



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 4/2018

In the matter between:

POLYCARP MFANASIBILI DLAMINI
BUYISILE DLAMINI
HOMEBOYZ CONSTRUCTION

1st APPLICANT
2ND APPLICANT
3RD APPLICANT

and

CENTRAL BANK OF SWAZILAND
FIRST NATIONAL BANK OF SWAZILAND
STANDARD BANK OF SWAZILAND LIMITED
NEDBANK SWAZILAND LIMITED
SWAZILAND DEVELOPMENT & SAVINGS BANK

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT

Neutral citation: Polycarp Mfanasibili Dlamini & 2 Others v Central Bank of Swaziland and 4 Others (4/2018) SZHC 219 [2019] (20th November, 2019).

Coram : MAPHANGA J

Date heard : 07/10/2019

Date delivered : 20/11/2019

Summary: Civil Procedure-Taxation- Review of taxing masters ruling in terms of Rule 48(1) of the Rules of the High Court- Practice- non compliance with the procedural requirements of the Rule- Held failure by taxing master to state a case is no

impediment to review in the circumstances where the issue concerns a singular review of decision by taxing master to allow counsels fees at a certain rate

Costs- Taxation- effect and import of a special order allowing fees of counsel in terms of Rule 68(2) of the Rules of the High Court- counsel's fees not exempt from taxation, albeit subject to taxing master's discretion as to the reasonableness of quantum of fees, reasonableness as pertains the items of work for which charged, and the rate and totality of the fee charged.

Held- Respondent bears onus of demonstrating quantum is unreasonable- having failed to prove the grounds for review relied on – application dismissed with costs.

JUDGMENT

- [1] This is an application for review of taxation of a bill of costs. It follows an award of costs in favour of the applicants (the Respondent in these proceedings). As part of that award the applicant was especially allowed costs of Counsel ***“to be certified in terms of Rule 68(2) of the High Court Rules as to taxation of costs”***.
- [2] For ease of reference it is convenient to retain the designations of the parties as in the main application whence the costs order emanated in these proceedings. I do so throughout. The applicant herein shall therefore be referred to as the Respondent as it was in the main application giving rise to the contested taxation of costs.
- [3] Of common cause is the fact that pursuant to the costs award the applicant drew up and presented a bill of costs for taxation and recovery of its cost on a party-and-party basis in which bill he sought to incorporate an item indicated in the said bill as a disbursement, in respect of a claim therein for Counsels' fees in the sum of E116,850.00. In that regard the Applicant sought to vouch for the sums claimed by way of an annexed VAT invoice of the advocate's fee account.

- [4] Upon presentation of the bill the taxing Master taxed off certain items in the bill but allowed the Counsels fees in full as claimed without adjustment. On the 5th September 2019, the Respondents Attorneys filed a Notice, in terms of Rule 48(1) for the High Court Rules, for the review of the Taxing Masters *allocatur* objecting with specific reference to the Counsel's fees on the grounds set out in the Notice.
- [5] The particularity of the Respondents objection to the *allocatur* was that:
- a) the costs order or award was not at attorney and client scale; and
or
 - b) Counsels fee invoice did not specify the hourly rate charged; and
or
 - c) Counsels *other* fees were grossly disproportionate to her
appearance fee; and or
 - d) That (the invoice) did not specify how many hours or how much
time was spent on each of the three items for which the total
time of 32 hours was indicated as the time spent on the
attendances (namely "***perusal and consideration of answering
affidavit, drafting and finalising replying affidavit, additional
research and drafting heads of argument***").
- [6] The respondent contend generally that the Counsels fee account was 'grossly unreasonable'. I surmise by this the respondent means the account is exaggerated or grossly inflated in the quantum of the fee charged. Thus it has persisted in attacking the Taxing Masters *allocatur* on these grounds . In that respect, it is common ground that the only aspect sought to be reviewed in the taxing Masters ruling is limited to the Counsel fee on the grounds alluded to.

