

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Nr. : 1229/2011

In the matter between:-

C.P WENTZEL

Plaintiff

And

MEC FOR HEALTH, DEPARTMENT OF HEALTH
FREE STATE PROVINCE
NETCARE LIMITED

1st Defendant
2nd Defendant

CORAM:

MOLOI, J

DELIVERED ON:

8 May 2014

REVIEW JUDGMENT

- [1] This is a review of taxation of a taxed bill of costs in terms of Rule 48 of the Uniform Rules of the High Courts. The bill of costs have been taxed by the Taxing Master, Mr O.B. Masoka.

BACKGROUND

[2] On 14 March 2011 the plaintiff issued summons against the first and the second defendants. On 25 March 2011 the first defendant filed a notice of intention to defend the action. On 18 April 2011 the second defendant filed its notice of intention to defend. Immediately the second defendant's attorneys pointed out to the plaintiff's attorneys that the second defendant was incorrectly sued and suggested the action against it be withdrawn. This was not done despite several reminders. Pleadings were exchanged, notices served and correspondence exchanged. Only on 26 July 2012 did the plaintiff file a notice of withdrawal of the action against the second defendant and tendered wasted costs. Norton Rose Fulbright of Johannesburg was the second defendant's attorneys and engaged the services of Webbers attorneys of Bloemfontein as correspondents.

[3] The second defendant appointed costs consultants to draw up the bills of cost for the instructing as well as the correspondent attorneys and presented them for payment to plaintiff's attorneys by 28 March 2013. No payment was

forthcoming. On 2 April 2013 the second defendant gave notice of its intention to tax the bills of costs on 3 June 2013. The plaintiff filed a notice to oppose the taxation on 23 May 2013. On 3 June 2013 the bills of costs were taxed and the allocator in respect of instructing attorneys was the amount of R 47 308, 22 and in respect of correspondent's attorneys an amount of R 21 741, 90. The second defendant presented the taxed bills of costs to the plaintiff's attorneys for payment on 05 June 2013. On 14 June 2013 the plaintiff gave notice of his intention to review the taxation in terms of Rule 48 of the Uniform Rules of Court.

[4] I am placed in possession of the following documents pertaining to this matter:

- (a) The taxed bills of costs dated 3 June 2013;
- (b) Notice of intention to oppose the taxation of the bills dated 23 May 2013;
- (c) Notice of review of taxation of the bills in terms of Rule 48 dated 18 June 2013;
- (d) Second defendant's response to the plaintiff's notice of review in terms of Rule 48(1);

- (e) The undated response by the Taxing Master in terms of Rule 48;
- (f) An affidavit by Second defendant's attorney, Liesel Kok, a director of Norton Rose Fulbright.

[5] According to the affidavit by Ms Liesel Kok, shortly after institution of the action, she entered an appearance to defend on 18 April 2011. She then addressed a letter to the Plaintiff's attorneys, Levin van Zyl on 06 May 2011, wherein she drew the attention of the plaintiff's attorney to the fact that the second defendant averred that the plaintiff was not treated at its private hospital but rather at a public health establishment, the Universitas Hospital in Bloemfontein. On 11 August 2011 she again sent a facsimile to the plaintiff's attorney advising that, after perusing the second defendant's hospital records as provided by the plaintiff in answer to the second defendant's Rule 36(4) notice dated 21 April 2011, and confirmed that the plaintiff was not treated at the second defendant's private hospital but was in fact only treated at the public Universitas Hospital, which is a state-owned and operated hospital, which is under the control of the MEC for Health, Free State Province. On the 17 October 2011 and

again on 7 November 2011 further facsimiles were sent highlighting the fact that the Plaintiff had not yet withdrawn its action against the Second defendant. On 9 November 2011 the plaintiff's attorney responded that they had the fullest right to investigate the matter and that there was absolutely no urgency in relation to the issues raised in the previous correspondence and that counsel had been briefed in the ordinary course to provide an opinion as to the second defendant's involvement in the action. Only once such opinion was received, would a decision be made as to whether or not to proceed with the action against the second defendant. Numerous correspondences were sent from the second defendant's attorney to the plaintiff during the period of November 2011 up until 15 May 2012, without any response from the plaintiff's attorneys.

