IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Review number: 1081/2017

In the matter between:

JORIAN CONSTRUCTION CC Applicant

and

KOPANONG LOCAL MUNICIPALITY 1st Respondent

RANTOA SERVICE PROVIDERS 2nd Respondent

CORAM: MATHEBULA, J

DELIVERED ON: 03 OCTOBER 2019

Summary

Review of a taxed bill of costs-Perusal of tender documentation of all bidders not party to the proceedings before court deemed unreasonable and unnecessary. – The documents not placed before court or formed part of the bundles. - Decision of the taxing mistress to disallow the disputed items confirmed.

[1] This is a review of the taxation of the bill of costs as between party and party in terms of rule 48 of the Uniform Rules of Court presented for taxation by the applicant's attorneys on 9 September 2018.

[2] During the taxation of the bill, the applicant was represented by Mrs. Sandra van Wyk and Mr. Thabo Mhlokonya appeared on behalf of the first respondent. The applicant was dissatisfied by the ruling of the taxing mistress to tax off items 95 to 118. These are the items that were referred for review and will deal with them in the following paragraphs.

Background

[3] The applicant, an unsuccessful tenderer, sought on an urgent basis an interim interdict pending the outcome of the review proceedings. On 28 March 2017 Pohl AJ granted the urgent application with costs to be costs in the proposed review application. On 5 June 2018 the decision of the first respondent to exclude the applicant's bid from further evaluation in the assessment process to award the bid was declared irregular, reviewed and set aside by Van Zyl and Mbhele JJ. The first

respondent was ordered to pay the costs of the application. In my view this means that the first respondent is liable for payment of costs on a party and party scale.

[4] The documents listed hereunder were placed before me to consider in adjudicating this matter. They are:-

(i) The taxed bill of costs referred to in paragraph 1.

(ii) Notice of Review for Taxation in terms of rule 48(1).

(iii) Taxing Mistress' Report in terms of rule 48(2).

(iv) An undated document titled "Important Facts To Remember". It is unclear who the author is of the document. Essentially it sets out the chronology of facts and the key issues pertaining to the dispute between the parties.

(v) Applicant's submissions in terms of rule 48(5)(a) to the Stated Case by the Taxing Mistress.

<u>Grounds of Objection</u>

[5] The applicant was one of the twenty three (23) bidders who had submitted a bid for the augment water supply and increase water pressure - Reddersburg. The gist of the review concerns the

applicant's attorney's perusal fee of the tender documentation of the other twenty two (22) bidders. The contention is that the taxing mistress erred in disallowing all the items.

[6] The submission is that it was of crucial importance to peruse and consider all documentation of other bidders in order to consider and select which tender documentation was necessary to argue the matter in court. Accordingly the perused documents were material to the matter before court and had evidentiary and probative value. In order to curtail unnecessary copies were not made.

[7] The applicant is relying on the **C. P. Wentzel v MEC for Health - Department of Health, Free State Province and another** case.[1] In that matter Moloi J, reiterated the views espoused by Kruger J et al in their book "**Taxation of Costs in the Higher and Lower Courts – A Practical Guide**" the learned authors are of the opinion that "if documents were discovered and had to be perused, the costs of perusal should be allowed". They continued that not all documents discovered are used at the trial. Therefore the costs for perusal should not be disallowed.[2]

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[1] **Case No 1229/2011 (8 May 2014)**
[2] **Taxation of Costs in the Higher and Lower Courts – A Practical Guide at page 44**

[8] In response to the Stated case of the taxing mistress the applicant submitted that the issue before the court was differential treatment meted out by the first respondent. Therefore it was imperative that some comparative study is undertaken to demonstrate this aspect. The perused documents were not irrelevant to the matter and were not placed before the court to avoid burdening the record.

Taxing Mistress' Stated Case

[9] In her stated case the taxing mistress tabulated reasons which led her to disallow the items under review. She submitted that the court awarded costs of the application which means costs on a party and party scale. The matter was between the cited parties without the involvement of the other twenty two (22) bidders. Pertinently it was her view that the tender documents were not served by the first respondent to the applicant and perusal of such documents was deemed to be irrelevant to this matter. In addition, the tender documents of other bidders were not placed before the court nor did they form part of the bundle of documents for consideration. Lastly that there was no mention of the other bidders in the opposing affidavit and the attached Engineers Report and Bid Adjudication Committee minutes were adequate to explain the reasons for the selection of the successful bidder. She reiterated that there was no

cogent reason to peruse the tender documents of the other bidders. These are in a nutshell the basis of disallowing the items as she deemed them to be an irrelevant exercise on the part of the applicant's attorneys to peruse them.

[10] The issue for determination as couched by the parties is whether the applicant is entitled to peruse the tender documentation although they were not served upon the applicant's attorneys by the respondent's attorneys. At the centre of the dispute is the disallowing of the amount of R18 232.00 multiplied by twenty two (22) totalling the sum of R401 104.00.

