

REPUBLIC OF SOUTH AFRICA



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

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

11/4/2022
DATE


SIGNATURE

CASE NUMBER : 31131/2020

In the matter between:

ALEX ZANELLA
ALEX ZANELLA N.O
TAMARA ZANELLA

1st APPLICANT
2nd APPLICANT
3rd APPLICANT

And

MICHAEL RICHARD HARTY
GIOVANNI ZANUTTA
MASTER OF THE HIGH COURT, PRETORIA
REGISTRAR OF DEEDS

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court.

[2] The Taxing Master ruled that the 1st and 2nd respondents are entitled to all the costs for the application in respect to urgency as well as the merits. The Urgent Court struck the matter off the roll on 27 October 2020.

[3] The applicants are dissatisfied with the ruling of the Taxing Master.

[4] The matter is before me on a stated case. I did not see reason to call for further arguments and accordingly reviewed the matter on the papers as presented.

[5] After the Taxing Master filed his stated case on 22 October 2021, the applicants filed their contentions in terms of Uniform Rule 48(5)(a) on 11 November 2021 and the 1st and 2nd respondents filed their contentions in terms of Uniform Rule 48(5) (a) on 16 November 2021.

[6] The review is based on two questions, firstly, whether a Taxing Master may allow costs which were not allowed by the Urgent Court and secondly, whether a Taxing Master may hear evidence on the mootness of a matter.

BACKGROUND

[7] The applicants served an urgent application on the respondents seeking interdicts against:

- (a) the trust (part A in the notice of motion)
- (b) the estate (part B in the notice of motion)
- (c) further relief against the 3rd and 4th respondents.

The 3rd and 4th respondents did not oppose the application.

[8] The relief sought against the trust (part A) was identical to the relief sought against the deceased estate (part B).

[9] Before the application was served, a letter was sent to the applicant's attorney by the 1st respondent's attorney dealing with undertakings sought in the letter of demand dated 9 October 2020.

[10] At this stage of the proceedings, no party had filed any answering affidavit. The 1st and 2nd respondents delivered their respective answering affidavits on 21 October 2020. The answers were primarily directed to the Urgency and part A of the applicant's papers. The applicants then filed replying affidavits on the respondents on 23 October 2020.

[111] This resulted in the applicant's attorney filing a supplementary affidavit rendering the relief in part B moot. An amended notice of motion, only referring to part A and excluding part B, was annexed to the supplementary affidavit. This all happened before the matter was set down for argument on part A on 27 October 2020.

[12] The amended notice of motion which is marked DF1 read as follows:

'1. Dispensing with the forms of service and time periods stipulated for in the Rules for the Conduct of Motion proceedings and disposing of this application as an urgent one in accordance with the provisions of Rule 6(12).

2. Ordering the first respondent to furnish the applicants with copies of all correspondence that he has directed to the third and/or fourth respondents and to the second respondent in connection with the affairs of the Tokyo Trust, IT1607/93 created on 30 June 1993 ("the Trust");

3. Pending the outcome of an application or action to be instituted by the applicants within 20 days of receipt of the information to be provided by the first respondent in terms of the mandamus in paragraph 2 above:

3.1 Interdicting the second respondent from alienating, encumbering, disposing of or taking any steps that would devalue or depreciate, the assets of the Trust including but not limited to:-

3.1.1 Erf 201, Sandown Ext 24 ("the property"); and

3.1.2 A Toyota Landcruiser, 80 series, 4.5 EFE, 5 speed manual, colour: red and gun metal grey.

3.2 Ordering and directing the fourth respondent to register a caveat against the property preventing the alienation, hypothecation or other encumbrance against the property.

(The application or action to be instituted shall be for appropriate relief in relation to the assets of the Trust and may include declaratory orders pertaining to the beneficiaries of the Trust, the identification of trustees of the Trust, and for the regularisation of the affairs of the Trust).

4. Ordering the third respondent to supply the applicants with a copy of all documents on record pertaining to the Trust.

5. In the event that the application or action is not instituted within the 20-day period, the interim interdict shall automatically lapse, and the applicants shall pay the respondents' costs of the application; otherwise reserving the question of costs for determination in the foreshadowed application or action.'