- [6] On 31 May 2012 a facsimile was sent to the plaintiff's attorneys concerning an application for a trial date, as the second defendant had not pleaded, the application for a trial date was irregular. On 11 June 2012 the plaintiff served a notice of withdrawal of action against the second defendant; however this notice required each party to pay their own

costs incurred in the action. Again a further facsimile was sent on 15 June 2012 pointing out to the plaintiff's attorney that their notice of withdrawal does not incorporate a tender of the second defendant's costs as required by Rule 41(1). On 26 July 2012 the plaintiff's attorney transmitted a further notice of withdrawal via facsimile tendering the second defendant's wasted costs. The second defendant's attorney on instruction by second defendant requested that the tender of costs be made *de bonis propriis* due to the dilatory conduct of the plaintiff's attorney who was directly responsible for the second defendant incurring unnecessary costs having been wrongfully sued. In these circumstances it was pointed out to the plaintiff's attorneys that the second notice of withdrawal was still unacceptable. The plaintiff's attorneys informed the second defendant's attorney that they disputed the second defendant's entitlement to costs on the proposed scale of attorney/ own client and *de bonis propriis* and any application for costs in terms of Rule 41 which is brought would be an abuse of process. In order to finalise the matter the second defendant's attorney agreed with the plaintiff's attorney that it would be in the interests of both parties to resolve the matter and provide them with an

estimate of the attorney/client costs which the second defendant had incurred in defending the matter to date.

- [7] The second defendant's attorney instructed Ms Alet Lubbe of the firm Phatshoane Henney Attorneys to draw the relevant bills of costs and according to the costs consultant the bills of costs drawn on party and party scale would essentially be the same as those of an attorney/client bill given the nature of the attendances made to date. For this reason, the bills of costs which were presented on behalf of the second defendant were styled as "party and party" bills of costs. No payment in respect of the taxed costs has been received on behalf of the second defendant to date.

CONSIDERATION OF OBJECTIONS

- [8] **Bill of costs of Messrs Norton Rose Johannesburg Attorney**

AD ITEM 11

Receive and peruse the documents as listed in the Plaintiff's reply in terms of rule 36(4) in order to ascertain cause of action against the 2nd Defendant (415p)

It was argued by the plaintiff's attorneys that these documents (if perused at all) should have been dealt with on a time basis, with reference to **ROSENBERG V STANDARD BANK OF SA LTD & THE ASSISTANT TAXINGMASTER** 1940 WLD 119. Furthermore, that these are voluminous documents of similar nature that should be read at the reduced rate of half the tariff. The Taxing master did reduce this item by R 860.00 and allowed R 16985.00 (with a time value of 19 hours and 56 minutes). The taxing master stated in his report that the "time basis" argument for perusal was one which at that point in time he could not summarily dismiss or even try to as it was true and he conceded that he could have erred in not allowing perusal on a time basis. The cost consultant for the second defendant agreed with the taxing master in this regard and stated that there was no case law that stated that just because documents are of a voluminous nature they should be perused at half of the tariff. The documents perused were pleadings filed by the plaintiff and in terms of Rule 36(4), the documents were meant to ascertain if the cause of the action would form part of the discovered documents, should the case proceed.

In Taxation of Costs in the Higher and Lower Court: A

Practical Guide: Judge Kruger states on page 44 that if documents were discovered and had to be perused, the costs of perusal should be allowed. If documents are supplied by the opponent's they must be material to the case and have evidentiary and probative value in the sense of furthering either party's case. (**Waring v Mervis and Others** 1970(3) SA 239 (W) 243 F-H).

- [9] I am of the view that these documents were properly perused and compiled by the plaintiff's attorneys, containing relevant and important information, resulting in the voluminous nature thereof. The plaintiff's attorneys would also be entitled to their full perusal and preparation fee and definitely not at half of the tariff. In light of the above I can see no reason why the second defendant's attorneys should only be entitled to half of the perusal fee. Thus, I agree with the ruling of the taxing master.

