



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 1345/10

In the matter between:

JOHAN VAN DER BERG

Applicant

and

THE TAXING MASTER,

First Respondent

WESTERN CAPE HIGH COURT, CAPE TOWN

THE GENERAL COUNCIL

OF THE BAR OF SOUTH AFRICA

Second Respondent

JUDGMENT: 14 JUNE 2010

Riley, AJ:

[1] This is an application for a review of the first respondent's taxation of a bill of costs of the second respondent on the 14th December 2009 under case number 2419/2005.

[2] The applicant, who instituted the proceedings on the 25th January 2010 sought an order directing the first respondent to show cause why his taxation of the second respondent's bill of costs should not be reviewed and corrected or set aside in terms of

[3] It is common cause that on the 8th of February 2010 the First Respondent filed a notice of intention to abide and Second Respondent filed a notice of non opposition and consent to order on 9 February 2010, in the following terms:-

- (1) That the allocator of the First Respondent of 14 September 2009 in case number 2419/2005 ("the allocator") is set aside.
- (2) That the bill of costs in case number 2419/2005 presented by the Second Respondent on 14 December 2009 is referred back to a different taxing master of this Court, for taxation on a date and at a time to be fixed by such taxing master after consultation with the Applicant and Second Respondent.
- (3) That there be no order as to costs.

[4] On 23 April 2010 and after having heard argument from Applicant and Second Respondent, the following order was made by agreement between the parties:-

- (1) That the allocator of the First Respondent of 14 December 2009 in case number 2419/2005 ("the allocator") is set aside;
- (2) That the bill of costs in case number 2419/2005 presented by Second Respondent on 14 December 2009 is referred back to a different taxing master of this court for taxation on a date and at a time to be fixed by such taxing master after consultation with the Applicant and Second Respondent.

[5] The only issues left for determination are:-

- (1) Whether the deponent to the Second Respondent's answering affidavit, who is the chairperson of the Cape Bar Council Adv. Jeremy Muller SC ("Muller") was duly authorised to depose to the affidavit on behalf of the General Council of the Bar of South Africa, and
- (2) Whether Applicant's application for leave to amend its notice of motion in order to include an additional prayer "directing the respondents to pay the Applicant's costs on a scale as between attorney and client" should be granted and whether Applicant was entitled to costs in the event of any of the Respondents opposing the application.

[6] The Second Respondent objects to the proposed amendment.

[7] For the sake of convenience, I deal firstly with the preliminary issue as to whether Muller, the deponent to the Second Respondent's answering affidavit was duly authorised to depose to the affidavit on behalf of the Second Respondent. Mr. H.C. Schreuder contended on behalf of the Applicant that even though Muller had authority to depose to affidavits on behalf of the Second Respondent that:-

- (1) Muller had made himself guilty of inappropriate conduct in the matter when he persisted with the opposition to the amendment in the name of the Second Respondent for which, so he alleged, Muller had no authority;

- (2) Second Respondent had failed to show that it had considered the matter and in particular that it had given consideration to the opposition of Applicant's application to amend its notice of motion in order to claim costs;
- (3) Second Respondent had filed no extracts of minutes of any meeting to show that it considered and authorised the approach to be followed by Muller.

[8] Mr. D. Irish SC assisted by Ms. K Pillay for the Second Respondent, contended that the attack on Muller's authority to have deposed to affidavits on behalf of the Second Respondent is both belated and opportunistic.

[9] It is apparent from the papers that the lack of Muller's authority is raised for the first time in the supplementary affidavit filed on behalf of the Applicant.

[10] In response to Applicant's founding affidavit on 8 February 2010, Muller deposed to an affidavit in which he records the following:-

"I am the chair of the Cape Bar Council and am duly authorised to depose to this affidavit on behalf of the above-named second respondent; General Council of the Bar of South Africa, of which the Cape Bar Council is a constituent"

[11] In the affidavit in support of his notice of application to amend, Applicant does not dispute or challenge Muller's authority to depose to an affidavit on behalf of the Second Respondent at all. He accepts Muller's authority as appears from the fact that he states

that:–

"I am amenable to the order suggested by him in paragraph 4 of his affidavit, provided an order for costs as applied for in the accompanying Notice of Motion, is included therein."

