REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 36924/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

1 JUNE 2020 **FHD VAN OOSTEN**

In the matter between:

TOMMY'S USED SPARES CC t/a TOMMY'S AUTO PARTS **APPLICANT**

and

ATTORNEYS ANAND-NEPAUL **FIRST RESPONDENT**

THE TAXING MASTER OF THE SOUTH GAUTENG HIGH COURT **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an application for an order setting aside the taxation by the second respondent (the Taxing Master), on 23 September 2015, of an attorney and own client bill of costs and allocatur, in the sum of R145 475.08, in the matter of Tommy's Used Spares CC t/a

Tommy's Auto Parts v Mutual and Federal Insurance Company Ltd and Another (the bill of costs).

[2] The first respondent is a firm of attorneys practicing in Durban. The applicant is a close corporation, with principal place of business in Newcastle. During March 2013 the applicant appointed the first respondent (Anand-Nepaul) as its attorneys to institute and pursue a claim against Mutual and Federal Insurance Company Ltd, in this court. A written agreement, styled 'Retainer Agreement', to which was annexed a 'Retainer Billing Rates' schedule, was concluded when the first consultation was held on 5 March 2013 (the fee agreement). Preparations in pursuing the claim commenced including the briefing of senior counsel, practicing at the Durban Bar, at various stages of the preparations. Anand-Nepaul's mandate was terminated in mid-February 2014, when the applicant decided to appoint another firm of attorneys to act in the Mutual and Federal matter.

[3] In 2015 the bill of costs in respect of fees and disbursements owing by the applicant, was prepared by a professional assistant in the employ of Anand-Nepaul, and submitted through the firm's correspondents in Johannesburg, for taxation, which came before the Taxing Master, in the absence of the applicant, on 23 September 2015.

[4] The applicant now seeks an order setting aside the taxation, on the grounds, firstly, that it was unaware of the taxation and secondly, that the taxation and allocator of the Taxing Master in respect of a number of the items in the bill of costs and in various other respects, is incorrect.

[5] Anand-Nepaul has raised two *in limine* points, first, a challenge to the authority of the applicant's attorneys in this application to act on its behalf and second, that in view of this application having been instituted almost three years after the date of the taxation, the applicant was required to seek and obtain condonation. In response thereto, the applicant, in its replying affidavit, seeks condonation 'insofar as it may be required', in support of which further facts and considerations are set out.

Challenge to authority: Rule 7

[6] This point should not detain me for long. In the Mutual and Federal Insurance Company matter, instructions were given to Anand-Nepaul by Haroun Rashid Jamaloodeen, on behalf of the applicant, who is the husband of the sole member of the close corporation, Mariam Bibi Jamaloodeen. In the present matter Mohammed Haniff Jamaloodeen, the son

of Haroun and Mariam Bibi Jamaloodeen, deposed to the affidavits on behalf of the applicant. Anand-Nepaul challenged the applicant's attorneys' authority to act on its behalf, by way of delivering a Rule 7(1) notice. In response the applicant filed a resolution by the sole member of the applicant, in terms of which Mohammed Haniff Jamaloodeen was authorised to act on behalf of the applicant, in regard to legal proceedings in another, unrelated case. This prompted Anand-Nepaul to file a Rule 30A notice, on the ground that the applicant's response was defective and failed to satisfy Anand-Nepaul or the court that the applicant's attorneys were authorised to act on its behalf in this matter. The applicant responded thereto in annexing another resolution by the applicant, in terms of which Mohammed Haniff Jamaloodeen 'confirmed and resolved' that the applicant's attorneys of record were duly authorised to act on its behalf.

[7] I am satisfied that, having regard to all the facts and circumstances of the litigation between the parties, the applicant's attorneys are acting with the requisite authority. The applicant's attorneys likewise are acting on its behalf, in the pending Magistrate's court case, to which I shall revert. No challenge to their authority to act in that case has been raised. This application is a sequel to the Mutual and Federal Insurance matter in which the applicant was represented by its sole member's husband. I have no doubt, that the authority challenge was raised with some ulterior motive. Had Anand-Nepaul been serious and bona fide in raising the challenge, they should have enrolled the matter at that stage for an order by the court to stay the application until furnishing of proper proof of authorisation. Rule 7 requires *the court* to be satisfied that authority exists.

(See *Eskom v Soweto City Council* 1992 (2) SA 703 (W), approved in *Ganes and Another v Telecom Namibia* 2004 (3) SA 615 (SCA) para [19])

[8] The rule 7(1) challenge, accordingly, is dismissed.