[13] The matter was enrolled on 27 October 2020 and argued. Only part A was dealt with and the court struck the matter off the roll with costs.

[14] On 11 December 2020 the attorneys for the 2nd respondent tendered certain undertakings on behalf of the 2nd respondent. These undertakings were accepted by the applicant's attorney in a letter dated 15 December 2020 and the undertakings were made an order of court on 17 May 2021.

[15] The undertakings made by the 2nd respondent's attorney in the letter dated 11 December 2020 were to the following effect:

'My instructions are that my client has no difficulty with having an order taken in this matter provided that it is an order in terms of the attached draft:

without any admission of liability the second respondent consents to an order pending the outcome of the action under case number 38002/2020 ("the action") in the following terms:

1. The second respondent shall not alienate, encumber or dispose of not shall he take any steps that will devalue or depreciate:-
 - 1.1 Erf 201, Sandown Ext 24, and
 - 1.2 The Toyota Landcruiser, 8 series, 4.5 EFE, 5 speed manual, red and gun metal grey, ("the assets"),
2. The unopposed costs of making this order the Order of Court on an unopposed basis are to be costs in the Action.
3. My client persists in contending that none of the applicants:
 - enjoy any rights in terms of the Trust or its assets;
 - have any locus standi to propagate litigation;
 - have established any such right in the application; or
 - need any such relief in the first instance in that they made out no case that my client intends to dispose of any such assets.
4. My client only makes the offer to avoid incurring unnecessary costs in further pursuit of this application. Self evidently my client has not encumbered, alienated or disposed of the Assets nor taken steps that diminishes or depreciates the value of the Assets, in light of the order to which he is prepared to consent.
5. My client will not consent to an order in terms of DF1.' [my emphasis]

[16] The order of court dated 17 May 2021, in relation to the undertaking by the 2nd respondent, reads as follows:

'1. Without any admission of liability, the second respondent consents to an order pending the outcome of the action under case number 38002/2020 ("the Action") that the second respondent shall not alienate, encumber or dispose of not shall he take any steps that will

devalue or depreciate;

1.1 Erf 201, Sandown Ext 24; and

1.2 the Toyota Landcruiser, 80 series, 4.5 EFE, 5 speed manual, red and gun metal grey (“Assests”).

2. The unopposed costs of making this order the Order of Court on an unopposed basis are to be costs in the action.’ [my emphasis]

[17] The application was never enrolled again, instead, a summons was issued to determine the outstanding issues between the parties.

[18] On 12 May 2021 the respondent’s respective attorneys served a bill of costs on the applicants. The applicants served a notice of opposition on both respondents wherein paragraph 1 of the opposition was argued, being the point *in limine* relating to the entire proceedings being specified in the bill, instead of only items that would give effect to the order dated 27 October 2020. The taxation, which was opposed by the applicants took place on 3 August 2021. On 3 August 2021, the 1st and 2nd respondents’ bills of costs were partially taxed. The respondents claimed that on 27 October 2020 the entire application had become moot because the applicants had withdrawn part B of the application and that the order dated 17 May 2021 concluded the mootness of part A of the application. The applicants on the other hand argued that the order of 27 October 2020 was merely an order striking the matter from the urgent roll and as a result the respondents would only have been entitled to the wasted costs relating to 27 October 2020 and that the matter could not have been rendered moot as claimed by the respondents. A further date was obtained by the 1st and 2nd respondents and the matter was finalized on 8 September 2021.

[19] On 8 September 2021, the applicants requested if the Taxing Master’s views had changed from when the first matter was heard. The Taxing Master replied that he did not change his views after he heard argument on 3 August 2021 and allowed all costs on the 1st and 2nd respondent’s bill of costs in relation to the urgency, part A and Part B of the application.

[20] Paragraph 1 of the applicant’s notice of opposition had directly opposed all items that had been allowed, being items 1 to 38 of the 1st respondent’s bill of costs and items 1 to 56 of the 2nd respondent’s bill of costs.