Procedure

- [7] I have noted that it has become the practice in these Rule 48 proceedings that the procedural provisions of the rule are not being complied with to the strict letter of the rule and as a result, almost invariably, a truncated approach is taken by the parties in the process of the proceedings.
- [8] The terms of the rule could not be clearer. It directs that upon receipt of a Notice under Rule 48(1) the taxing Master is required to set in motion a sequence of steps. He or she is obliged (save where the *allocatur* quantum falls below the sum of E50.00) firstly to file and serve on the parties a stated case setting out each item or part of an item together with the grounds of objection advanced on taxation. The stated case must embody within it a finding of facts that the taxing Master made in the taxation. Thereafter the parties may file their respective contentions following receipt of which, and only then, the Master may present and file his or her report.
- [9] The notable departure or non-compliance with the rule occurs, as in the case at hand, by reason of the Taxing Master's frequent dispensation with the filing of stated case, and instead filing the report that ought to be entered as a final step as contemplated by the rule – in that sense virtually inverting the process.
- [10] That said and the non-compliance notwithstanding, it appears to me that the issues for consideration in this review are narrowly focussed and limited in scope in that only one item in the taxing master's *allocatur* has elicited this review and as such the area of contention may merit this courts condonation of the lapse of compliance with the rule at this time. In a recent ruling on a similar Rule 48 proceedings, I have had occasion to observe that the rule as pertains to the requirement for a stated case is rather permissive and directory in nature and where the area of contention is focussed on a singular item or a few items on the bill, it may be proper and convenient to obviate the cumbersome procedure and dispense with strict compliance (see *Terence Everard Reilly N.O. v The Directory of*

Veterinary & Livestock Services (1354/2018) SZHC 172 [2019] (07/10/2019) at para 7-11 and the cases referred to therein, to wit, ***Brener N.O. v Sonnenberg, Murphy, Leo Burnett (Pty)Ltd (Formerly D. Arcy Masins Benton & Bowless SA (Pty) Ltd 199(4) SA 503 (W)*** cited in the ***Reilly*** case). That is the approach I take in this case.

The applicable Principles on Review- Nature & Scope of the Procedure.

[11] The underlying principle as pertains review of a taxing masters decision is that the taxing master enjoys wide discretionary powers with which the courts should be chary to interfere save for very exceptional circumstances as in where;

- a) The taxing Master has failed to exercise his discretion judiciously but improperly;
- b) Where he/she disregards relevant important or pertinent considerations or fails to direct his/her mind to a critical or relevant question in issue or takes irrelevant factors into account or;
- c) Acts on a wrong principle and procedure.

[12] The second principle is that in exercise of the Rule 48 revisional powers, the courts power in the enquiry is broader than conventional review as relating to the regularity or otherwise of process or method but incorporates an investigation as to the correctness of the Masters ruling on an item by item basis, so that if the court finds the taxing master has acted erroneously and was clearly wrong in some specific regard or ruling in the taxation of certain items, the court is at large to itself determine the point in contention as to the *allocatur* and as such itself substitute its own determination for that ruling. (see ***Kingsborough Town Council v Thurtwell [1957] (4) SA 533 N; Ocean Commodities INC. and Others v Standard Bank of South Africa Ltd and Others [1984] (3) SA 15(A); Also Erasmus B1-348 to B1-349.***

- [13] Two issues arise for determination in this matter. The first is whether the special award as to costs allowing the inclusion of costs of employing Counsel in terms of Rule 68(2) of the Rules of the High Court exempts such fees from taxation in terms of the rule and the prescribed tariff for advocates fees and if not on what terms are such fees to be taxed or considered. The second turns on whether the taxing Masters *allocatur* and allowance of the Counsels costs is susceptible to be reviewed and set aside on account of any irregularity or either in consideration to the item complained of.

The Court's discretion in terms of Rule 68(2) – Special Award of costs of counsel

- [14] The rule ((r68(2)) is framed broadly as follows:

“Where the court or judge is satisfied, on application being made, that having regard to the nature of the case or any exceptional circumstance the costs allowable under Section H of the tariff (costs of Counsel) may be inadequate, the court or judge may direct that the taxing Master on taxation is not bound by the amounts set out in that Section, and where such a direction is given the taxing master, may, if he thinks fit, allow on taxation such larger amounts as he think reasonable”.

