



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Nos: JR1061-2007

In the matter between:

SAMANCOR LIMITED

Applicant

and

NUM obo MARIFI JOHANNES MALOMA

First Respondent

TAXING MASTER, LABOUR COURTS

Second Respondent

Heard: 13 February 2017 (In Chambers)

Date of Judgment: 24 March 2017

Summary: Application to review and set aside the taxation of two bills of costs on the basis that they were taxed on an unopposed basis in breach of an undertaking given to

the applicant. Application granted on the basis that undertaking was binding and taxation of the bills in breach thereof was procedurally unfair.

JUDGMENT

BARNES AJ

- [1] This is an application to review and set aside, alternatively, rescind the taxation of two bills of costs undertaken by the Second Respondent on 30 May 2012 under the above case numbers.
- [2] The application was heard in chambers by agreement between the parties.
- [3] The facts which gave rise to the application are the following:
- 3.1 The applicant unsuccessfully brought an application in the Labour Court to review and set aside a Commission for Conciliation Mediation and Arbitration (CCMA) award. On appeal, the Labour Appeal Court, overturned the decision of the Labour Court in part. Thereafter, the first respondent successfully appealed the matter to the Supreme Court of Appeal. Consequently, the applicant became liable to the first respondent for the costs of the proceedings in the Labour Court and the Labour Appeal Court.
- 3.2 The applicant was represented in the above litigation by Ms Kate Savage of Bowman Gilfillan Inc. The first respondent was represented by Mr Makinta of Makinta Attorneys.
- 3.3 Early in 2012, Ms Savage left Bowman Gilfillan and joined Haffegée Roskam Savage Attorneys. At the time of her departure, Ms Savage sought and obtained from Mr Makinta a verbal undertaking that he

would serve any documents or process related to the litigation between the parties on her at Haffegge Roskam Savage Attorneys.

- 3.4 Mr Makinta concedes that he gave Ms Savage this undertaking.
- 3.5 Nevertheless, on 26 March 2012, notices of taxation in respect of the bills of cost arising out of the Labour Court and Labour Appeal Court proceedings were served on Bowman Gilfillan Attorneys and not on Ms Savage at Haffegge Roskam Savage Attorneys.
- 3.6 To make matters worse, apparently due to an administrative error, Bowman Gilfillan Attorneys did not draw the bills to the attention of Ms Savage after her departure from the firm.
- 3.7 As a result, Makinta Attorneys taxed the bills on an unopposed basis.
- 3.8 Thereafter, the bills were served on the applicant to be paid.
- 3.9 Ms Savage first had sight of the taxed bills in late June 2012. She immediately made telephonic contact with Mr Makinta and reminded him of the undertaking he had given. Ms Savage states that Mr Makinta confirmed his undertaking and “accepted that his conduct was in breach of his undertaking.” Mr Makinta denies this. However, as stated above, he concedes that he gave the undertaking itself.
- 3.10 The applicant, on perusing the taxed bills, took the view that certain of the items were unreasonable and unjustified. The applicant communicated this to the first respondent and this gave rise to attempts by the parties, with the assistance of costs consultants on both sides, to settle the disputed items. These attempts were extensive. They finally proved unsuccessful on 18 March 2013.
- 3.11 This application was launched on 7 April 2013, approximately three weeks later.

- [4] In its founding affidavit, the applicant states that had it been made aware of the taxation date, it would have attended and made representations in relation to certain of the items on the bills. The applicant contends that the bills fall to be reviewed and set aside on the basis that they were taxed on an unopposed basis in breach of the undertaking given to it.
- [5] The first respondent raised two point *in limine*. First, it submitted that the applicant had delayed unreasonably in bringing the review application and that it fell to be dismissed for this reason. Second, it submitted that the application was fatally defective because the notice of motion did not request the record or reasons and therefore failed to comply with Labour Court Rule 7A(2)(b).
- [6] On the merits, the first respondent submitted that the undertaking given by Mr Makinta was not binding. It submitted further that because no formal notice of change of attorneys had been filed, the notices of taxation had been properly served on Bowman Gilfillan Attorneys.
- [7] Although neither party made reference to Labour Court Rule 25, the application is in my view, governed by it. Rule 25 provides as follows:

“25 Taxation

- (1) The registrar may perform the functions and duties of a taxing master or appoint any person as taxing master who is in the registrar’s opinion fit to perform the functions and duties as are assigned to or imposed on a taxing master by these Rules, on such terms and for such period as may be determined.
- (2) The taxing master is empowered to tax any bill of costs for services actually rendered in connection with proceedings in the court.
- (3) At the taxation of any bill of costs, the taxing master may call for any book, document, paper or account that in the taxing master’s opinion is necessary to determine properly any matter arising from the taxation.

