Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

JUDGMENT

Case No: JR 75/15

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA ('NEASA')	**First Applicant**
PLASTIC CONVERTORS ASSOCIATION OF SOUTH AFRICA ('PCASA')	**Second Applicant**
BORDER INDUSTRIAL EMPLOYERS' ASSOCIATION ('BIEA')	**Third Applicant**
H G MOLENAAR & CO (PTY) LTD	**Fourth Applicant**
ADMIN CRANE MAINTENANCE CC	**Fifth Applicant**
PETER BRESLER & ASSOCIATES t/a MAGNADOR	**Sixth Applicant**
HEINZ FISCHER ENGINEERING (PTY) LTD t/a FISCHER PROFILE SA	**Seventh Applicant**

and

MINISTER OF LABOUR	**First Respondent**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ('MEIBC')	**Second Respondent**
PARTIES TO THE MEIBC	**Third to Thirty Fifth Respondents (set out in the Notice of Motion)**

Summary: (Review – items in taxation – cost at tariff of reproducing record for all respondents a reasonably necessary expense – no obligation to enquire of respondents if they need record before record is filed – alleged practice in direct appeals not relevant – Misdirection by taxing master in attributing additional hours for preparation to time during which counsel was preparing replying affidavits)

JUDGMENT

LAGRANGE J

<u>Introduction and background</u>

[1] This is an application to review and set aside certain items in the decision of the taxing master in this case.

[2] The application had been brought by various employer organisations and a few individual employers engaged in the metal and engineering industry falling within the scope of the Metal and Engineering Industrial Bargaining Council ('MEIBC' or 'the Council') to set aside the decision by the Minister of Labour ('the Minister') to extend a collective agreement concluded between certain parties to the bargaining Council to non-parties. They also sought to set aside the Minister's renewal of the period of operation of the previous main agreement until 30 June 2017 under government notice number

R1050 (GG 38366 dated 24 December 2014) under section 32 (6)(a)(ii) of the LRA. The applicants also asked the court to strike down section 32(5) of the LRA as unconstitutional, in so far as it might be necessary.

[3] The applicants raised numerous grounds of review requiring an extensive canvassing of factual and legal issues. The following was said in the judgement on the issue of costs.

> <u>Costs</u>
>
> The ongoing and repetitious litigation between the parties over these issues as evidenced by some of the other cases mentioned above is regrettable, and could probably be avoided if past lessons were learned. In my view, it should not have been necessary for the applicants to litigate to assert the need for compliance with council procedures and to exercise their right to make representations when agreements are to be extended to non-parties. Accordingly, I believe they are entitled to their costs. The only party to the MEIBC which opposed the application in its own name was the National Union of Metalworkers' ('Numsa'), the thirty-fourth respondent which accordingly should also bear its share of the applicants' costs.

[4] The following cost order was then made

> The costs of the application are to be paid by the first, second and thirty-fourth respondents jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

<u>The review</u>

[5] The applicant wishes to set aside two aspects of the taxation ruling. The first relates to the costs of the record served on the other 32 respondents who were members of the bargaining council even though none of them opposed the review application. The second concerns certain items relating to senior counsel's fees.

[6] The review was brought under Rule 10 of the labour court rules which provides for reviews in chambers, but which does not

specifically identify which matters falling within the ambit of the rule. This omission will in all probability be rectified when the revised rules of the court are promulgated. Be that as it may, even though the respondent in the review application contends that the review ought to have been argued in court, it acceded to the review being conducted in chambers.

Item 200

[7] The taxation master awarded an amount of R151, 221.00 for 35 copies of the record served on the respondents. The amount was calculated based on the standard tariff of fees of attorneys applicable at the time, which permitted a fee of R 3.50 per copied page.

[8] While accepting that it was necessary for the applicants to cite all 35 respondents as interested parties, NUMSA submits that before serving copies on all the respondents the applicants should have written to them to inquire if they required copies thereof in circumstances where the three respondents had indicated they intended to oppose the application.

[9] Secondly, NUMSA contends that it is wasteful and burdensome for a party to serve records on interested parties that have no intention of entering the fray. In this regard NUMSA notes that rule 7A(6)[1] of the Labour Court Rules requiring an applicant in review proceedings to serve a copy of the record on other parties is similar in all relevant respects to Labour Court Rule 9 (5A)(d)[2],which also requires an appeal record to be served on other parties, yet NUMSA submits it is

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[1] Rule 7A(6) states:

> The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

[2] The relevant provision, which is only applicable to direct appeals to the Labour Court permitted by the LRA, states:

> (5A(d) The appellant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

common practice that copies of the appeal record are not served on respondents who are not opposing an appeal. In a related ground, NUMSA argues that since the vast majority of the respondents were employer associations affiliated to the third respondent, SEIFSA, it was unnecessary to file copies on them individually. Lastly, the union contends that the applicants could have produced the copies of the record more cheaply.