[12] On a simple reading of the paragraph Applicant acknowledges that Muller had made his affidavit on behalf of the Second Respondent when he states that:–

"I refer to the affidavit of Idris Jeremy Muller (Muller) on behalf of he (sic) second respondent dated 8 February 2010."

[13] In Second Respondent's answering affidavit Muller states as follows:–

"In response to paragraph 5.2, I note that the applicant for the first time disputes my authority to depose to an affidavit on behalf of the second respondent. This challenge is misconceived and without foundation. A challenge of this nature can only competently be brought in respect of the attorneys handling this matter. I attach hereto a copy of a Special Power of Attorney marked "IJM1", which I respectfully submit confers the requisite authority to Bisset Boehmke Mcblain Attorneys in respect of these proceedings. I respectfully submit that the second respondent has indeed properly applied its mind to the issues that are the subject of these proceedings. Any allegation to the contrary is plainly without foundation."

[14] It is common cause that "IMJ1" is a special power of attorney granted by the General Council of the Bar to Bisset Boehmke Mcblain Attorneys. It is unnecessary to repeat the wording thereof as the content speaks for itself. Suffice to say that it importantly makes provision for the ratification of any action by the attorneys.

[15] In my view Mr. Irish is correct in his contention that in the present matter the crisp answer to Applicant's challenge to Muller's authority is to be found in Rule 7 of the Uniform Rules of Court.

[16] Rule 7(1) provides that:—

"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[17] Apart from the fact that there has been no challenge to the authority of Second Respondents' attorneys, Applicant has failed and neglected to comply with the prescripts of Rule 7 of the Uniform Rules of Court.

[18] In Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 F-H the following was held:-

"The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1)."

[19] This, in my view, is a sound approach and is applicable in *casu*. In this regard, see also Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at paragraph 19.

[20] Accordingly I find that the challenge to Muller's authority is indeed misconceived, and without merit. It follows that the Applicant's challenge to Muller's authority cannot succeed.

[21] It is not necessary to go into too much detail about the background and the events leading up to the taxation of Second Respondent's bill of costs on 14 December 2009. What is however clear and undisputed is that there existed severe tension and acrimony

between Applicant and Second Respondent's attorneys of record from the time that Applicant received the notice of taxation in August 2009. The tension and animosity is further illustrated and highlighted with reference to the serious accusations levelled by Applicant against Koen, Second Respondent's attorney of record. Applicant *inter alia* accused Koen of the following:-

- (1) filing a false certificate in terms of Rule 70;
- (2) having been made aware of the falsity thereof persisting on having the bill taxed on the scale as between attorney and client, and
- (3) claiming for costs of three counsel well knowing Second Respondent was only entitled to costs for two counsel.

[22] Even though Applicant further alleged that he had personally delivered a copy of his letter requesting a postponement of the taxation, on Second Respondent's attorney, his counsel was unable to provide us with a copy of such letter nor was such letter attached to any of the affidavits filed on his behalf in this matter.

[23] The fact of the matter is that at the time that Applicant brought his application for the review of the taxation he was fully aware about all the trouble and frustration that Second Respondent's attorneys had caused him up until then. The correspondence reeks of acrimony and tension.

[24] Mr. Schreuder contended that it was necessary for the Applicant to launch the review application as a direct result of the approach and conduct of the Second Respondent which led to the taxation of the bill of costs on 14 December 2009 in the Applicant's absence. It was also contended that the taxing master would not have taxed the bill in Applicant's absence were it not for this approach and conduct. I cannot find anything in the record of the proceedings before the taxing master that Second Respondent's attorneys of record made themselves guilty of any particular conduct apart from the taxing master's recording that he intended to proceed with the taxation.

