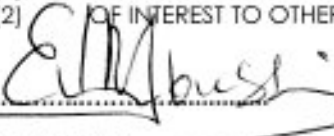




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 81552/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE: 25-01-2021

In the matter between:

V. MOLEFE

Applicant

and

THE TAXING MASTER

First Respondent

M.M. MOLEFE

Second Respondent

JUDGMENT

KUBUSHI J,

This judgement is handed down electronically by circulating to the parties' representatives by email.

[1] This is a review application in terms of uniform rule 48. The rule provides that any party dissatisfied with the ruling of the Taxing Master as to any item or part of an item which was objected to or disallowed *mero motu* by the Taxing Master, may by notice require the Taxing Master to state a case for the decision of the Judge.

[2] For ease of reference, and due to the number of applications referred to herein, I intend to refer to the parties in their names. I shall refer to the applicant, in this review application, as Mr Molefe and to the second respondent herein as Mrs Molefe. Mr Molefe, is the first defendant in the action that was brought by Mrs Molefe against him and the Government Employees Pension Fund ("the GEPF"), as the second defendant, for the claim of the amount of R1 361 762, 92, being half of the pension benefits due to Mr Molefe from the GEPF ("the main action"). Mr Molefe is, also, the first respondent in an interlocutory application that ensued from the main action ("the application to compel") that has now become the subject matter of this review application. The GEPF is not participating in these proceedings.

[3] The review application, itself, pertains to a Bill of Costs taxed by the Taxing Master on 20 February 2020 in relation to an order of costs granted on 15 May 2018, against Mr Molefe in the application to compel.

[4] The application to compel pertains to the notice in terms of uniform rule 35 (3), which had previously been served on Mr Molefe's attorneys and was not responded to. The application to compel was served on Mr Molefe's

attorney by Mrs Molefe's attorneys on 11 February 2018, and enrolled for hearing on 15 May 2018.

[5] Although the application to compel is referred to in the papers before me, it does not form part of the record. However, from the perusal of the other documents, it appears that two prayers were sought in the application to compel, namely, prayer 1, which sought to compel the respondents' therein (Mr Molefe and the GEPPF) to comply with the prayers demanded by Mrs Molefe in terms of the uniform rule 35 (3) notice, which prayers required the said respondents to discover certain documents; and prayer 2 being for the payment of costs.

[6] It is common cause that Mr Molefe's attorneys, complied with prayer 1 of the application to compel by delivering the reply to the notice in terms of uniform rule 35 (3) to Mrs Molefe's attorneys on 7 March 2018, that is, before the hearing of the application to compel. On 15 May 2018, when the parties appeared in court, an order to remove the matter from the roll and that the respondents, in that application, pay the costs jointly and severally, was granted.

[7] The Order in question was written as follows:

*

IT IS ORDERED THAT

1. The matter be and is hereby removed from the roll.
2. First and Second respondents to pay the costs jointly and severally."

[8] On 6 May 2019 Mrs Molefe's attorneys served Mr Molefe's attorneys with a notice of intention to tax the Bill of Costs relating to the said Court Order

of 15 May 2018. Mr Molefe opposed the application, objecting to all the items in the Bill of Costs including that the matter was not yet finalised and that there was no order against him to pay the said costs immediately.

[9] At the taxation of the Bill of Costs, on 20 February 2020, Mr Molefe's attorneys argued on the same basis as that objected to in his notice to oppose the Bill of Costs.

[10] Mrs Molefe's attorneys, on the other hand, argued that the Bill of Costs was due for taxation as the application to compel was concluded when Mr Molefe's attorneys complied with the notice in terms of uniform rule 35 (3) and argued further that it was not necessary that it be specifically stated in the Court Order that payment of the costs should be made immediately.

[11] The Taxing Master concurred with the argument of Mrs Molefe's attorneys that the application to compel was concluded when Mr Molefe finally complied with the notice in terms of uniform rule 35 (3), and that the Bill of Costs was, thus, due to be taxed. The Bill of Cost was accordingly taxed in favour of Mrs Molefe.