- [15] Two issues bear consideration in regard to the sub rule. The first is that the context of the special award qualified under the sub rule was an ordinary party-and-party costs order and not one granted on a scale as between attorney and client. The second is that the respondent's objection as I understand it is not so much as pertains a perceived procedural irregularity in the taxation as it is the assertion that the Taxing Master took an incorrect approach in the taxation of the bill as pertains the costs of counsel item.
- [16] Put another way the respondents complaint does not concern the form or manner in which the bill was drawn and presented or that the costs of

Counsel have not been itemised in a bill drawn in accordance with the rule as to render it amenable for taxation in accordance with the prescribed, tariff under Section H (for Counsel fees). In other words a procedural irregularity. The core of its complaint in the set out grounds appear to be simply that there is no breakdown as regards to the specific items of counsels attendances summarised in the invoice presented with the bill to show the split of the time charged out totalling 36 hours and also that the sum of E2,500 per hour is unreasonable.

- [17] A clear position in the law of taxation is that the award of costs enabling recovery of costs of counsel in addition to ordinary attorneys costs on a party-and-party basis (or even at an attorney-and-client scale) does not exempt the taxation (and application of the taxation rules) to counsels fees. This implies that a bill in respect of counsels fees must be drawn and presented in accordance with the tariff for counsels fees under section H of the schedule of Rule 68. In this instance clearly no itemised bill for costs of Counsel has been drawn as would enable scrutiny and consideration in terms of the schedule of *section H* tariff.
- [18] Indeed there is a prevailing practice in this jurisdiction that sums claimed in respect of Counsels costs is often presented as a composite figure incorporated as a disbursement into the attorney's party-and-party bill of costs. More often than not the Counsels invoice is annexed simply as a voucher. That practice clearly falls foul of the procedure and form as to the drawing and presentation of bills for taxation in terms of Rule 68 and prescribed tariffs for attorneys and counsel's fees. That however appears to be beside the point in light of the nature and substance of the objections as I have already noted because the respondent is not contending that the bill flouts the procedure in so far as presentation of the costs of counsel for taxation. It has to do with the substance than form in so far as it challenges the basis for the taxing masters ruling on the *quantum* by allowing the globular sum of costs of counsel. That is the narrow focus of the issue as regards the grounds for this review

RESPONDENT'S CASE.

[19] Foremost the respondent contends that the Taxing Master failed to apply the correct principles of taxation in that she appears to have permitted the Applicants to merely attach the advocates invoice *“which did not specify the hourly rate charged, and did not specify how much time was spent on some of the items included in the invoice”*.

(my emphasis).

[20] To this end I was referred to the case of *City Deep Ltd v Johannesburg City Council* [1973](2) SA 109 (WLD) at 119 as authority for the proposition that it is mandatory that each item must be dated and specifically charged.

[21] I think these contentions would bear consideration were we dealing with objections to a separate bill of costs for the counsels fees or if the respondents complaint, as stated earlier was directed to the principle as pertains to compliance and form of the bill tabled for taxation. The specificity of the objection as regards the flaws pointed out in the taxation concerning the sums charged as counsels attendance fees relate to an “invoice” and not a bill of costs. The substance of objection is not directed to the item of fees claimed being presented as an invoice as opposed to an itemised bill for taxation. That is a fundamental distinction of principle.

[22] In this context and the intended approach adopted by the applicants is was not unreasonable or inconceivable that when she presented her invoice to the instructing attorneys, she would have drawn it in the truncated form in which it is framed. After all it was intended as an invoice presented for payment as per the attorney and own client. It does not purport to be a bill of costs for taxation as contemplated in the rule. Whether the taxing master was within her rights to consider the item in the form presented is another issue on which I reserve my comments given the grounds for this review. If the objection was one whose object is more to form than substance, then the issue cannot be that the **invoice** is not itemised or is

wanting as to particularity (as it is not a bill of costs) but should be that it is not a 'taxable' bill of costs drawn in terms of the rules. However as I have already pointed out, that is not the basis of the respondent's objection or ground for the review. *What is the essence of the respondent's complaint?*

- [23] On the contrary the respondents' central complaint is that the invoice does not;
- a) specify the hourly rates charged for each of the three main heads of attendances between 22-24 January 2018; and
 - b) does not specify the time spent on each attendance in regard to these items.