[25] Mr. Schreuder also argued that the fact that Second Respondent had elected to oppose the Applicant's application to amend its notice of motion (before the granting of the review and setting aside of the taxing master's taxation of the bill of costs) led to the bulk of the costs being incurred in this matter up to the date of hearing and that the Second Respondent should not have opposed the Applicant's application, and have consented to costs on an unopposed basis.

[26] I pause to mention that even though the taxation took place on 14 December 2009 and Applicant launched his review application on 25 January 2010, he made no attempt whatsoever to address correspondence to Second Respondent's attorneys to advise them of their error in proceeding with the taxation in his absence, nor did Applicant request them to agree to have the taxation set aside. This in my view would certainly have resulted in costs being drastically curtailed. Based on the facts and circumstances of this matter I find that the bulk of the costs incurred in this matter is in fact as a result of Applicant and his legal team's own doing.

[27] On the papers before me it is evident that it was the First Respondent who proceeded with the taxation even though he was in possession of the letter in which Applicant requested a postponement.

[28] I find it strange that after service on Applicant of the notice of taxation for 14 December 2009, that Applicant did not address any correspondence to them by fax, email or otherwise to Second Respondent's attorneys of record, or at the least, telephoned them to complain that the date did not suit him or his cost consultant. It seems logical that the Second Respondent's attorneys would be the first to be notified about the problems he had with the date if one considers the prior correspondence between the Applicant and Second Respondent's attorneys. Applicant failed to do this, even though the issue relating to the taxation of the bill had consumed his time and effort for almost a year.

[29] The following facts need to be highlighted:-

- (1) Applicant's affidavit in support of the review of the taxation was signed on 18 January 2010;
- (2) The notice of motion was signed by Applicant's attorneys on 25 January 2010.
- (3) Applicant had at least a week to reflect and consider the contents of his founding affidavit.

- (4) On 25 January 2010 the notice of motion with supporting documents were issued out of this court. The notice provides that should no notice of opposition be given in the stipulated time that application will be made for the relief sought on 12 February 2010.
- (5) On 25 January 2010 at 11h06 the notice of motion with supporting documents were served on Second Respondent's attorneys and presumably also on the First Respondent.
- (6) On 8 February 2010 First Respondent served a notice of intention to abide on Applicant's attorneys at 14h15.
- (7) The notice of intention to abide was also served on Second Respondent's attorneys on 8 February 2010.
- (8) At 14h15 on 8 February 2010 First Respondent served a notice in terms of Uniform Rule 53 on Applicant's attorneys in terms of which he gave notice to the Applicant that he has despatched the record of the proceedings in the taxation under case no. 2419/2005 to the registrar and that he did not intend supplementing the reasons for his decision contained in the record of the proceedings. The relevant part of the record of the taxation proceedings on 14 December 2009 is as follows:-

"On the 7th October I declined to tax the bill for being improperly presented for taxation.

The bill was redrafted and a new date was obtained for taxation and service of the notice of taxation was effected on 12 November 2009 by the Sheriff. I advised the parties including the respondent, who was present, that I will allocate an early date on account of the past delays on 27 November 2009. I received a letter from the respondent, in which he asked for the postponement of the taxation and a date next year to enable him to consult with his cost consultant.

It is apparent from the respondent's letter that he has already consulted Mr. Lourens about the bill and do not consider the basis for postponement of application is good. I therefore conclude that I should tax the bill in his absence.

(my underlining)

T. Yalezo
Taxing Master – 14 December 2009"

- (9) At 14h25 on 9 February 2010 the attorneys for Second Respondent served a Notice of Non-Opposition and Consent to order in the following terms:-

- "1. *the allocator of the first respondent of 14 December 2009 in case number 2419/2005 is set aside;*
2. *the bill of costs in case number 2419/2005 presented by the second respondent on 14 December 2009 is referred back to a different taxing master of this court, for taxation on a date and time to be fixed by such*

taxing master after consultation with the applicant and the second respondent; and

3. *there is no order as to costs."*

- (10) On 9 February 2010 Applicant's attorney of record served and filed a notice of set down, setting the matter down for hearing on Friday, 12 February 2010 at 10h00, on the Second Respondent.
- (11) On 10 February 2010 and at Loxton S.A. Police Services, Applicant deposed to his affidavit in support of the notice of application to amend (which appears to have been sent to his attorney of record per telefax at 11h55).
- (12) On 10 February 2010 the notice of application to amend which is set down for hearing on 12 February 2010 was issued and served on the First Respondent.