[10] **AD ITEMS 19 – 21**

The plaintiff's attorney objected to all of these items and argued that they related to a memorandum and research in support of the memorandum in substantiation of the claim that the plaintiff tender attorney and client costs. These items pertain to correspondence between the second defendant's attorney and the plaintiff's attorney regarding the cost that should be tendered because the second defendant should not have been included in the proceedings from the onset. It was argued during the taxation that the costs in these items should be halved in the alternative the taxing master contented that if those costs were allowed as they stood they would equal attorney and own client costs. He consequently allowed what he deemed reasonable on a party and party scale viz thirty minutes. These costs are indeed attorney and own client costs and cannot be allowed, correspondence were written and the second defendant will receive the costs of the letters written.

The following amounts should be deducted:

Item 19 – R 852.00

Item 20 - R 1118.00

Item 21 - R 52.00

[11] **AD ITEMS 1,4,8,12,13,15,19,23,25**

According to the plaintiff's attorneys these items should not be allowed, being perusal fees, due to the fact that Webbers Attorneys (correspondent for Messrs Norton Rose) acted merely as a "post box", they did not draw any notice and just attended to the serving and filing of the notices. The second defendant's attorney argued at the taxation that the "post box" issue is addressed correctly on page 66 of **Taxation of Costs in the Higher and Lower Courts: A practical Guide** wherein it is stated that it is the duty of the attorney of record to ensure that time limits are complied with. It is also the duty of the attorney of record to make sure that all pleadings filed complied with the rules. The taxing master did not agree with the plaintiff's attorneys argument and stated that it was recently decided in the review of case no: 1666/2010 **Vasiliki Patrinos v Chavonnes Badenhorst Inc and Two**

Others by Phalatsi AJ, that it was not only reasonable to allow full perusal fees, but also prudent and necessary to peruse all documents that pass through ones hands as a correspondent or instructing attorney. In view of the above, I can see no reason to correct the decision of the taxing master and the items stand as taxed.

[12] **AD ITEM 24**

The plaintiff's attorneys objected to this item on the grounds that attendance of the Registrar meeting was an aspect that could be dealt with by a candidate attorney. The second defendant's correspondent, Webbers Attorneys, and more specifically Ms Conradie attended the meeting. The second defendant's attorney agreed with the taxing master and confirmed that it was practice in the Free State High Court that 15 minutes were allowed on an attorney scale for the Court roll irrespective of the time actually spent to attend the Registrar's meeting. The taxing master conceded that the cheapest route in litigation should be followed, and where a candidate attorney can attend the Registrar's meeting it can be done, but in this specific matter, the candidate attorney

was not available resulting in an attorney attending meeting.

I do not see how it is unreasonable to allow R 213.00 as minimum fee for 15 minutes spent, even though the Registrar's meeting is usually longer than 15 minutes.

COSTS OF REVIEW OF TAXATION

[13] In terms of the Uniform rule 48(7) I can allow an amount for costs of the review of the taxation. In view of what is stated above I decided to allow costs that plaintiff attorney pay to second defendant's attorneys.

In the premises the following orders are made:

1. Item 11 – The item as taxed is allowed.
2. Items 19 – The amount of R 852.00 is disallowed.
Item 20 – The amount of R 1118.00 is disallowed.
Item 21 – The amount of R 52.00 is disallowed.
3. Item 24 – The item as taxed is allowed.

4. The rest of the items are allowed as taxed.
5. The Plaintiff attorneys are ordered to pay the amount of R 500.00 to the second defendant being costs for Review of the Taxation.

K.J MOLOI

On behalf of the applicant:

Ms AC Conradie

WEBBERS ATTORNEYS

BLOEMFONTEIN

On behalf of the second respondent:

Mr JL Weihmann

**KRAMER WEIHMANN &
JOUBERT**

BLOEMFONTEIN