) SA 745 (E) at 747.

inexpensive and expeditious procedure afforded by Rule 48' (rule 25 of this court and rule 75 of the High Court). The better view and which I associate myself with is that where an item (contemplated in rule 25) has not been objected to rule 25 can then not be employed to review the *allocator* or an item therein.<sup>4</sup> In *Ellisons Electrical Engineers Ltd v Bottom*<sup>5</sup> where the plaintiff did not appear at the taxation before the clerk of court, but thereafter he brought before the magistrate for review the award by the clerk of court of a particular item of some magnitude in the bill of costs thus taxed by him. The magistrate upheld the decision of the clerk of court. Having been unsuccessful before the magistrate, the plaintiff then required the magistrate to state a case for the decision of a judge. The magistrate raised the question whether the plaintiff, having failed to attend the taxation before the clerk of court, had *locus standi* to require such a case to be stated.

[16] Beck J, referred to the case of *Gran-or's*,<sup>6</sup> where a party that failed to attend the taxation sought a stated case in order to object to certain items that had been allowed by the Taxing Master and held that the plaintiff lacked the necessary *locus standi* to invoke the special procedure contained in order 31, Rule 5(3) of Rhodesia then, Zimbabwe today.<sup>7</sup>

[17] The principle in the above case, finds application in this case. The applicant had no right to seek, for his absence at the taxation, to require a stated case and the application should fail for that reason alone.

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<sup>4</sup>*Marcus Jacobs & Ehlers: Law of Attorneys' Costs and Taxation thereof*, Juta and Company Limited, 1979 at 242. See also *Gran-Or's (Edms) BPK v Bevan* 1969 (2) SA 87 (T).

<sup>5</sup> 1973 (1) SA 556 (R).

<sup>6</sup> Footnote 4.

<sup>7</sup> At 559H.

[18] The application for review, although it makes reference that it was brought in terms of rule 25, it is couched for a larger right of review. Rule 25 provides an additional and special procedure for a particular kind of review available only under the circumstances set out in that Rule and not under other circumstances.<sup>8</sup> Beck J, translated the Afrikaans version to English at p 90A-B of Viljoen J's judgment in *Gran-or (Edms) Bpk v Bevan* above and that translation reads:

'Rule 48 is an exception to Rule 53 (i.e. the Rule which deals generally with review, and which provides that review shall be by way of notice of motion) and the purpose is obviously to furnish a speedy and inexpensive procedure in those situations for which Rule 48 makes provision. (My underlining). In my view the Court cannot read into this Rule what it does not contain. The Rule makes specific provision for particular cases. The Court can only interpret the Rule, but cannot amplify it.'<sup>9</sup>

[19] Even under the ordinary review, applicant's application for review is flawed. In his objection to the Taxing Master taxing the bill of costs, he states that, he was of the view that the Taxing Master may not proceed to do the taxation for the reasons he provides in para 6 above. In the review application itself, he only states that he was dissatisfied with the Taxing Master's decision on the entire taxation procedure and process and that he was refused the transcript of the taxation proceedings. It is not clear what taxation procedure and process he was dissatisfied with or the taxation proceedings he required. The taxation proceedings would be the bill of costs and the items taxed off or taxed down, which document was made available. A perusal of the bill of costs reveals only reasonable fees

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<sup>8</sup> Footnote 5 above at 559G-H.

<sup>9</sup> *Ibid* at B-C.

which were incurred. The argument that the Supreme Court did not award costs against the applicant lacks merit. Rule 25(1) empowers the Registrar in his or her capacity as Taxing Master to 'must tax costs incurred in an appeal or application . . . .' On the documents before me, that is what the Taxing Master exactly did in this case. Rule 25 is silent on whether there must be a court order in place awarding costs to a party before a bill is taxed.

[20] From applicant's objection to taxation, he seems to labour under false apprehension that it was the learned DJP who should have defended his refusal for recusal in this court. There is no lis between the applicant and the learned DJP. The lis is between him and Standard Bank and it was entitled to file opposition in this court and seek payment of its costs incurred in the appeal. The case on point is *Thorne v Retail Trades Inquiry Bureau Ltd and Another*<sup>10</sup>. The second preliminary point taken was that owing to the fact that there was no order for costs of the appeal by a competent court, the taxation by the Taxing Master could not be brought on review as he taxed the costs not in his capacity as taxing officer but as arbitrator. The circumstances were exactly the same as in this case. Appellant had noted an appeal, but the appeal was not proceeded with and was later withdrawn. Thereafter, the respondent drew up a bill of costs, which as taxed by the taxing officer of the Supreme Court. The preliminary objection was dismissed, the court holding that the Supreme Court has jurisdiction to review the taxation of a party and party bill of costs, although the taxation has not been pursuant to an order of court as to costs.

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<sup>10</sup> 1936 (TPD) 310. See also *Jos Crosfield & Sons, Ltd v Nils Testrup* 1912 TPD 696, *Eisenstadt v Barone* 1931 AD 486.