According to the notice of application to amend Applicant sought an order that:–

"1. *The following prayer be added after prayers 1 and 2 of the notice of motion dated 25th January 2010:*

"3. Directing the respondent to pay the applicant's costs on the scale as between attorney and client."

2. Costs of this application in the event of the respondents opposing the application."

[30] It is common cause that Applicant did not seek a cost order in his original notice of motion, nor does Applicant make out a case in his founding affidavit for costs against either First or Second Respondents. Mr. Schreuder was adamant that it was always the Applicant's intention to seek a cost order against First and Second Respondent. He was unable to provide us with a note, instruction or mandate from Applicant to his attorney or to counsel to this effect.

[31] It is necessary to note that at the time of launching these proceedings Applicant was an experienced senior counsel for many years. His attorneys of record and counsel who allegedly drafted the notice of motion and his attorneys of record are equally experienced and well established in practice.

[32] In his affidavit dated 10 February 2010 in support of the notice of application to amend, the Applicant states that the reason why costs were not referred to in the original notice of motion was due to an oversight on the part of his attorneys for which he sincerely apologised.

[33] In a further affidavit dated 11 February 2010 the Applicant states that:—

"2. *I refer to paragraph 6.1 thereof and apologise for the error contained therein.*

2.1 *I was under the impression that the original notice of motion was in fact drawn up by my attorneys but it has now been pointed out to me that in fact the notice of motion was drawn up on my behalf by my counsel.*

2.2 *I did not have sight into the notice of motion prior to the filing thereof."*

[34] In my view it is inconceivable and illogical for Applicant to suggest, that as very seasoned practitioners in the law, he and his legal team would have omitted to include a prayer for costs if that is what his original intention was.

[35] It is further highly unlikely and improbable that bearing in mind the history of the matter and the extreme acrimony between the parties that he would have forgotten to include any reference to costs in his founding affidavit to the notice of motion. I am therefore not persuaded by the argument that it was his original intention to claim costs. If one looks at the correspondence between Applicant and particularly Second Respondents' attorneys his chief complaint relates to the unnecessary costs incurred by him seemingly as a result of the Second Respondent's unreasonable attitude. The issue of costs would therefore have been alive in his mind at the time when the affidavit was prepared. He had

the affidavit with him for at least a week before the application was brought. It is also strange that he would not or did not have sight of the notice of motion prior to the application being launched. Applicant's first explanation as to why costs were not referred to in the original notice of motion does not make sense either. In the first place this explanation is on his own admission factually incorrect. It is once again unlikely and improbable that having practiced law for many years as an advocate and senior advocate that he would go on oath and state as a fact that:—

“...is due to an oversight on behalf of my attorneys...”

Surely he would have determined and at the least ought to have made sure about the factual correctness of the averment that he makes. It is obvious that he faxed the founding affidavit to his attorneys. It can reasonably be accepted that the affidavit when received, was read.

[36] On this version the attorneys would certainly have conducted themselves in a grossly negligent manner by the service and filing of an affidavit which contained factually incorrect information.

[37] We have no affidavit from Applicant's attorney of record explaining why they filed the affidavit well knowing that it was factually incorrect.

[38] As stated the Applicant changed his version and avers that he was “under the impression” that the original notice of motion was drawn up by his attorney, but that it had

been “pointed out to” him that it was in fact drawn up by counsel. He gives no explanation whatsoever why he, having been in practice as an advocate for many years, could have gained that impression.

[39] Neither Applicant’s attorney of record, nor counsel have supported the averments made by him as aforesaid, nor have they made affidavits to explain why no reference is made in either the founding affidavit or the notice of motion in regard to the cost issue, if that was originally the instruction by the Applicant.