[24] It is contended the invoice is flawed and ought to have been disallowed on account of the "lumping" together of the items referred to in (a) and assigning a total of 32 hours as a measure of the fee claimed in that element. That is the point that the taxing master has focussed her attention on in responding to the respondent's challenge to her ruling.

THE MASTER'S REPORT

[25] In her "Report" the taxing master addresses the respondents' objection as pertains Counsels fees thus:

"As Taxing Master, I believe the fees allocated to counsel under civil case NO. 05/18..... are fair and justifiable, when considering the following calculations made on an hourly rate of E2,500 and as explained by the Applicants attorneys in the presence of the Respondent's attorney's....."

12 December 2017 > 2.5 hrs]
11 January 2018 > 1.5 hrs] E10,000
12 January 2018 > 2.5 hrs = E2,500

22-24 January 2018 > 32 hrs = E10,000

30 January 2018 > ¾ day = E10,000”

[26] Further and as specifically regards the hourly rate in respect of the Counsels fees charged the Taxing Master in her response narrates:

“In addition to that, on that day (the 17th August 2018 the day of the taxation) the Respondents attorney made an enquiry on the charge for an hourly rate and it was explained to her by the Applicants attorney that it was calculated at E2,500 per hour”.

[27] These are the considerations cited by the taxing Master on the basis whereof she allowed the Counsel costs as reflected in the invoice in question.

APPLICANTS CASE

[28] In his submissions the Applicant counters the grounds relied on by the respondent in the review by contending:-

- a) That the Respondent does not appear to be disputing the total time charge-out basis of 32 hours, but complains as regards the lack of clarity as to the distribution of the time among the attendances listed in the invoice;
- b) That the rate of E2,500/hr was reasonable; and
- c) That, notwithstanding the costs order being on a party-and-party basis, in considering the costs of Counsel, on account of the provision of Rule 68(2) and the courts directive in that regard, the taxing Master was not strictly bound to follow the tariff but to exercise her discretion by allowing such sums as she deems reasonable;

- d) Applicant finally contends that the time of attendance set out in the Counsels amount (32 hrs) was justifiable having regard to the nature and complexity of the matter and the voluminous paperwork generated in the documents drafted (a total of some 250 pages).

Disposition

[29] Shorn of collateral issues the heart of the respondents challenge to the Taxing Masters *allocatur* may be distilled to two points;

- a) that the total time claimed has not been particularised or broken down but set in a composite figure a total 32 hours; and
- b) that the hourly rate charged is unreasonable

[30] To reiterate – the respondents position is NOT to dispute whether that the work alleged to have been done as indicated in the invoice has in fact not been done nor is it to whether the hours of attendance stated is exaggerated. Those are questions of fact hardly in contention nor did they arise for serious consideration in the taxation. The point raised was that of clarity or that particularity was wanting in the invoice. Having already commented concerning the question of itemisation of the said invoice, no purpose can be served in ploughing the same ground again. It leaves the issue of the reasonableness or otherwise of the rate as the only substantive matter for consideration. That itself is a vexed question. It turns on the meaning to be assigned to the word reasonable – a value judgment that is fluid and the test to be applied in considering the proper province fo the taxing master’s discretion.

