

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 13420/2007

In the matter between:

JOSEPH ARTHUR WALTER BROWN
ID NO:

First Applicant

SUSAN JENNIFER BROWN
ID NO:

Second Applicant

And

GEORGE PAPADAKIS N.O.

First Respondent

DINES CHANDRA GIHWALA N.O.

Second Respondent

Court: JI Cloete. AJ

Heard: 16 February 2011

Judgement on application for leave to appeal

Delivered: 17 February 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] The applicants (and their attorney of record, Mr Khan) brought an application in terms of rule 48 for the review of the taxing master's decision in relation to certain items in a bill of costs which the respondents had presented for taxation on 20 May 2009. The respondents then made a counter application in terms of the same rule in regard to their complaints in respect of the taxing master's decision relating to certain items.

[2] The notice of application for leave to appeal presently before me refers to the first and second applicants as being parties to the application for leave to appeal. Whilst this may notionally be correct, as a matter of fact the costs order which underpins this entire matter is one granted against Mr Khan only. I agree with counsel for the respondents that there can be little doubt that Mr Khan is the effective applicant.

[3] The taxing master's stated case was delivered on 3 June 2010. The respondents delivered written submissions in terms of rule 48(5)(a) in response thereto on 25 June 2010. On 14 September 2010 the taxing master delivered a notice in terms of rule 48(5)(b) indicating that he had nothing further to add and that he would abide the decision of the reviewing judge.

[4] Although open to the applicants, they did not deliver any written submissions after receipt of the taxing master's stated case as is provided for in terms of rule 48(5) (a).

[5] The application and counter application for review came before me in chambers and on 8 November 2010 I made an order dismissing both, with no order as to costs.

[6] The applicants now seek leave to appeal against the whole of my judgement and order. The respondents do not seek leave to appeal, but oppose the application.

WHETHER THE ORDER IS APPEALABLE

[7] Before turning to the grounds of appeal, it is necessary to consider whether an appeal lies against my judgment and order.

[8] In *Menzies. Birse and Chiddy v Hall* 1941 CPD 297 a full bench of this division held that, save as specifically provided by statute, there is no appeal from a judgment or order given by a judge sitting in chambers. Although the court was dealing with the former rule 48 of the rules of court, it would appear that the relevant provisions were, for practical purposes, the same as the present rule 48: see *Vaaltyn v Goss and Another* 1992 (3) SA 549 at 557 G. The rationale for this decision is to be found at page 301 of the judgment where the court stated that:

'As an appeal only lies in general from a Divisional Court, and as a Judge sitting in

Chambers is not such a Court, it follows that, save when specifically provided by Statute, there is no appeal from the judgment or order given by a Judge sitting in Chambers, and that an appeal consequently will not lie in the present case."

[9] At page 302 the court went on to say that:

"Under the rule now in question, the Judge sits purely as a Judge in Chambers, and does not purport (whether in term time or in vacation) to exercise the functions of the Court, and there is, in my opinion, no appeal from his decision.. That it was competent to take away that right of appeal by the new rule is, I think, clear from the fact that there is no inherent right to a litigant to 'review' the taxation of the Taxing Master - which is in the nature of a ruling by an administrative official - save, naturally, for a gross irregularity or some other reason which makes it per se reviewable. Here, he is given a right of 'review', which is in reality a revision, on the merits, of that ruling, and is in no sense a proceeding of the Court. It was consequently competent, by this rule, to make such revision the last word on this subject."

[10] It should also be noted that "Judge" is defined in rule 1 of the rules of court as meaning "a judge sitting otherwise than in open court", and "court" in relation to civil matters is defined as meaning "a court constituted in terms of section thirteen of the Act. Section 13 of the Supreme Court Act 59 of 1959 ("the Act") provides, insofar as it is relevant to the present matter, that a court of first instance shall be "constituted before a single judge of the division concerned".

[11] Further, section 20(1) of the Act makes provision for an appeal *"from a judgment or order of the court of a provincial or local division in any civil proceedings.. "* (my emphasis).