[40] It is trite law that an amendment will not be allowed if it is *mala fide*. In this regard, see Moolman v Estate Moolman and another 1927 CPD 27 at 29 and Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd 2008 (2) SA 177 (C) at par 26.

[41] The Second Respondent has disputed that there was an “oversight” in the drafting of Applicant’s notice of motion, particularly when regard is had to the founding affidavit. Mr. Irish contended that the founding affidavit follows the relief sought in the original notice of motion. However he contended that the facts of the case on the whole demonstrate that the proposed amendment is *mala fide*. It is common cause that the review application was directed at the taxing master.

[42] I agree with Mr. Irish, on a simple ordinary reading of the Applicant’s founding affidavit there is not a single reference to the Second Respondent, save for the prejudice to be suffered should the relief not be granted.

[43] Based on the events that occurred after the service and filing by Second Respondent's attorneys, of the notice of non-opposition and consent to judgment and the conduct of the Applicant's attorneys in setting the matter down on an unopposed basis, it seems that Applicant's attorney was satisfied that the matter is being resolved on the basis as set out in Second Respondent's Notice of non-opposition and consent to order.

[44] Mr. Irish contended that this action by Applicant's attorney, in setting the matter down on an unopposed basis, was a clear indication to the Second Respondent that the matter had been settled between the parties and that there was no longer any dispute between them. Accordingly he argued that by bringing the application to amend the prayers for costs, the Applicant had introduced a new claim for costs on an attorney and client scale, as well as costs on that scale in the event that the Second Respondent opposed the application for amendment. Based on the facts of this matter I find that the Second Respondent had no alternative but to oppose the application for amendment and the relief sought therein.

[45] In J.R. Janisch (Pty) Ltd v W.M. Spilhaus and Co (WP) (Pty) Ltd 1992 (1) SA 167 (C) at 169 I, it was held that:—

"The tendency of our courts is not to be over-formalistic and to grant an amendment whenever it will facilitate the proper ventilation of a dispute between the parties. In Whittaker v Roos and Another; Morant v Roos and Another 1911 TPD 1092 at 1102-3 this tendency was described as follows:

'This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a grave injustice, if for a slip of the pen or error of judgment, or the misreading of the paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore the Court will not look to technicalities, but will see what the real position is between the parties.'"

[46] I agree with this approach.

[47] On the facts of this matter the Applicant gave two contradictory versions for why costs were not asked for originally. I have already expressed my reservations in this regard. In my view the affidavits filed by the Applicant are severely lacking in detail and particularity in regard to the absence of any reference to costs being sought against either First or Second Respondent. In addition I have mentioned that both Applicant's attorneys of record as well as counsel have failed to go on affidavit to explain how it came about that they failed and neglected to deal with the important issue of costs in the papers.

[48] Applicant has not given a satisfactory explanation for having omitted the most important issue relating to costs, from his founding affidavit or the original notice of motion.

[49] The real position it would seem is that there was never any intention to ask for costs in the first place. This in my view was the real position between the parties. I am therefore not persuaded that applicant is *bona fide* in the relief sought.

[50] In the result the following order is proposed:-

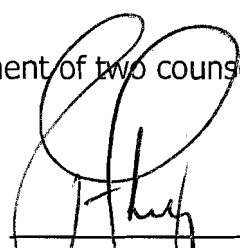
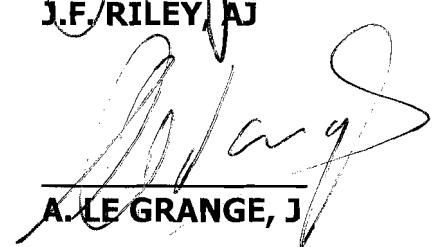
- (1) The Applicant's application for leave to amend his notice of motion to include an additional prayer –

"Directing the Respondents to pay the Applicant's costs on a scale as between attorney and client"

is dismissed with costs.

- (2) Costs to include the costs occasioned by the employment of two counsel.

I agree. It is so ordered.


J.F. RILEY, AJ
A. LE GRANGE, J