[10] Dealing first with the last point, I accept that there might have been cheaper ways of reproducing the record. However, the tariff permits an attorney to charge the amount per page levied by the applicants' attorneys in this matter. The tariff does not specify that this is a maximum charge or that attorneys are obliged to adopt the most economically efficient method of printing documents. In so far as that means the tariff permits a less cost effective methods of making copies that is a problem with the tariff and not the exercise of the taxing master's description, even though it is doubtless a source of irritation to any party having to foot the bill.

[11] I accept also that if the applicants had been considerate they might have inquired of respondents whether they required copies of the record before filing them. The difficulty is that a respondent in review proceedings is not obliged to indicate if they are opposing the application before they have received the record and any supplementary affidavit. Even if NUMSA is correct in contending that a practice of not filing the record on all parties exists in direct appeals to the labour court, a point on which I make no finding as these are relatively rare, the existence of a practice in appeal proceedings, does not obligate an applicant in review proceedings to adopt similar practices. In filing copies of the review records on the respondents, the applicants were doing what the rule required and it cannot be said that the costs incurred were wasteful or unnecessary.

[12] Once again, the incurral of the cost is a consequence of the rules governing review proceedings, which an applicant must comply with,

in the absence of an indulgence granted by a respondent party, which the applicant is not obliged to seek.

[13] In light of the above, I cannot find that the taxation master acted unreasonably in awarding the costs under item 200.

Counsels' fees

[14] The contested fees in question concern the taxing master allowing 60 hours of preparation for senior counsel under items 248 (14/09/15), 287(30/11/15), 322 (03/10/16) and 347 (26/04/17) of the taxed bill of costs. The taxing master's explanation for her ruling on the taxation of these items is as follows:

> In the items above the applicants had submitted that counsel be given 11 days for preparation of the matter. In their submissions the applicants gave a calculation of the documents that had to be read and perused by counsel. The description was as follows:
>
> > (a) Annexures, replying affidavits and supplementary affidavits amount to a total of 891 pages;
> >
> > (b) 34th respondent's answering affidavits, second respondent, first respondents - all amounting to a total of 854 pages
> >
> > (c) Heads of argument-72 pages' global amount
> >
> > (d) The total number of pages is 1817
> >
> > This entails perusal, drafting and settling of affidavits and other related work.
> >
> > In addition, the applicant submitted that the record had a total page count of 955 which counsel was required to peruse and make use of for preparation.
>
> The taxing master ruled that perusal would be allowed at half tariff.
>
> The taxing master further ruled that preparation would be allowed at six days and not 11 days as submitted by the applicants.
>
> The decision of the taxing master took into consideration (the) amount of work and time of counsel in preparing for the matter. Noting that the matter had run for a period of a year the taxing master saw fit to grant 6

days' preparation. The taxing master found that the proposed 11 days was excessive.

[15] NUMSA's essential contention is that, the taxing master "erred" in ruling that 6 days preparation should be allowed for senior counsel in circumstances where senior counsel only charged approximately 3.5 days for settling heads of argument and to prepare for the hearing. It was rightly accepted by the parties that the senior counsel's hourly rate of R 3,300.00 at the time of the hearing was reasonable. Because NUMSA accepted that six days preparation for junior counsel was reasonable, the applicants contend NUMSA cannot argue that senior counsel's contribution should not be calculated on the same basis. The applicants further submit that the taxing master was entitled to take a robust approach in determining a reasonable number of hours which senior counsel needed to prepare himself to present the matter.

[16] The applicants further argue that senior counsel's actual charges for 35 hours preparation were for accounts submitted on 30 September and 31st of October 2016 and did not include 90 hours charged for work done in 2015. NUMSA argues that the taxing master effectively allowed an additional 25 hours preparation time for work done in August to November 2015, which should already have been included in time spent in the preparation of replying affidavits at that time. It is not in dispute that taxing master accepted the applicants' argument at the taxation that counsel would have been entitled to charge for 60 hours preparation had they done so and the fact that they perused documents in 2015 meant they did not have to spend as much time in 2016 to prepare. It appears from the papers that senior counsel's actual charges for work done in preparation for the hearing during September and October 2016 were allocated by him as follows: 20 hours for settling heads prepared by Junior counsel and 15 hours considering opposing heads and preparing for the hearing.

[17] The nub of the dispute on this issue is whether the taxing master in the exercise of her discretion unreasonably allowed an additional 25 hours to be attributed to the task of preparation for the reading and

perusal of the documents in 2015 , as itemised in her explanation for the taxation of these items (see paragraph (13) above).