[12] However, see *Vaaltyn v Goss and Another supra* at 557 B - 560 G; although in that matter the court was called upon to interpret the provisions of rule 69(3) of the rules of court, an issue which is clearly of relevance to other litigants and their legal representatives as well. In the present matter I was called upon to interpret the provisions of a court order relevant only to parties to the litigation which preceded it. This was conceded by counsel for the applicants and Mr Khan during argument.

[13] In any event, I am bound by the decision in *Menzies supra*, since it pronounced

on the provisions of rule 48 itself, and it is trite that a single judge is bound by the decision of the full bench of the same division on the same issue. Fourie J also considered himself to be so bound in his judgment handed down on 23 April 2010 in the as yet unreported matter of *Weaving v Reck and 3 Others* (Western Cape High Court Case No: 11579/06).

[14] It should however be mentioned that a full bench of this division in the matter of *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (CPD) in fact heard an appeal arising from the dismissal by a judge in chambers of an application for review of taxation. It is clear though from a reading of the judgment that the court was not called upon to consider whether the leave granted by the judge *a quo* to appeal her order was competent or not. Accordingly I do not believe that the *City of Cape Town* case can be regarded as authority for the proposition that a review of taxation is appealable.

WHETHER THE APPLICATION FOR LEAVE TO APPEAL SHOULD BE POSTPONED TO ALLOW THE MINISTER OF JUSTICE TO BE JOINED IN THE APPLICATION FOR THE PURPOSE OF A CONSTITUTIONAL CHALLENGE

[15] The applicants and Mr Khan have asked that in the event that the respondents contend that the order which I made is not appealable, they (together with Mr Khan) shall apply for an order postponing the application for leave to appeal to allow the Minister of Justice to be joined in the application for the purpose of:

15.1. Declaring that the provisions of rule 48(2) are unconstitutional in that they violate the right of the costs debtor to have a dispute determined by a court;

15.2. Declaring that the procedure of a judge sitting in chambers violates the provisions of section 34 of the Constitution of the Republic of South Africa Act no 108 of 1996 ("the Constitution"), which provides for a public hearing. Alternatively, the rule must be amended to eliminate the distinction between a judge sitting in chambers - giving a judgment or making an order - and a judge sitting in open court giving a judgment or making an order. If the decision in chambers is intended as a final judgment or order, the rule must say so and the section must be amended.

[16] In my view, the second ground relied upon by the applicants (and Mr Khan) is really a variation on the same theme as the first ground.

[17] Section 34 of the Constitution provides as follows:

Access to Courts

34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[18] Section 173 of the Constitution provides that:

"Inherent power

173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'

[19] In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC) the Constitutional Court commented on section 173 as follows (at 181 B - D):

"This is an important provision which recognises both the power of courts to protect and regulate their own process as well as their power to develop the common law. It is the former power that is of relevance in this case. It must be understood in the context of section 165 which provides that the judicial authority is vested in courts, that they are independent and must apply the law impartially and without fear, favour or prejudice.

Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power must take into account the interest of justice" (court's emphasis)

[20] The preamble to the rules of court specifically provides that the purpose of the rules contained therein is to regulate the conduct of the proceedings of the provincial and local divisions of the Supreme Court of South Africa.

[21] In the present context, the rules of court must surely fall squarely within the provisions of section 173. In terms of rule 48(5) (c), in a review of taxation, the taxing master is obliged to *"lay the case together with submissions before a judge"*. I have already referred to the definition of a *"judge"* above and accordingly do not need to repeat such definition.

[22] Rule 48(6) (a) confers a discretion on the judge to whom the case has been submitted. He or she may either (a) decide the matter upon the merits of the case and submissions so submitted; or (b) require any further information from the taxing master; or (c) if he or she deems it fit, hear the parties or their advocates or attorneys in his or her chambers; or (d) refer the case for decision to the court.

[23] As to the first ground advanced by the applicants and Mr Khan, namely that the provisions of rule 48(2) are unconstitutional in that they violate the right of the costs debtor to have a dispute determined by a court (my emphasis), it is to be noted that the applicants (and Mr Khan) do not submit that the discretion conferred upon me in terms of rule 48(6) (a) was improperly exercised. In any event, the reference by the applicants (and Mr Khan) to rule 48(2) is clearly incorrect. Rule 48(2) simply refers to the manner in which the notice in terms of rule 48(1) must be phrased. I will accept for purposes of this judgement that the reference to rule 48(2) was intended to be a reference of rule 48(6).