Legal principles and application of the legal principles

[11] It is settled law that the taxing mistress has a discretion to allow or disallow any item(s) in a bill presented to her. In the exercise of that administrative act which is judicial in nature, she must act reasonably, in a just and fair manner based on sound legal principles. It stands to reason that this court will be reluctant to interfere with her decisions which largely required the exercised of a discretion.[3] This being a review, this court with wider powers of

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[3] Gentech Engineering Plastics CC v Sheldon Maurice Zimmer and 3 others (2462/2008) 2013 ZAELPEHC 16 (1 April 2013).

supervision will interfere with her decision if she exercise it improperly, failed to apply her mind or wrongly applied the principle.[4]

[12] Both the applicant and the taxing mistress relied on the **Waring v Mervis and Others** case.[5] In that matter a distinction was highlighted between important and material documents. Material documents include those that carry evidential or probative value in proving the case of either party. Important documents are those upon which a cause of action or defence originate.

[13] The main purpose of a costs order, as I understand it, is to indemnify a successful party who has incurred expenses in instituting an action like in this matter. Essentially it is a refund of the costs not indemnification of the risk that a party took in litigating. A costs order on a strict party and party scale is seldom a full refund. In the same vein it has been held that a party must not pay the costs that are unnecessarily incurred through the failure to take necessary steps or taking wholly unnecessary steps.[6]

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[4] **President of the RSA v Gauteng Lions Rugby Union 2002 (2) SA 64 (CC).**
[5] **1970 (3) SA 239 (W) 243 F-H**
[6] **Gamlam Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996 (3) SA 692 (C) at 701 (C)**

[14] The authors Kruger J et al describe party and party costs as “costs, charges and expenses which appear to the taxing master to have been necessary or proper for the attainment of justice or for defending the rights of any party.[7] It is a well-known fact that taxing masters (mistresses) do depart from allowing fees for perusal of documents they deem to be unreasonable or unjust.

[15] I have already stated the reasons advanced by the taxing mistress to disallow the items under review.

[16] Prior to launching the application, the applicant’s attorneys directed a letter to the respondent requesting reasons as well as the Evaluation Report, Minutes of both the Bid Evaluation and Adjudication Committees as well as their reports and recommendations. The letter explicitly stated that these documents were required to consider the prospects of success in the event the applicant challenges the decision to award the tender to the successful bidder. These are usually the documents which contain all the information relating to the process of awarding a tender.

[17] In preparation for launching any litigation a great deal of preparation is embarked upon to consider the prospects of success. Granted, it will not be every fee or expense that will be refunded in the event of

[7] **Kruger J et al page 13 para 3.1**

success. In my view there was no cogent reason(s) to peruse the voluminous tender documents of each and every bidder. The applicant was not in litigation with other bidders. There are no reasons to peruse the tender documentation of eight (8) bidders whose bids were declared non-responsive. These documents had no evidential or probative value to any party's case. It will be unreasonable and unjust to allow a fee for perusal when it was totally unnecessary to do so.

[18] It was equally unnecessary to peruse tender documents relating to others as well. The tender evaluation methodology is clearly defined in the documents provided to the appellant's attorneys. I could not find anything in the papers over and above what is succinctly stated in the requested and furnished documents. The taxing mistress was correct that these documents were not placed before the court nor did they form part of the bundles. The fact that other bidders were mentioned in the opposing affidavit is not a good enough reason to embark on a laborious exercise to peruse unnecessary documents. The averments by the respondent was backed up by documents to that effect which could be challenged without resorting to an unnecessary expedition of perusing tender documentation of all other bidders. The reasons for disqualification was clearly defined in the minutes. These being not signing all documents, non-

attendance of compulsory briefing session or price variation. All these could be dealt without perusing documents even of non-responsive bids.

[19] I have no doubt in my mind that the applicant's attorneys are entitled to the perusal of these documents. That must be collected from the applicant. The party and party scale is more restrictive in nature and does not make provisions for allowing fee for perusal in the context of this court order, as the taxing mistress correctly concluded. I conclude that it was contrived for the applicant's attorneys to claim such fees when there was no basis for it.

[20] I do not understand Kruger J et al as well as Moloi J in C. P. Wentzel supra to mean that all documents if discovered and had to perused should be allowed. In any event, in this matter it was unreasonable and unnecessary to read the documents and seek to discover the fee for perusal based on a party and party costs order. The discretion of the taxing mistress is paramount taking into consideration the context that the costs order was made by the court. The above lead me to the conclusion that the taxing mistress did not act wrongly or misapplied the principles in disallowing fees for perusal of the items under review.

[21] It is within my discretion to make any costs order that I deem just and equitable after consideration of the facts and obviously circumstances of this matter. The norm in matters of this nature is that nominal costs are awarded in favour of the successful party and I fix the amount at R1 500.00.

Order

[22] It is ordered that:-

22.1. The review is dismissed.

22.2. The applicant is ordered to pay the costs of the application in the sum of R1 500.00.

M. A. MATHEBULA, J

On behalf of applicant: Gous Vertue & Associates Incorporated

On behalf of respondents: Mhlokonya Attorneys

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