[18] In paragraph 3.1. of NUMSA's representations it states:

> 3.1.1 In her stated case, the Taxing Master states that preparation would be allowed at 6 days, and that she "took into consideration amount of work and time of counsel in preparing for the matter".
>
> 3.1.2 NUMSA has elected not to review the 6 days allowed for the Junior counsel, as (Junior counsel) indeed charged more time than this.
>
> 3.1.3 However, NUMSA submits that the Taxing Master erred in ruling that 6 days should be allowed for the Senior Counsel for heads/preparation in circumstances where (senior counsel) only charged roughly 3.5 days to settling the heads of argument and to preparing for the hearing.

[19] The applicants argue in response that:

> It appears from paragraph 3.1.3 of NUMSA's representations that it takes issue with the *<u>form</u>* of (senior counsel's) account. Applicants reiterate that the Hounorable Court is a Court of substance not form and, as (senior counsel) <u>has not yet been compensated for the general preparation he did during 2015</u> (by reading *inter alia* the record and papers filed by the opposing parties), <u>nothing precluded the taxing master from taking a robust approach</u> in allowing a reasonable and considered number of hours for (senior counsel) to prepare himself to present the matter of the half of the applicants.

(*<u>original</u>* emphasis; <u>court's</u> emphasis)

[20] At the taxation, the cost consultants agreed amongst themselves what they considered a reasonable fee for senior counsel's drafting and settling of the affidavits and heads, using a formula adopted by taxing masters in the Gauteng Local Division of a fee per statutory page (250 words). The agreed fee was R 1,100-00 per page. However, the applicants contend that this fee did not include perusal of the opposing affidavits and annexes, perusal of the respondent's heads of argument, perusal of the annexures to the applicants'

affidavits (which he had settled), perusal of the records and preparation for the hearing.

[21] The applicants claim that they argued at the taxation that senior counsel should be allowed a reasonable fee for the work mentioned and that the perusal of the documents in question was necessary for two reasons. Firstly, to put him in a position to draft and settle the applicants' affidavits and heads. Secondly, to put him in a position to argue the matter in court as a fee for general preparation. The applicants submit that the additional time spent by senior counsel reading the record and affidavits of the respondents and consulting with junior counsel between January 2015 and November 2015 amounted to 90 hours. In view of this, the applicants had urged the taxing master to adopt a "robust approach" and consider all the work done by senior counsel in preparation.

[22] I agree that if senior counsel had spent more time on actual preparation for the hearing once pleadings had closed, as his junior did, in all probability the applicants would have been entitled to reimbursement for those fees. However, I have difficulty in the taxing master effectively retrospectively attributing 'preparation' for the hearing to work done during the time counsel was settling replying affidavits. The applicants contend this is simply a reasonable exercise of a robust discretion on the part of the taxing master. In my view, a robust approach cannot reasonably extend to re-characterising the nature of work done before pleadings were closed as part of work done in preparation for the hearing.

[23] It is perhaps also questionable why any perusal of documents and answering affidavits would have been implicitly incorporated in the time spent in settling the supplementary affidavit and settling the replying affidavit, which would have necessitated the perusal of the documents in question. However, I make no finding in this respect as it might be possible that when the parties agreed to determine senior counsel's fees for settling the affidavits and heads of argument on

the basis of a fixed rate per page, the perusal of answering affidavits and annexures was considered a separate item.

[24] In any event, what the taxing master did was to attribute additional hours to preparation, in excess of the time actually billed for preparation after close of pleadings, to a period during which replying affidavits were being settled. In my view, notwithstanding the extent of the taxing master's discretion it was a misdirection on her part to allow 6 day's preparation fees for senior counsel instead of the time actually claimed for preparation done after close of pleadings.

[25] Accordingly, the taxed off amount for senior counsel's preparation for the hearing should have been limited to 3.5 days.

<u>Costs</u>

[26] As NUMSA is only partially successful, no cost order is appropriate in my view.

<u>Order</u>

[27] The taxation master's taxation of the bill of costs is reviewed and set aside only to the extent that in relation to items 248, 287, 322 and 347 the taxation master's ruling that six days' preparation fees should be allowed for senior counsel is reviewed and set aside and substituted with a ruling that 3.5 days' preparation fees should be allowed for senior counsel under those items.

[28] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

(In Chambers)

3 October 2018

APPEARANCES

APPLICANTS:	AJ Freund SC assisted by G Leslie instructed by Anton Bakker Inc.
FIRST RESPONDENT:	H Maenetje SC assisted by JM Ramaepadi instructed by the State Attorney
SECOND RESPONDENT	N A Cassim SC assisted by V September instructed by Patelia Cachalia Attorneys
THIRTY- FIFTH RESPONDENT:	J G Van der Riet SC assisted by C Orr instructed by Haffegee Roskam Savage Attorneys