[24] As to the second ground advanced by the applicants and Mr Khan, namely that the procedure of a judge sitting in chambers violates the provisions of section 34 of the Constitution, in addition to what I have set out above. I believe that it is necessary to be mindful of the purpose of the proceedings for review of taxation, namely that, as far as possible, such procedure should simplify and reduce the costs of such proceedings: See *Erasmus: Superior Court Practice* at B1 - 352 and the comments of the full bench of this division in the *Menzies* case *supra* at 302 that *"the object of the rule was certainly to cheapen reviews of taxation."* In the *South African Broadcasting Corporation Limited* case (*supra*) the Constitutional Court stated the following at 181

E:

UA court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (section 35 of the Constitution) and the right to have disputes resolved by courts (section 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated"

[25] In my view, the discretion afforded to a judge presented with a review of taxation in terms of rule 48(6)(a) does not "unjustifiably attenuate" a costs debtor's rights in terms of section 34 of the Constitution, particularly if regard is had to the following:

25.1. The very purpose of the procedure prescribed in terms of rule 48, namely to cheapen reviews of taxation: and

25.2. The costs debtor (and the costs creditor) are each afforded two opportunities to make written submissions to the judge before whom the review is placed: the first set of submissions must comply with the detailed format prescribed in terms of rule 48(2) and, perhaps more significantly, the second set of submissions may be made after the taxing master has supplied his or her stated case, with the costs debtor (and creditor) specifically being afforded the opportunity in terms of rule 48(5)(a) to also raise any ground of objection not raised at the taxation. As set out above, the applicants (and Mr Khan) elected not to utilise the provisions of rule 48(5)(a).

[26] As to the alternative to the second ground relied upon by the applicants and Mr Khan, namely that the rule must be amended to eliminate the distinction between a judge sitting in chambers - giving a judgment or making an order - and a judge sitting in open court giving a judgment or making an order, and that if the decision in chambers is intended as a final judgment or order the rule must say so and be amended accordingly, I believe that the following is pertinent:

26.1. The powers afforded to the Chief Justice, Judge of Appeal and Judges President to make rules regulating the conduct of proceedings in the Supreme Court of Appeal and the various provincial and local divisions was abolished upon the

coming into effect of the Rules Board for Courts of Law Act 107 of 1985 (the Act came into effect as from 20 February 1987). Since that date it is the Rules Board for Courts of Law which has the power to make, amend or repeal rules for both the High Court and the Magistrates Courts. The existing rules made by the judges prior to the commencement of this Act remain in force until amended or repealed by rules made by the Rules Board under section 6 of the aforesaid Act;

26.2. Section 6(1) of the Rules Board for Courts of Law Act provides that:

"The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Courts and the Lower Courts, from time to time and on a regular basis review existing rules of court and. subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Courts and the Lower Courts regulating - ... (s) the taxation of bills of costs and the recovery of costs ..."

[27] By parity of reasoning, rule 48 of the Rules of Court falls within the purview of the Rules Board; and I am not persuaded that the apparent contradiction relied on by the applicants (and Mr Khan) *"unjustifiably attenuates"* the costs debtor's rights in terms of section 34 of the Constitution for the same reasons set out above.

[28] I accordingly decline the application to postpone the Leave to Appeal.

THE GROUNDS OF APPEAL

[29] As I have found that I have no authority to grant leave to appeal in this matter, the views which I express hereunder are. of necessity, academic. However, I do believe that it is necessary to state that, even if I had the power to grant leave to appeal, I would have refused it, as I do not believe that the applicants (and Mr Khan) have shown that they have a reasonable prospect of success on appeal.