Condonation

[9] In *Van Wyk v Unitas Hospital and Another* (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007), the Constitutional Court in regard to condonation, held (para [20]):

'This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to

the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.' (Footnotes omitted)

[10] This application, as I have alluded to, was instituted almost three years after the applicant was made aware of the taxation and allocatur. But, the enquiry does not end there. This court is enjoined to consider all the facts and circumstances of this case.

[11] Having analysed and considered the facts of this matter, in particular the exchange of correspondence between the parties relating to time periods, I am driven to the conclusion that both parties were at times dilatory. The applicant appears to have been aggrieved, right from the outset, mainly by the quantum of the fees and disbursements claimed by Anand-Nepaul. I am unable to find any indication of an unwillingness to pay the account. To the contrary, the applicant complained that the account was 'too high', took numerous steps to obtain documents on which the fees and disbursements were based and in the papers before me, reiterates a firm undertaking to pay whatever is rightfully found to be owing to Anand-Paul. Of significance is that it was the applicant that sought a taxation of the bill the costs. The applicant has moreover, through its attorneys, made a formal offer of settlement, which Anand-Paul was not prepared to accept.

[12] The history of the matter, indeed fortifies the applicant's willingness to pay what was owing. The applicant alleges that a deposit was paid to Anand-Nepaul soon after the first consultation was held, but it is stated that despite a diligent search, the documents in support thereof could not be traced. Counsel who was on brief, rendered two invoices to Anand-Nepaul, one dated 22 May 2013, for payment R5 700, and the second, dated 10 September 2013, for payment of R39 900, which were both at the request of Anand-Nepaul, promptly settled by way of the applicant's payment directly into counsel's bank account.

[13] A third invoice by counsel for payment of the sum of R37 050, dated 21 August 2014, was added as an item to the bill of costs and a copy thereof made available to the applicant. The applicant however, disputes both the contents and that it was received. The applicant's challenge is unsurprising, once a reconciliation of counsel's invoice with the bill of costs is attempted. Counsel's invoice reflects a debit in respect of a consultation with client and attorney, held on 4 April 2014. The particulars of the invoice are at odds with the common cause date of applicant's termination of Anand-Nepaul's mandate, which as I have

mentioned, was during mid-February 2014. Moreover, one looks in vain for a corresponding entry in the bill of costs. The bill of costs (item 112) reflects a 'consultation client at advocate's chambers', on 4 February 2014, and the attorney's fee of R3 000 in respect thereof. This notably, is the last consultation with counsel reflected in the bill of costs. Moreover, the 4 February 2014 consultation is nowhere to be found in any of the three invoices rendered by counsel. Reverting to counsel's third invoice, what the bill of costs does reflect (item 62) is 'attended to receipt' by the attorney, on 10 January 2013, of counsel's 'fee note' and a disbursement, on that date, of the amount R37 050.00, representing payment to counsel of the total amount of counsel's invoice. The invoice was furthermore, forwarded to the applicant on the same date, 'to make payment' in respect of which a fee was debited (item 63). The irreconcilability of what I have set out above, speaks for itself and requires no further comment.

[14] On 11 August 2014 Anand-Nepaul issued an interim bill of costs and tax invoice which were sent by email to the applicant. On 2 and 30 September 2014 follow-up requests for payment were made. On 3 October 2014 the applicant responded with 'we are not in agreement-please rectify'. The applicant states that numerous requests were afterwards made for a taxation of the bill of costs. A bill of costs was prepared by a professional assistant at Anand-Nepaul. More than 5 months later, on 20 April 2015, a notice of intention to tax was sent by registered post to the applicant. It is in dispute whether the notice was received by the applicant, to which I shall revert. On 3 August 2015 the bill of costs, signed on 30 May 2015, was lodged with the Taxing Master and taxed on 23 September 2015, almost 12 months after the challenge was raised by the applicant.

[15] On 1 February 2016, Anand-Nepaul instituted provisional sentence proceedings against the applicant for payment of the amount of the allocatur, in the Durban Magistrate's court. The action was defended but withdrawn on 29 March 2016, as the summons was defective.

[16] On 11 November 2016 Anand-Nepaul issued summons for payment of the allocatur amount in the Durban Magistrate's court. The applicant, having appointed its present attorneys of record, defends the action, which is still pending.

[17] The applicant's attorneys, in numerous letters from 9 December 2016, requested production of the documents on which the bill of costs was based. Anand-Nepaul were less than enthusiastic to comply. The line of correspondence regarding documents continued

until July when the applicant's attorneys informed Anand-Nepaul 'further to our investigations of your taxed bill, we have made various discoveries in respect to the taxed bill which were in the least to mention, unethical, unprofessional and irregular in terms of the proceedings with the High Court Rules of Taxation' which resulted in the lodging of the present application.