[21] In the case of *Shali v The Prosecutor-General*,<sup>11</sup> the court referred with approval to *Visser v Gubb*,<sup>12</sup> where Smuts J, as he then was stated:-

'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.'

[22] The discretion to be exercised by a Taxing Master must be exercised reasonably and justly on sound principles with due regard to all the circumstances of the case.<sup>13</sup> The test generally employed is that set out by Sachs J, in *Francis v Francis & Dickerson*, where the learned judge said:<sup>14</sup>

'when considering whether or not an item in a bill is 'proper' the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client...'

[23] In *Hendriks N.O. and Others v Grant*,<sup>15</sup> the court held that:

'The Court recognised the principle that the court may interfere in those classes of cases where the court is able to form a good opinion as the Taxing Master, and perhaps, even a better opinion... However, the court is mindful of the fact that the Taxing Master deals with these matters on a daily basis and is in fact in a better

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<sup>11</sup> (POCA 9/2011) [2012] NAHCMD 44 (31 October 2012) (unreported), para 3.

<sup>12</sup> 1981 (3) SA 753 (C) 754H – 755C.

<sup>13</sup> *Kloot v Interplan Inc and another* 1994 (3) SA 236 (SE) 238H.

<sup>14</sup> [1955] 3 ALL ER 836 at 840D.

<sup>15</sup> Case Number (6087/2010) [2017] ZAFSHC delivered on 26 October 2017, para 8, per Chesiwe AJ.

position to use her discretion in taxing matters.’

[24] I associate myself with the sentiments in *Madlala v Southern Insurance Association Ltd*,<sup>16</sup> where the court made the following remarks:

‘Litigants and practitioners should be discouraged from wasting the time of the Taxing Master and Judges with reviews that clearly have no prospect of success, and it may help to discourage them if I award the defendant in this case a realistic amount to cover all of its costs of opposition.’

[25] The Taxing Master was correct in taxing the bill of the respondent as the respondent incurred costs in the appeal and his final determination cannot be faulted. The only items I should frown upon was the inclusion and taxing of costs in opposition incurred in connection with the taxation of the bill of costs. That is a function of the trial court to decide whether or not such costs should be included in the judicial costs and be incorporated in the party and party costs. In *Mouton and Another v Martine*,<sup>17</sup> the court said:

‘On this broad basis, generally speaking, only amounts which the successful party has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs, and such a party, is for instance, only entitled to claim his own witness expenses provided he is duly declared to have been a necessary witness; cf. *Texas Co. (S.A.) Ltd. v Cape Town Municipality*, 1926 A.D. 467 at pp 488 and 489. The Taxing Master is also limited in exercising his functions in respect\_of judicial costs, i.e. to, say, costs which are *prima facie* directly and necessarily incurred in connection with the due presentment of the case. There are also costs which are incurred in connection with something incidental or collateral to the litigation and not as a direct or necessary step in the conduct of the action. Such costs are not covered in an ordinary judgment for

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<sup>16</sup> 1982 (4) SA 280(D & CLD) at letter H.

<sup>17</sup> 1968 (4) SA 738 at 744B-E.

costs in the action or proceedings, and it is the function of the trial Court to decide whether or not such costs should be included in the judicial costs and be incorporated in the party and party costs. The Taxing Master has no right to usurp the functions of the Court in this regard.'

At 745 B the court continued to say:

'The costs of opposition incurred in connection with the taxation of the bill of costs cannot be said to have been incurred directly or necessarily in connection with the due presentment of the respondent's case and do not form part of the party and party costs in the action that was settled. Furthermore, the purpose of a taxation is to fix the amount due under a bill of costs. No provision is made in the tariff for the costs incurred in opposing such a taxation. The party who draws the bill of costs and has it taxed is also only entitled to a charge allowed in the tariff, despite the expense he has been put to by opposition in having the bill taxed.'

[26] For the purposes of this review, it would have been sufficient had the respondent sought costs incidental or collateral to the litigation in their contention in opposition. Respondent incurred costs in opposing the review and the amount is only N\$345. I will without creating a precedent, condone the usurpation of the function of the court by the Taxing Master and allow the costs to stand.

[27] Litigants are discouraged from filing appeals at this court and not prosecuting the same to finality, particularly those filed with the sole purpose to delay execution of the judgment. It is a waste of time for this court and its support staff, which this court do not have.

[28] Rule 25 (9) empowers a judge deciding a review in terms of the rule to make such order as to costs of the suit, as he or she considers appropriate,

including an order that the unsuccessful party is to pay the opposing party a sum fixed by the judge as to costs. The respondent claimed costs incidental or collateral to the litigation in their bill of costs. It does not appear that respondent incurred further costs beyond that stage. In terms of rule 25(9) I exercise my discretion not to award costs.

[29] In the result I make the following order.

1. The review is dismissed and no order as to costs.

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**MAINGA JA**



## APPEARANCES:

APPLICANT:

In person

RESPONDENT:

R P Behrens

of Behrens &amp; Pfeiffer, Windhoek