[30] Apart from the aspect dealt with hereunder, I have already provided reasons in my judgment in the review of taxation as to why I believe the taxing master was correct, and it is not necessary for me repeat these reasons

[31] The applicants (and Mr Khan) have, in their notice of application for leave to appeal, raised a new ground which they did not raise in the application for review,

namely that I erred and/or misdirected myself by failing to find that the taxing master erred and misdirected himself in concluding that the application was '*exceptional and extraordinary*', it is alleged that the application for leave to appeal in respect of which the taxing master taxed the bill of costs was "nothing more than an application for leave to appeal".

[32] In this regard, the respondents (in their written submission on the taxing master's stated case in terms of rule 48(5)(a)) set out the history of the matter giving rise to the order of Davis J that their costs be taxed and allowed on the scale as between attorney and own client, payable *de bonis propriis*. The applicants further submitted that: "*The extraordinary facts of this matter necessitated research into the powers of a Court of Appeal as set out in sections 20 and 21 of the Supreme Court Act 59 of 1959 ("the Act") and an investigation into whether, by virtue of the fact that no application was made by the Respondents (i.e. the applicants in the matter) for Davis J's recusal and no refusal of such application was granted, there was a judgment, order or decision in regard thereto which may be appealed against as envisaged by the provisions of section 20 and 21 of the Act. An investigation into the proper procedure to be followed by the respondent was furthermore required... (and further) ... A case had to be made out by the applicants (the respondents in the matter) justifying the granting of a costs order de bonis propriis against the respondents attorney of record.*" It was also submitted that Davis J, in ordering and allowing the costs of two counsel, acknowledged and accepted the complexity and importance of the application for leave to appeal

[33] Counsel for the applicants (and Mr Khan) conceded during argument that, in reaching my decision on review, I was entitled to have regard, not only to the taxing master's stated case, but also to all of the written submissions by both the costs debtor and costs creditor. There was nothing in the submissions by the applicants to counter or contradict the respondents' submissions on the issue of whether or not the case was '*extraordinary or exceptional*'.

[34] The issues involved have been set out by the respondents and, in the words of Vos J in *Horseshoe Caterers (Green Point) (Pty) Ltd v Bumkloof Caterers (Pty) Ltd* 1977 (3) SA 383 at 327 B. I regard myself "*in as good a position as, if not in a better one than, the Taxing Master to assess the complexity of this matter*".

[35] To my mind, there is no question that the taxing master correctly ruled that the case was an "*extraordinary or exceptional*" one.

COST OF THIS APPLICATION

[36] This application thus clearly falls to be struck from the roll with costs. The issues which now arise are (a) which scale of costs should apply; and (b) whether such costs should be awarded against the applicants and Mr Khan jointly and severally or against Mr Khan himself.

[37] During the course of argument counsel for the respondents (with the consent of counsel for the applicants and Mr Khan) handed in a letter dated 29 November 2010 which had been addressed by the respondents attorneys to Mr Khan in which his attention was drawn to the *Menzies* case, particularly as Mr Khan had indicated that he would seek leave to appeal in this matter

[38] The letter advised that it would be brought to this court's attention that Mr Khan had been advised of the *Menzies* case and that a costs order would be sought against him on the scale as between attorney and client.

[39] Counsel for the respondents argued that a punitive costs order is warranted in this matter, since, despite having been advised of the *Menzies* case. Mr Khan pursued this application.

[40] I am not persuaded that a punitive costs order is warranted, matter but only because of the constitutional issues raised by the applicants (and Mr Khan) in their notice of application for leave to appeal. I do however believe that it would be appropriate that the costs order should be effective against Mr Khan since, as pointed out by counsel for respondents, the costs order which underpins this entire matter is granted against Mr Khan only.

[41] As set out in *Rautenbach v Symington* 1995 (4) SA 583 (OPD) at 587 J - 588 A, it is well known that the question of costs rests in the discretion of the court and that in the exercising thereof the court should attempt as far as possible to dispense justice and fairness to all the parties. Further, the court's discretion is not restricted to cases of dishonest, improper or fraudulent conduct and no exhaustive list exists. It includes

all cases where special circumstances or considerations justify the granting of such an order (see the *Rautenbach* case at 588 A - B).

[42] In the result, the application is struck from the roll with costs, such costs to be paid by Mr M R Khan, the applicants' attorney of record.

JI CLOETE