

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)

~~Reportable~~/Not Reportable

Case no.: 1825/2024

Matter heard on: 13 August 2024

Judgment delivered on: 20 August 2024

In the matter between:

BUSISWE MOKWANA Applicant

and

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

First Respondent

**DIRECTOR COURT OPERATIONS,
EASTERN CAPE HIGH COURT,
DENIM KROQWANA N.O.**

Second Respondent

**SOPHIE KLUE, TAXING MASTER OF
THE HIGH COURT, MAKHANDA N.O.**

Third Respondent

THE MEC FOR HEALTH EASTERN CAPE PROVINCE

Fourth Respondent

In re:

BUSISWE MOKWANA

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COMMITTEE
FOR HEALTH, EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

BRODY AJ

1. This is an application for a review of the decision of the Taxing Mistress and I shall refer to the parties as they have been cited above, and in the main application.

2. The applicant, (the mother and guardian of a minor child) who instituted action under case number 1201/2017 for damages that presumably arose out of the negligent treatment of the minor child. This is not clear from the review papers, or the record of the proceedings.

3. The applicant was successful in her action on behalf of the minor child and was awarded a substantial capital sum and cost order.

4. The cost order awarded was the usual order and reads as follows:

“The reasonable costs of the consultations of the plaintiffs counsel and attorney with plaintiffs experts on quantum, of whom notice has been given in terms of Rule 36 (9) (a) and (b), in preparation for trial”

5. The applicant resides at Mqanduli in the Eastern Cape, is unemployed and indigent, and was unable to afford legal representation. The issue of costs and legal representation was referred to Christopher Consulting (Pty) Ltd, (“Christopher Consulting”) who in turn briefed Werner Boshoff Incorporated, a panel of attorneys for Christopher Consulting.

6. Werner Boshoff Incorporated practise from Pretoria in the Province of Gauteng and they in turn appointed Ms Ilze Pienaar practising at Netteltons Attorneys Incorporated in Makhanda, Province of the Eastern Cape. Summons was issued under case number 1201/2017 against the MEC of Health, Eastern Cape Province, (“the Defendant”).

7. After receipt of the award by this court the applicant, in terms of paragraph 2 of the order of the court submitted two bills of costs between party and party by Werner Boshoff Incorporated, and the correspondents at the seat of the court, namely, Netteltons Attorneys.

8. The defendant submitted a notice of objection to the taxation of the applicants bills and the main objection was the presentation of two sets of bills and argued that a reconsolidated bill should be presented for taxation. The basis for the objection was that the applicant lived in Mqanduli and instructed attorneys in Pretoria, not being a close local attorney and alleged that the plaintiff did not reside, or work, in Pretoria. The defendant further submitted to the taxing mistress that the plaintiff should have instructed an attorney in a nearby town center such as Mthatha, Queenstown or East London or an attorney at the seat of the court directly, instead of instructing an attorney in Pretoria, which had resulted in unnecessary duplication costs, which is not for the account of the defendant.

9. The plaintiff invited the defendant to identify any unnecessary duplication of costs which would not been incurred, had the plaintiff appointed an attorney in Mthatha, Queenstown or East London. These costs were never identified as a result of the Taxing Mistress's decision.

10. The Taxing Mistress then refused to allow two bills of costs and refused to sign an allocator, ruling that "no items" had been disallowed.

11. The Taxing Mistress then gave the following reasons for failing to tax the bills, "I cannot allocate the bills by endorsing the allocators, because Netteltons Attorneys are dissatisfied with my ruling that one composite bill should be presented for taxation. The review should first be decided before the bills can be taxed."

"Please take note that Rule 48 is meant for a party that is dissatisfied with Rulings relating to individual items on the bill. Thus, your review should be brought in terms of Rule 53.

On that basis I refuse to state a case in terms of Rule 48 (1)."

12. These reasons were given by the 20th of July 2023.

13. Ms Pienaar then received instructions from her instructing attorney to proceed with an application for review and to set aside the Taxing Mistress decisions on the 24th of July 2023.

14. A draft founding affidavit was prepared on 10 August 2023 in consultation with Ms Pienaar's instructing attorney, and the applicants cost consultant. Ms Pienaar, however, was under the impression that the pleadings and annexures were be considered by the instructing attorney and awaited further detail.