[12] On 12 March 2020, Mr Molefe's attorneys served the review application on the Taxing Master which review application sought to review the taxation of the Bill of Costs she taxed on 20 February 2020. Two grounds of review are raised in the review application, namely, that

- "4. The Taxing Master's discretion to award costs for the entire application, which application is still before court by reason of the fact that the defendant complied

with prayer 1 of the application, is unreasonable, incorrect and improperly made and, it is also contrary to the Court Order issued hereto;

5. Under the circumstances the Taxing Master was clearly wrong and the court has to interfere in his ruling, as he has vitiate (*sic!*) from the Court Order dated 15 May 2018.”

[13] In terms of uniform rule 48 (1), the Taxing Master is called upon to prepare a stated case for the decision of a Judge in chambers. The Taxing Master, in this instance, prepared the stated case and served it on both Mr Molefe and Mrs Molefe’s respective attorneys. Mrs Molefe’s attorneys submitted written submissions as required in terms of uniform rule 48 (5) to the Taxing Master’s stated case on 4 November 2020 and the submission by Mr Molefe’s attorneys was done on 13 November 2020. The Taxing Master in her report in terms of uniform rule 48 (5) had nothing further to submit, consequently, the matter was placed before me in chambers for adjudication.

[15] In her stated case the Taxing Master submits, correctly so, that she will not address point 1 to 3 of the Notice of Taxation since these points relate to the merits of the court application which are outside the ambit of the taxation.

[16] The Taxing Master further submits that items (1) to (14) of the Bill of Costs were not specifically objected to as the attached notice of intention to object indicated that the main objection is the contention that the matter has not been finalised. As a result, the Taxing Master’s conclusion was that the review application does not pertain to those items.

[17] In his response to the Taxing Master's stated case, Mr Molefe argues for the granting of the review application on the following basis:

"OBJECTION TO TAXATION BY THE TAXING MASTER

3.1 . . .

3.3 The applicant herein objected to items 1 to 4 as set out in the second respondent's Bill of Costs. The applicant's grounds of objection of the second respondent's Bill of Costs included (but not limited) to the following, that:

3.3.1 The costs awarded as *per* court order dated 15th June 2018 (*sic!*) were wasted costs, thus of appearance on that particular day, since the matter has been removed from the unopposed to opposed motion court roll;

3.3.2 From the aforesaid matter, there is a material dispute of facts on which the above Honourable Court need to adjudicate on, failing which the applicant will be severally (*sic!*) prejudiced;

3.3.3 The Master's discretion to award costs on the entire matter was misconstrued. As was made contrary to the order of the court;

3.3.4 There is double charges levied on each item, in that the charges of the second respondent's attorneys combines charges for Pretoria North as well as that of Pretoria Central of the same firm of attorneys;

3.3.5 The correspondence charges levied were between the office Hack, Stupel and Ross situated in Pretoria North as well as that in Pretoria Central, leading to excessive charges levied against the applicant hereto;

3.3.6 Charges from item 1 to 14 (or certain costs) being unjustified due to being for the main application which was not concluded.

IN CONCLUSION THEREOF

- 4.1 Regard to aforesaid herein above, it is evident that the Taxing Master did not exercise his/her discretion properly, did not apply his/her mind to the matter, disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper to consider;
- 4.2 As a result he/she acted upon wrong principle or wrongly interpreted rules of law or has given a ruling which no reasonable person would have given, because same is clearly wrong and interference on review is justified."

[18] The question for determination is whether the Taxing Master, when taxing Mrs Molefe's Bill of Costs on 20 February 2020, exercised here discretion unreasonably, incorrectly, improperly and contrary to the Court Order issued.

[19] Underlying this question are two further questions:

- 19.1. Firstly, whether the Taxing Master's discretion to award costs for the entire application to compel, which application according to Mr Molefe, is still before court by reason of the fact that the applicant complied with prayer 1 of the application was clearly wrong and this court has to interfere in her ruling.
- 19.2. Secondly, whether a cost order in an interlocutory application, in this instance the application to compel, is immediately payable without the court having made an order for immediate payment of those costs.

[20] I deal hereunder with the said issues in turn.