- (4) The taxing master must not proceed to the taxation of any bill of costs unless the taxing master has been satisfied by the party requesting the taxation (if that party is not the party liable to pay the bill) that the party liable to pay the bill has received due notice as to the time and place of the taxation and of that party's entitlement to be present at the taxation.
- (5) Despite subrule (4), notice need not be given to a party –
 - a. who failed to appear at the hearing either in person or through a representative; or
 - b. who consented in writing to the taxation taking place in that party's absence.
- (6) Any decision by a taxing master is subject to the review of a court on application."

[8] Rule 25 does not stipulate a time limit for the institution of an application to review a decision by a taxing master and Mr Mashishi, who appeared for the first respondent, conceded that there is no prescribed time limit for the launching of an application of this nature. Mr Mashishi argued however that the applicant had delayed unreasonably in launching the review application.¹

[9] I disagree. The delay in launching the review application was as a result of the parties' efforts to settle the disputed items on the bills. These attempts were extensive and included the involvement of costs consultants on both sides. A number of proposals and counter proposals were made over an extended period of time. These are set out in some detail in the papers. Had these efforts proved successful, the need for this review application would have been obviated. It was only on 18 March 2013 that it finally became clear that the disputed items could not be settled. This application was launched promptly thereafter, on 7 April 2013.

[10] For the above reasons, I am of the view that the review application was

¹ In the absence of a prescribed time period, the review application must of course be brought within a reasonable time, see *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

launched within a reasonable time in the circumstances and that there is no merit in the first respondent's point *in limine*.

[11] The first respondent's second point *in limine* is also without merit. It is not correct that the failure by an applicant for review to invoke Rule 7A(2)(b) renders its application fatally defective. It is not incumbent on an applicant for review to invoke Rule 7A(2)(b). This is so especially, but not only, in cases in which there is no record.

[12] In *Simelela and Others v Member of the Executive Council for Education, Province of the Eastern Cape and Another* (2001) 22 ILJ 1688 (LC), this Court held as follows with reference to Rule 7A(2)(b):

“This rule is similar to rule 53 of the Uniform Rules of the High Court. Rule 53 bears the same relationship to rule 6 of the Uniform Rules as rule 7A has to rule 7 of the Rules of the Labour Court. It is trite that rule 53 of the Rules of the High Court is for the benefit of the applicant in review proceedings, and that an applicant's decision to proceed in terms of rule 6 without calling for the record of the proceedings under review is not fatal to the application.

The record contemplated in rule 7A(2)(b) is the record, either handwritten or electronically recorded, of formal proceedings which require such a record. No such record exists in the present matter.”²

[13] The proceedings before a taxing master are not usually recorded. But in any event, the applicant in this case seeks to review and set aside the bills on the narrow basis that the taxation proceeded on an unopposed basis in breach of an undertaking given to it. There was, in these circumstances, no obligation on the applicant to invoke the provisions of Rule 7A(2)(b).

² At para 17.

- [14] Turning to the merits of the review application, I do not accept the first respondent's submission that the undertaking given by Mr Makinta was not binding. There is a duty of care owed by attorneys conducting litigation on behalf of their clients, both to the Court and to their opponents.³ The duty exacted by the law in this regard is one of *uberrima fides* – that is, the highest possible degree of good faith. This clearly includes the duty to honour undertakings such as the one given by Mr Makinta. This is so regardless of whether or not a formal notice of change of address or of attorneys was filed.
- [15] Moreover, and in addition to the duty derived from common law, Labour Court Rule 25(4) itself imposes a duty on a party requesting taxation to satisfy the taxing master that the party liable to pay the bill has received notice as to the time and place of taxation. In this case, Mr Makinta's failure to ensure that the notices of taxation were served on Ms Savage as per his undertaking meant that this rule was effectively breached.
- [16] In *SASBO – The Finance Union v UFIWO and Others* (2003) 24 ILJ 231 (LC), this Court confirmed that Rule 25 of the Labour Court Rules affords a party who is aggrieved by a taxing master's decision a single remedy, namely that of common law review. It is trite that at common law, decisions are subject to be reviewed and set aside if the requisite standards of procedural fairness are not met. In this case, the bills were taxed on an unopposed basis in breach of a binding undertaking given to the applicant. This meant that the applicant was unfairly deprived of an opportunity to be heard in relation to the bills. The taxing of the bills was therefore procedurally unfair and they fall to be reviewed and set aside for this reason.
- [17] Since no costs order was sought by the applicant, none will be made.
- [18] I accordingly make the following order:

³ See *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Another* 1985 (4) SA 341 (T)

Order

1. The decisions of the Second Respondent in the taxations of the bills of cost undertaken on 31 May 2012 under case numbers JA57-2008 and JR1061- 2007 are reviewed and set aside.
2. The bills of cost are referred back to the Second Respondent for a taxation *de novo* to be undertaken on an opposed basis on a date to be determined by the Second Respondent.
3. There is no order as to costs.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv M Musandiwa instructed by Hafegee Savage Roskam

For the Respondent: Adv P Mashishi instructed by Makinta Attorneys