15. It was only on 10th November 2023 that Ms Pienaar received communication from the applicants' costs consultant enquiring on the progress report of the review that Ms Pienaar had been under the mistaken belief that the matter was still being considered by the instructing attorney.

16. Due to pressure of work from November 2023 to the recess in December 2023 Ms Pienaar overlooked the matter and thereafter documents were sought, and were only made available later.

17. The record was eventually finalized, and the review application was launched on the 2nd of May 2024.

18. In terms of Rule 53, the review had to be brought within a reasonable period of the decision of the Taxing Mistress, (20 July 2023) and the applicant contends that the review application was brought three-and- a-half months later than the 180 days provision in a PAJA application.

19. The applicant's attorney contended that, despite the delay, there is no prejudice to the defendant in that the legal costs have not being taxed, and no interest runs on the bills of costs until the bills are allocated.

20. I am persuaded in the submission that there can be no prejudice to the defendant, in that the bills of costs have not been taxed and there has been no allocatur.

21. I agree with the applicant that the minor child will be prejudiced if condonation is not granted as the issue of the taxation of the costs will not be finalized until this issue is resolved.

22. Therefore, despite the lengthy delay in bringing the application, I am inclined to grant condonation in the best interests of the minor child, and in the interests of justice.

23. In considering a review of taxation on this issue it is appropriate that Rule 70 (8) is set out, which reads as follows:

“(8) Where, in the opinion of a Taxing Master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him”

24. There can be no doubt from the rule that the decision as to whether a litigant is entitled to recover the cost of an out of town attorney, as well as those of an attorney engaged at the seat of the court is one for the Taxing Mistress.¹

25. This was also considered by Kroon J in **Schoeman v Schoeman** at 431-44B where the following was stated:

“For the sake of completeness I should mention that although the present proceedings are termed a review they are in fact a ‘revision’ of the Taxing Master’s decision and the Court’s power to interfere is not limited to that applicable to the ordinary type of review *stricto sensu* which concerns the interference by the Court with improper exercise of a discretion entrusted to him by, eg, disregarding factors which ought proper to have been taken into account or giving a grossly unreasonable ruling or where he failed to apply his mind to the matter or where he acted on a wrong principle, but also where the Court is of the view that the taxing official has been clearly wrong in regard to

¹ Kellerman v Die Takseermeester en Andere 1971 (4) SA 103 (NC) at 104H and Schoeman v Schoeman 1990 (2) SA 337 (E) at 39G

some matter, even one involving degree. The Court will, however, not lightly interfere with the decision of the taxing official. The matter must go further than mere disagreement therewith and the Court must be distinctly of the opinion that the decision is wrong before interference therewith will be warranted. See Cilliers Law of Costs 2nd ed at 226-8 B and the cases there cited.”

26. Applicants counsel, Ms Sephton, in her eloquent heads of argument made reference to the matter of **AD and Another v MEC for Health and Social Development, Western Cape 2017 (5) SA 134 (WCC)** and in that matter Rogers J (as he was then) stated the following:

(12) the plaintiffs could not have afforded to run this litigation at their own expense. It could only have brought the case by reaching a special arrangement with the attorneys.

(13) the general rule is that a litigant who resides in a town distant from the seat the court is entitled to engage an attorney where he resides and that in such cases that the cost of the second (correspondent) attorney at the seat of the court is justified. (**Sonnenburg v Moima 1987 (1) SA 571 (T)**). The general rule would thus not, in the present case, permit the plaintiffs to recover additional costs occasioned by the choice of their Johannesburg attorney. I cannot find on the evidence before me that the plaintiffs could not have found a competent firm in Cape Town to act on a contingency basis. Put differently, I cannot on the material before me conclude that the plaintiffs could not have instituted action except be engaging Joseph’s Incorporated and other out of town-firm willing to act on a similar basis. The plaintiff may be able to persuade the Taxing Master that this was indeed the case in which event the Taxing Master in his discretion may properly allow the further costs occasioned by the engagement of the main attorney in Johannesburg.

27. With regard to the authorities stated above, this court is only able to depart from the Taxing Mistress decision if the court is satisfied that she did not exercise her discretion properly, or that she was clearly wrong. This very issue was a matter in which Eksteen J was faced with similar circumstances, and in which he had the following to say:

“[9] In the circumstances I would only be able to depart from the Taxing Masters decision if I’m satisfied here that she did not exercise her discretion properly, or that she was clearly wrong.”²

28. In the present review the applicant had submitted that the Taxing Mistress was clearly wrong and that she failed to apply the principles set out in the authorities, referred to by the applicant.