Whether the Taxing Master incorrectly exercised her discretion to award costs for the entire application to compel

[21] There is a dispute as to the reason why the application to compel was removed from the roll on 15 May 2018. According to Mr Molefe, the application to compel served on the unopposed court roll and was removed from that roll to the opposed court roll because he had filed a notice to oppose the application to compel. The said notice to oppose forms part of the papers filed in the review application as Annexure "VVM3". From the perusal of Annexure "VVM3" it appears that it was served on Mrs Molefe's attorneys of record on 13 June 2018 and delivered to the Registrar of the court on 15 June 2018. However, the Court Order that is at issue in this review application was granted on 15 May 2018. There is no explanation on the papers why the said notice to oppose was filed after the hearing of the notice to compel on 15 May 2018.

[22] It is also common cause between the parties that Mr Molefe complied with the request in terms of the notice in terms of uniform rule 35 (3) on 7 March 2018. There seem to be no reason why, none was proffered, that if Mr Molefe had complied with rule 35 (3) the matter was still opposed. I am also of the view that if the notice to compel was removed from the unopposed roll to the opposed roll, the order granted would reflect as such, but this is not the case. Mr Molefe does not provide a reason, if any, why the order was granted as stated in paragraph [7] of this judgment.

[23] Therefore, the contention by Mrs Molefe that the matter was removed from the roll because Mr Molefe had complied with the request in the notice in

terms of uniform rule 35 (3) on 7 March 2018, is plausible and more probable than the explanation given by Mr Molefe. According to Mrs Molefe, on 15 May 2018, the application to compel served in court merely for purposes of costs, which order of costs was granted jointly and severally against Mr Molefe and the GEPPF.

[24] Having come to such a conclusion, the complaint of Mr Molefe that the Taxing Master awarded costs in respect of the whole application instead of the wasted costs of the appearance of that day, is without substance.

[25] It is worth noting that Mr Molefe in his papers, filed of record, keeps referring to an order granted on 15 June 2018 whilst the Court Order pertaining to the taxation which is the subject matter of this review application was granted on 15 May 2018.

[26] In terms of uniform rule 30A, where a party fails to comply with the rules of court or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that she or he intends, after the lapse of ten (10) days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out. Failing compliance within ten (10) days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.

[27] Uniform rule 6 (1) provides that every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

[28] The application to compel would thus consist of a notice of motion supported by an affidavit, as well. It is thus my finding that the Taxing Master exercised her discretion correctly when she taxed the whole application and not only the costs incurred by the appearance of the parties on that day, as suggested by Mr Molefe.

[29] The issue that remains for adjudication is whether costs awarded in respect of an interlocutory application, where the main case has not been finalised, are payable immediately before the whole matter has been finalised.

Whether a cost order in an interlocutory application is immediately payable without the court having made an order for immediate payment of those costs.

[30] Mr Molefe's argument is that the Taxing Master in taxing Mrs Molefe's Bill of Costs exercised her discretion contrary to the Court Order issued, as the Court Order does not provide for the immediate payment of the costs.

[31] At the taxation of the Bill of Costs, Mr Molefe's attorneys argued that such costs should wait the finalisation of the main action before they can be paid unless the court granting such costs indicated that they should be paid immediately. Whereas Mrs Molefe's attorneys submitted that such costs are payable immediately on demand. The Taxing Master in taxing the Bill of Costs concurred with Mrs Molefe's attorneys and ruled that there was no reason not to proceed with the taxation as the matter was concluded when Mr Molefe finally complied with the notice in terms of uniform rule 35 (3).

[32] Conversely, Mrs Molefe in her response to the Taxing Master's stated case moved for the dismissal of Mr Molefe's review application, on the ground that costs orders in the High Court are immediately payable, unlike costs awarded in the Magistrates' Court which are not payable until the conclusion of a matter.

[33] When the matter finally served before me, I sent a request to the Taxing Master to provide me with the basis on which she concurred with Mrs Molefe's attorneys that the matter had been concluded when the applicant complied with the notice in terms of uniform rule 35 (3). The Taxing Master's response was that Mr Molefe's compliance with the application to compel before the hearing, effectively rendered the notice to compel obsolete, and once the cost order was granted it was her duty to give effect to such an order.

[34] I also sent a request to Mrs Molefe's attorneys requesting to be provided with authority that the costs in the High Court are payable immediately unlike the costs awarded in the Magistrate's Court. The response I received was that Rule 33 (3) of the Magistrates' Court Act No 32 of 1944 specifically provides that *"unless the court shall for good cause otherwise order, costs of interim orders shall not be taxed until the conclusion of the action, and a party may present only one bill for taxation up to and including the judgment or other conclusion of the action"* whereas uniform rule 70 has no such provision.