[18] Nothing has been alleged or argued in support of wilful default, which, in any event, in my view, has not been shown.

[19] Against and based on the background facts set out above, I consider it in the interests of justice to grant condonation.

Discussion: Merits

[20] The point of departure is to consider whether the applicant was properly apprised of the notice of taxation. Anand-Nepaul heavily relied on a Post Office registered slip, with date stamp, indicating that the notice was sent to the applicant by registered post on 20 April 2015. The applicant however, obtained the parcel tracking results report in respect of this item from the Post Office, showing that that it was 'returned back to sender' on 28 May 2015. It is accordingly indisputable that the notice of taxation was not served on the applicant and the applicant's denial of receipt thereof, accordingly, stands uncontroverted.

[21] In *Gründer v Gründer and Another* 1990 (4) SA 680 (C), the English headnote (at 680J - 681B) correctly reflects what was stated in the judgment, namely:

'The Taxing Master's allocatur is a quasi-judicial administrative act: He must hear parties or their legal representatives (and if needs be also evidence) and exercise a judicial discretion. Inasmuch as proceedings before the Taxing Master constitute an action in miniature, common law principles applicable to the setting aside of default judgments apply also the setting aside of the Taxing Master's allocatur. An order as to costs cannot be enforced without the Taxing Master's quantification thereof, and a quantification done in the absence of one of the litigants ought to be open to challenge on the same basis as are default judgments.'

(See too *Barnard v Taxing Master of the High Court of South Africa TPD and Others* 2005 (2) All SA 485 (T))

[22] Applied to the facts of the present matter, the absence of service of the notice of the taxation on the applicant, resulted in the taxation being erroneously conducted and the allocatur erroneously appended. On this ground alone, the taxation falls to be set aside (Cf

Van der Merwe N.O. v MEC for Health, Gauteng, In Re: Steenkamp v MEC for Health, Gauteng (15360/2009) [2014] ZAGPPHC 1045 (11 December 2014); *Erasmus* Superior Court Practice B1-308A).

[23] Anand-Nepaul filed a 'Certificate of no objection', dated 13 July 2015, with the Taxing Master, to which was attached a copy of the registered slip pertaining to the sending of the notice of taxation. In the notice of no objection, reference is made to the sending of the notice to the applicant by registered post, the applicant's failure to inspect documents and the absence of a notice of intention to oppose the taxation, to which a request is added for the Taxing Master to tax the bill *ex-parte*.

[24] Uniform Rule of Court 70(4) provides:

'(4) The taxing master shall not proceed to the taxation of any bill of costs unless he is satisfied that the party liable to pay the same has received due notice as to the time and place of such taxation and notice that he is entitled to be present thereat: Provided that such notice shall not be necessary-

(a) if the party against whom costs have been awarded has not appeared at the hearing either in person or through his legal representative;

(b) if the person liable to pay costs has consented in writing to taxation in his absence; and

(c) for the taxation of writ and postwrit bills.'

[25] Whether opposed or *ex parte*, the Taxing Master was required to tax the bill of costs. Taxation requires the exercise of a discretion, which Leach J (as he then was) explained in *Kloot v Interplan Inc and Another* 1994 (3) SA 238H-I (SECLD), as follows:

'The Taxing Master has a discretion to be judicially exercised in allowing or disallowing or reducing the various items of a bill of costs. That discretion must be exercised reasonably and justly on sound principles and with due regard to all the circumstances of the case. In exercising his discretion he should ensure that the unsuccessful litigant is not oppressed by having to pay an excessive amount of costs and accordingly, although the court does not have a free hand to interfere with a Taxing Master's discretion on review, where he has failed to exercise ... judicially or properly or failed to bring his mind to bear upon the question, intervention is demanded.'

(See also *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) para [25] 235G; *Preller v Jordaan* 1957 (3) SA 201 (O) 203; *Society of Advocates of Kwazulu-Natal v Levin* (4564/13) [2015] ZAKZNPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) para [8]-[11])

[26] A cursory perusal of the bill reveals that the Taxing Master simply added the allocatur, without having given any consideration whatsoever to the items in the bill. Not a single item of a total of 121 items, was not allowed or taxed down. The numerous glaring discrepancies, some of which I have already alluded to, must have been overlooked, let alone considered. Absent any evidence before me concerning the taxation, either by the attending attorney or the Taxing Master by way of a report, the ineluctable inference is that the bill of costs was not taxed at all.

[27] On this alternative ground the application for rescission of the bill of costs must succeed.