APPLICANT'S CONTENTIONS

[21] The applicants contend that the Taxing Master erred in his ruling for the following reasons:

- (a) due to the withdrawal by the applicants of part B of the application, there was no tender to costs as the 1st respondent complied with a request of documentation to be given to the applicants. Thus no costs were included in the withdrawal. Nor were costs even requested by the 1st and 2nd respondents.
- (b) the order granted by Judge Mia on 27 October 2020, did not deal with the merits, as only the urgency was considered and the matter was struck off the roll due to lack of urgency. The matter was not dismissed with costs and accordingly the Taxing Master was obliged to interpret and give effect to the order and could not change the order. The order of Judge Mia only allows the respondents to claim costs relating to the matter being struck from the urgent court roll.
- (c) the order taken before AJ Kuny, (as he then was), on 17 May 2021, was pended to the outcome of the action under case number 38002/2020. The costs of taking the order on 17 May 2021 was granted in the cause of the action. The relief granted in terms of part A of the order dated 17 May 2021 meant that the matter would proceed by way of action and accordingly the merits would remain alive.

FIRST AND SECOND RESPONDENT'S ARGUMENT

[22] The 1st and 2nd respondents contend that by virtue of the order taken on 27 October 2020 as well as the supplementary affidavit of the applicants, they are entitled to tax the bill on the entire application. The basis for this contention is that the merits on part A and B of the application became moot, namely part B on 14 October 2020, as a result of the applicant's supplementary affidavit and part A as result of the undertakings given on 11 December 2020 and accepted on 15 December 2020 and made an order of Court on 17 May 2021. As a result, any further argument on the merits in this application became moot.

[23] The 1st and 2nd respondents' representative relied on the case of *Naskar Spares and Accessories Silverton and Accessories Silverton vs Naskar Spares and Accessories*¹ where the Court quoted the dictum from the case of *Van Niekerk v President of South African Deep Sea Angling Association*² where on review of the Taxing Master's taxation, the Court held that where the merits become moot, taxation takes place of the costs of the entire matter, including answering affidavits. The Court in *Van Niekerk*³ stated:

¹ *Naskar Spares and Accessories Silverton and Accessories Silverton vs Naskar Spares and Accessories* (unreported case number 30866/2017 Pretoria High Court) para 8

² *Van Niekerk v President of South African Deep Sea Angling Association* (case no 32001A/2013 Pretoria High Court para 11

‘Although the matter was struck from the roll and therefore the merits have not been dismissed, the Applicant compelled the Respondents to file answering affidavits and should therefore, in my view, be held liable for all the Respondent’s costs which costs include the wasted costs of 19 June 2013 and the costs for preparing the answering affidavit.’⁴

THE TAXING MASTER’S STATED CASE

[24] The Taxing Master placed reliance on the respondent’s argument and case law, being the cases of *Van Niekerk*⁵ and *Naskar Spares*⁶ and ruled that all reasonable costs are to be allowed, not only the costs of the matter being struck from the roll.

LEGAL PRINCIPLES

[25] Rule 48(1) of the Uniform Rule states:

‘Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within 15 days after the allocator by notice require the taxing master to state a case for the decision of the judge.’

[26] Rule 70 of the Uniform Rules of Court deals with the taxation of attorney’s costs in civil matters. The taxation of such costs is based upon fairness and practicality to effect a just balance between victory and defeat. Rule 70(5) of the Uniform Rules of Court vests the Taxing Master with a discretion to ‘at any time depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.’

[27] The Taxing Master has a discretion to allow, reduce or reject items in a bill of costs and this discretion must be exercised judicially in the sense that the Taxing Master must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case.⁷

[28] A reviewing Court is reluctant to interfere with the decisions and discretion of the Taxing Master. The scope of review under Rule 48 of the Uniform Rule of Court dictates that a Court has to be satisfied that the Taxing Master was clearly wrong before interfering with the decision.⁸ The reviewing Court would have to be satisfied that the Taxing Master failed to

³ *Van Niekerk* (note 2 above)

⁴ *Van Niekerk* (note 2 above) para 11

⁵ *Van Niekerk* (note 2 above)

⁶ *Naskar Spares* (note 1 above)

⁷ *City of Cape Town v Arun Property Development (Pty) Ltd* 2009 (5) SA 227 (C) at 232F-G and *Trollip v Taxing Mistress*, *High Court* 2018 (6) SA 292 (EDG) at 298 D-I.