[35] Subsequently, I referred the answers I received respectively from the Taxing Master and Mrs Molefe's attorneys to Mr Molefe's attorneys for comment. The response received was to the effect that the cost order granted

in respect of the notice to compel was erroneously granted since the matter was still to be heard in the opposed motion court. The contention is that even though Mr Molefe had provided a reply to the notice in terms of uniform rule 35 (3) on 7 March 2018 there was still an outstanding letter of 5 December 2017. It is also contended that the court never dealt with the merits of the application since Mr Molefe had filed an answering affidavit, hence the costs order was granted in error.

[36] On the issue of the immediate payment of cost I seem to be in agreement with the Taxing Master that once the matter was finalised, as it was in this instance, there was nothing prohibiting her from giving effect thereto. The prayer sought in the notice to compel was for compliance with the notice in terms of uniform rule 35 (3), therefore, the application to compel was finalised once Mr Molefe complied with the request in terms of that notice.

[37] Furthermore, I have stated earlier in this judgment that the notice to oppose on record was served on Mrs Molefe's attorneys on 13 June 2018, which is a date way after the court order that is in question herein. The other documents, like the letter of 5 December 2017 and the answering affidavit that are referred to by Mr Molefe's attorneys do not form part of the record before me. I can, therefore, not decipher when same were either served on Mrs Molefe's attorneys or delivered to the registrar.

[38] From what I can gather from his submission, Mr Molefe's complaint is that the cost order was erroneously granted. The proper procedure to follow where an order has been granted erroneously is to have such order rescinded.

It is trite that an order of court should be given effect to, even if it is thought to be wrong, until set aside by a competent court of law. Since the cost order has not been set aside the Taxing Master was correct to have given effect thereto by proceeding with the taxation.

[39] I have ruled, as well, that the Taxing Master was entitled to give effect to the court order as granted on 15 May 2018 because the application had been finalised. Similarly, I see no reason why the costs order could not be paid immediately as that part of the proceedings, the application to compel, has been finalised. There appears to be no reason to wait for the finalisation of the main action before payment of such costs could be made.

Objection to item (1) to (14) of the Bill of Costs

[40] It needs to be stated that the Taxing Master's finding that items (1) to (14) of the Bill of Costs were not objected to is not entirely correct.

[41] Mr Molefe in his notice of intention to oppose the Bill of Costs states that he objects to all items hereto, including that this matter is not yet finalised. In his submission in terms of uniform rule 48 (5) he states that item 1 to 14 (or certain costs) are unjustified due to being for the main application which was not concluded. In this sense it can be said that Mr Molefe has specifically objected to these costs.

[42] Nevertheless, what is clear is that Mr Molefe's attorneys did not, during the taxation, specifically object to each individual item as he now seeks to do in his submission in terms of uniform rule 48 (5).

[43] It is evident from the notice to oppose the taxation that Mr Molefe is objecting to the items in general terms, that is, because the matter has not been finalised. He does not specifically set out reasons for the objection of the individual items like he does in his uniform rule 48 (5) submissions. Therefore, the reasons stated by Mr Molefe in his submissions in terms of uniform rule 48 (5) appears so for the first time. It is does not even appear as if they were specifically raised at the taxation.

[44] From the perusal of the Taxing Master's stated case it seems that the taxation was argued only on two *in limine* points that the taxation should not be proceeded with because the matter has not been concluded, as the application to compel will still proceed; and that the Court Order does not provide for the immediate payment by the applicant. The reasons Mr Molefe seeks to bring forward in the uniform rule 48 (5) submission were not mentioned. In that sense, the reasons do not form part of the review.

[45] It is my finding that the Taxing Master exercised her discretion judicially and correctly. For that reason, I have to conclude that Mr Molefe's review application ought to be dismissed.

[46] Therefore, the review application is dismissed with costs.


E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Attorneys : **Leshilo Inc. Attorneys**

Respondent's Attorneys : **Hack, Stupel & Ross Attorneys.**

Date of hearing : 20 February 2020

Date of judgment : 25 January 2021