The Test to be Applied as what is Reasonable Counsel’s Fees

[31] The frame of reference or objective standard as regards what may or may not be reasonable has to be the tariff itself. Section H of the tariff of fees of attorneys and advocates sets out a range of rates chargeable on an hourly basis, between E35 to E600 in relation to certain categories of attendances as relates to motions, pleadings trials and appeals. In considering the rate claimed as against the prescribed rate in the tariff, obviously the taxing master has to exercise her discretion and consider whether and to what extent she is prepared to allow or permit any 'larger' or higher rate and thus what larger amount than permitted in the tariff because that is precisely the nature of her remit under the rule. The clear language of Rule 68(2) mandates that where the court directs, as regards counsels fees allowed under the sub-rule because of special circumstances of the matter, the taxing Master shall not be bound by the tariff, the taxing master thereby conferred with a discretion to allow such larger amounts as she thinks reasonable and in so doing depart from the tariff.

[32] **A.C. Cilliers** in *Law of Costs* throws some light as to the factors which bear on the Taxing Masters discretion in determining a reasonable fee for Counsel. The learned author describes these as:

“the category to which Counsel belongs as in seniority and experience), the actual time spent by Counsel; the amalgam of professional characteristics; the general standard of fees charged; the declining value of money”

(See Service issue 17, para 13.19)

[33] Again in *City of Cape Town v Arun Property Development (Pty) Ltd & Another*¹ Sholto-Douglas AJ identifies the key considerations that inform the assessment of counsel's fees on taxation to include the nature and complexity of the matter; the work done by counsel; the fee charged; its

¹ *City of Cape Town v Arun Property Development (Pty) Ltd & Another* 2009 (5) SA 227 (C) para 30.

its reasonableness in the context of the underlying principle that a successful litigant is entitled to fair recompense and should not be out of pocket and the totality of the fee for the matter. As stated earlier, the focal point in this matter has more to do with the *quantum* as regards the rate applied or charged and the totality of the fee for the matter than considerations as to the principle of the items claimed.

- [34] In a recent South African case (*The Trollip case*) concerning the parameters of the taxing masters discretion in regard to the assesment of counsel's fees, the court relying in a dictum of another South African court in *Kromoscope (Pty) Ltd & Ano v Rinoth* 1991 (2) SA 250 (W) at 26 E-F, stated the principle that ought to guide us thus:

"While the fee allowed by the taxing master must be reasonable in the circumstances, counsel is also entitled to be fairly compensated as a professional man for his preparation, attendance at court, presentation of argument and all the thought, concern and responsibility that went into the matter".²

- [35] Most crucially at paragraph 39 the court in the Trollip case touches on another fundamental principle governing any regard to counsels fees on taxation summarised tersely as follows:

"Counsel is entitled to be fairly compensated with the principles set out above. The taxing master, in his or her discretion, must strive to give the successful party a full indemnity in respect of costs 'reasonably incurred'. If an advocate's fee is a reasonable fee (and this is in the discretion of the taxing master taking into account all relevant circumstances) it ought generally to be allowed in full without deduction"³

² *Trollip v Taxing Mistress of the High Court and Others* 2018 (6) SA 292 (ECG) (*The Trollip Case*).

³ See also *Kloot v Interplan Inc* 1994 (3) SA 237 (SE) at 239 G –I.

- [36] I must say that the tariff prescribed under the rules for advocates fees suffers from one serious handicap, it is sadly outdated – having been last reviewed around the year 1990 and given the erosion in the value of money, it can hardly serve as a good basis for determining whether a rate above the rates allowed therein is reasonable or not. The respondent's attorneys have framed the enquiry as to what would be a reasonable rate in a curiously awkward manner. He contends that it was for the taxing Master to explain in her report the basis on which she concluded the Counsels claimed hourly rate of E2,500 was reasonable. I do not think that is the correct approach as to the incidence of the onus in entering into the enquiry. I think it is rather on the partly challenging the rate claimed to demonstrate that the rate was unreasonable as that is the basis on which it seeks to review and set aside the *allocatur*. The cardinal rule is that where the taxing Master is allowed such latitude as to allow such fees as in his discretion are deemed reasonable, that judgment is pre-eminently his or her domain and the court may only interfere, where the *allocatur* is shown to be manifestly unreasonable.
- [37]. Regarding the taxing masters discretion, the rationale for taxation of costs must be borne in mind – the indemnity principle central to which is the stated object of the rule on taxation namely; ensuring that the successful party who has been awarded costs is indemnified 'all' costs, charges and expenses as appear to the taxing officer to have been necessary for the attainment of justice in the litigation. In a word costs reasonably incurred so that the winning party's fruits of victory are not diminished by the burden of his attorney and client bill. He must not be put 'out of pocket' as it were. For the loser, it is the taxing master duty to ensure that that party's interests are also protected, so that the final pain of paying the other side's costs is tempered somewhat against a ruinous and excessive bill of cots. There lies the balance.
- [38] The ultimate issue for adjudication in this review is whether there are legitimate grounds to interfere with the Taxing Master's determination that