Costs

[28] It behoves me to comment on the magnitude of the litigation between the parties in proportion to the nature of the dispute between the parties. The bill of costs is disputed and Anand-Nepaul in order to become entitled to payment, are required to have it taxed or reach an agreement with the applicant (*Tredoux v Kellerman* 2010 (1) SA 160 (C)). The professional services in respect of which the bill of costs was prepared, were rendered in 2013 and 2014. The amount of the allocatur is R145 425.08. The taxation occurred almost 5 years ago. Two magistrate's court actions were instituted, the one still pending. This application involves 2 interlocutory applications, the one I have already referred to, and the other, the applicant's application to compel Anand-Nepaul to deliver heads of argument in this application. The case record in the present matter extends into almost 600 pages. Three firms of attorneys are involved, two of which are from Durban. Counsel for Anand-Nepaul also practices in Durban. The only real issue between the parties concerns the quantum of the items reflected in the bill of costs.

[29] The applicant, as I have mentioned, has made a formal offer of settlement. Anand-Nepaul indicated a preparedness to settle for an amount way above the amount taxed. That of course, must have stifled further negotiations. Unnecessary time and costs were wasted in a matter which could and should have been settled by the attorneys at a round table conference. The attorneys, after all, were best qualified and experienced to debate and agree on the quantum of the items in the bill of costs. Instead, the long and arduous road of unnecessary and costly litigation in respect of a relatively small amount, was an exercise in diminishing returns When it was disclosed by the applicant that the notice of taxation did not come to its notice, Anand-Nepaul should have re-assed their position, but the matter

unabatedly proceeded. I can only express the hope that these remarks will encourage sense and sensibility as far as litigation in future matters is concerned.

[30] As to costs, the normal rule of costs following the event, in my view, ought to apply. In regard to the costs of the application to compel, Anand-Nepaul raised valid arguments, based on the provisions of the Practice Directives, in support of the contention that the applicant's application to compel was premature. The applicant on the other hand, followed the 'instruction' of the Registrar in lodging the application to compel, which it was told is required for the applicant to obtain a date for the hearing of this application. Neither party, in my view, is to be blamed. It follows that it would be fair for each party to pay its own costs in respect of the application to compel.

Order

[31] The applicant requests that the bill of costs be referred back to the Taxing Master alternatively, that the bill of costs be referred to the Law Society of Kwazulu-Natal for taxation. I am unable to accede thereto. The bill of costs is anything but a model of clarity. Scant attention was afforded to the dates in respect of the items. The dates that are given are not in sequence or chronological, and in any event, difficult, if not wholly impossible, to follow and reconcile.

[32] A further fundamental difficulty, which seems to have escaped the attention of all concerned, emerges from the papers: the retainer billing rates schedule incorporated into the fee agreement, apart from the fee relating to 'time spent for work executed and travelling time', provides for 'other charges as per tariff as laid down by the Natal Law Society and/or the relevant Act of Court'. Whatever the interpretation of that clause may be held to be, the bill of costs does not disclose the basis for the tariff. The applicant has attached to its replying affidavit the tariffs provided for in the Uniform Rules of Court as well as the Kwazulu-Natal Law Society, and correctly points out that neither was applied in the preparation and drafting of the bill. The bill of costs, as it stands, therefore, represents nothing but an exercise in futility.

[33] For all these reasons, a return to the drawing board appears to be the only option left for the taxation process to start afresh.

[34] In the result I make the following order:

1. The taxation of the attorney and own client bill of costs and allocatur, in the matter of Tommy's Used Spares CC t/a Tommy's Auto Parts v Mutual v Federal Insurance Company Ltd and Another, by the second respondent, on 23 September 2015, is rescinded.
2. The first respondent is to pay the applicant's costs of the application, such costs to :
    2.1 include the reasonable fees of the applicant's attorneys in respect of preparation for and drafting of the applicant's heads of argument;
    2.2 exclude the costs of the applicant's application to compel delivery of heads of argument by the first respondent.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

FOR APPLICANT	***THASNEEM PARAK & ASSOCIATES***
APPLICANT'S ATTORNEYS	***THASNEEM PARAK & ASSOCIATES***
COUNSEL FOR 1st RESPONDENT	***ADV C-M DE VOS***
1st RESPONDENT'S ATTORNEYS	***ATTORNEYS ANAND-NEPAUL***
DATE OF HEARING	***MATTER ADJUDIATED ON THE PAPERS FILED AND HEADS OF ARGUMENT SUBMITTED BY THE PARTIES***
DATE OF JUDGMENT	***1 JUNE 2020***