29. In **Sonneburg v Moima 1987 (1) SA 571 (T)** Ackermann J set out the principle relevant to two sets of attorneys. The reason why a litigant is entitled to recover the costs of two attorneys is that it is desirable that a litigant should have an attorney at the place where he his resident, with whom he can easily consult.

30. The findings in **Sonneburg v Moima** were approved by a Full Bench of the Eastern Cape in the matter of **The Master v Gerber and Another: Thomas v Minister of Law and Order and Others 1989 (2) SA 659**, where Zietsman AJP, as he then was, stated the following at 663H-J:

“I would, however, like to qualify and extend in a limited way the meaning of the word ‘plaaslike’ in the passage just quoted. In my opinion there may be cases where the ‘local’ attorney instructed by the litigant is not an attorney who practices at the place where the litigant resides or carries on his work but where the litigant, if successful, should nevertheless be entitled to recover his costs. A person may, for example, reside in a small town where only one attorney has a practice and he may for good reason not wish that particular attorney to act for him. If he then gives his instructions to an attorney in a nearby town, who over the years has always done his legal work for him, I can see no reason why he should not be entitled to recover the costs of such attorney on the same basis as if the attorney had his office at the place where the litigant resides.”

² An unreported judgment of Phillippus Neckless Johannes Snyman NO & Others v Carl Albrechtaupt, (2222/2006) at 9

31. In **Morris v Commercial Union Assurance Company of South Africa Limited 1990 (3) SA 934** Levy AJ found the following:

“The boundaries of towns do not limit parties choice of attorneys. If an attorney lives conveniently near to a litigant or if the litigant lives conveniently near to the attorneys offices then the litigant cannot be denied his right to consult that attorney merely because a municipal boundary line separates the two places. A rule of practice must possess a degree of flexibility as indeed do the uniform rules themselves, the application of which lies in the court’s discretion.”

32. The aforesaid approach has consistently been accepted in the Eastern Cape and/or highly relevant to the present review.

33. In the present matter the applicant resides at Mqanduli, which is 30km away from Mthatha. The applicant chose to instruct an attorney in Pretoria, which is 1004km away from the applicant and 1042km from the seat of the court.

34. There is no evidence before me, to find that applicant could not have found a competent firm in Mthatha, or Makhanda, that would have acted for her on a contingency basis. This was not canvassed at all on the papers, and I cannot find on the material before me that the applicant could not have instituted action, on behalf of the minor child, save for engaging Werner Boshoff incorporated.

35. It follows therefore that the instruction of a firm of attorneys in Pretoria was not “necessary”.

36. In the review papers the submission was made that the actions of the Taxing Mistress will have serious financial implications and cause serious prejudice to the interests of the minor child, and which will violate her constitutional right as envisaged in section 28 (2) of the constitution.

37. The main contention was that without the financing supplied by Christopher Consulting the applicant would not have been able to litigate and this would be determined to the minor child, and her rights.

38. Ms Sephton also made reference to those authorities where the issues of practicality and reasonable convenience was raised and Zietsman AJP, in response to this argument, stated the following:

“This, however, is not borne out by the authorities which refer specifically to the place of the residence or place of business of the litigant as the criterion for justifying his right to instruct local attorneys and to recover the costs from the unsuccessful litigant.”

39. As I cannot find evidence in the case before me that the applicant could not have found a component firm in Mthatha, or Makhanda, to assist her on a contingency basis, and that her only redress was to appoint a further attorney in Pretoria I am not persuaded that the Taxing Mistress erred in making the ruling that she did. Based on the facts and the authorities cited above, it is my view that the Taxing Mistress was in fact correct, and her ruling is upheld.

40. In the review application the applicant sought costs of the application from the Taxing Mistress, on behalf of the applicant. The defendant early on in the proceedings filed a notice to abide.

41. In the result, I make the following order:

1. Condonation is granted for the late filing of the review.
2. The application for review is dismissed.
3. The applicant is ordered to pay the costs of the defendant on Scale A, in terms of Rule 69 (7).

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Adv. Sephton

Instructed by : Netteltons Attorneys
118A High Street
MAKHANDA
(REF.: Ms. Pienaar/Sam)