the charge-out rate on which the counsel's fees sought to be recovered in the bill of costs was reasonable. In view of the order of the court allowing the recovery of costs of counsel in general the taxing master's discretion is directed to whether in the particular circumstances in regard to specific items such ought to be included as reasonably incurred and also the reasonableness of the quantum of the fee. The respondent expresses no disquiet over the number of hours in the attendances as per the item in contention where counsel ostensibly devoted a total of thirty six hours on the brief including preparatory work, consultations and the drafting of the required documents in prosecuting the matter. There is thus no dispute of fact or any aspect that turns on evidential questions. On that basis the test of work and expense necessarily incurred in the pursuit or attainment of the cause is not in question. The main gripe or concern is in relation to the issue of reasonableness or otherwise of the charge-out rate on which the composite fee is predicated. In *Trollip* the court touches on a fundamental matter of the ethos of taxation as concerns the confidence with which the taxing master must regard the professions of counsels on matters of integrity. I could not express it better than the exhortation by that court at paras 20 and 29 of its judgment where it was stated:

"While the taxing master may not ignore evidence that may show that work that has been charged for has, in fact not been done, this does not mean that there is a duty upon practitioners to 'prove their claims' as it were. The legal profession is a 'distinguished and venerable profession' and its members are officers of the court. As a result, 'absolute personal integrity and scrupulous honesty' are expected of them. It follows that a taxing officer is entitled to take counsel's fee list at face value as constituting a record of the work that has been done. The honesty and professional ethics of counsel ought not be lightly questione.....(and).....(A) taxing master's starting point should be that, in the absence of evidence to the contrary, advocates as members of an honourable profession, render fees honestly and behave ethically" (my parenthesis).

I think that has to be the mantra for every taxing officer in considering the counsels fees. On the other hand it is not to be traded off against or held at the cost of compromising the taxing master's duty to keep an open mind to 'trust but verify' counsels fees claimed and act judiciously at all times.

[39] In *Attorney General v The Taxing Master and Ano.* SZHC Case No. 783/00 (unreported) this court has had occasion to advert to, and in a sense recognise, the existence of a Schedule of Fees published by the Law Society of Swaziland (eSwatini) setting out, *inter alia*, such parameters of fees or rates for Attorneys and Counsel in the Bar and Side Bar of this jurisdiction. The fee structure schedule was formulated through a consultative process within the profession in comparison with other bars and side-bars in the neighbouring jurisdictions. Of particular interest here is that in the *Attorney General* case the court noted the then prevailing hourly rate for counsel fees of E2,000.00. That tariff was formulated over 10 years ago. Using these rates as a yardstick provides some scale of reference that may have been uppermost in the Taxing Master's mind in her determination that the rate of E2, 500.00 was reasonable and in keeping with her remit to allow such larger amounts as she deems appropriate as directed by the court.

[40] In light of these facts I am disinclined to accept the respondent's contention that the Taxing Master acted improperly or without any rational basis nor am I persuaded that this is the case and therefore find no basis for interfering with her ruling on this aspect or to interfere and set aside her the result of the exercise of her discretion in taxing and allowing the fee o counsel in the *allocatur* she made. Consequently the application must fail. It is accordingly dismissed with costs.



MAPHANGA J

Appearances:

For the Applicants : L.R. Mamba & Associates

For the Respondents : M.J. Manzini & Associates