⁸ *Ocean Commodities Inc and Others v Standard Bank of SA Ltd And Others* 1984 (3)

exercise his or her decision judicially and that it was improper.⁹

[29] In the matter of *Bindco (Pty) Ltd v AC Ce Brindpro*¹⁰ an urgent application was removed from the roll and the applicant had to pay the respondent's costs. On review the court held that:

- 1) The fact that the urgent application was removed from the roll and not dismissed indicates that the merits have not been adjudicated.
- 2) The application is still alive and can still be set down on the roll at any time for hearing.
- 3) The costs order can only apply to wasted costs incurred due to setting the matter down on the urgent roll; and
- 4) As the matter had not been finalized the merits should still be adjudicated. Should the applicant fail to set the matter down, the respondents have remedies to finalize the matter. Only after a final set down the party who obtains the relevant cost order may tax all the costs with regard to the merits.

EVALUATION

[30] The question before me is whether the Taxing Master applied his mind, bearing in mind the discretion he had in terms of Rule 70 of the Uniform Rule of Court, and whether he was correct to allow all the costs of the urgent application, knowing that the merits were not adjudicated upon.

[31] The Taxing Master placed too much reliance on the case of *Van Niekerk*¹¹ to substantiate his findings and stated that the case concurs with *Nasker Spares*¹², which is not the case at all. In fact, the Court in *Nasker Spares* distinguished the facts from those in the matter of *Van Niekerk* and held that the Taxing Master's reliance on the dictum in *Van Niekerk* to conclude that the matter is moot, was incorrect.

[32] It is clear that the Taxing Master deviated from Judge Mia's order by allowing all the costs as being wasted and disregarded Rule 41 of the Uniform Rule of Court. In fact, the Taxing Master interpreted the Court order to be that the application at hand was dismissed with costs which is not the case. Accordingly, the Taxing Master failed to give effect to the order of Judge

SA 15 (A)).

⁹ *Visser v Gubb* 1981 (3) SA 753 (C) 754H-755C

¹⁰ *Bindco (Pty) Ltd v AC Ce Brindpro* TPD case number 19055/2000

¹¹ *Van Niekerk* (note 2 above)

¹² *Nasker Spares* (note 1 above)

Mia. A Taxing Master cannot determine liability in any matter whatsoever, as it does not form part of the Taxing Master's duty.¹³

[33] In the applicants' supplementary affidavit, there was no provision made for costs even though part B of the application became moot. The relief sought by the applicants in part B of the application became moot merely because there was compliance by the 1st respondent.

[34] The legislature makes provision in Rule 41 of the Uniform Rules of Court for an aggrieved party who is in receipt of a notice of withdrawal, similar to that of the supplementary affidavit *in casu*, and where there is no tender for those costs, to apply in terms of Uniform Rule 41(1)(c) for the court to award those costs.

[35] From the contents of the Court order dated 17 May 2021, it is clear that the intention of the plaintiff and the 2nd respondent was that the costs would be dealt with in the action. The Taxing Master could not vary this order by accepting the merits were moot. It is clear that the action under case number 38002/2020 is very much alive.

[36] The fact that the Taxing Master heard evidence on the mootness is incorrect as the Taxing Master is not a Judge and cannot determine liability of a matter in any circumstances. Accordingly, the Taxing Master erred in doing so. Had the 1st or 2nd respondents felt that the matter was moot they could have placed the matter before a Judge in terms of Uniform Rule 41 for consideration.

[37] The approach in the matter of *Bindco*¹⁴ in my view is the more correct approach, particularly in view of the fact that a summons was issued to finalise the merits and the order dated 17 May 2021 expressly stated that 'the second respondent consents to an order pending the outcome of the action under case number 38002/2020.'

[38] The Taxing Master disregarded his function in terms of Rule 70 of the Uniform Rules of Court. He did not have the power to vary the cost orders or to decide that the matter *in casu* is moot.

[39] The applicants are only liable for the cost of the urgency hearing on 27 October 2020

¹³ *Composting Engineering (Pty) Ltd v The Taxing Master* 1985 (3) SA 249 (C) at 250 I-J, *Berman & Flalkov v Lumb* 2003 (2) SA 674 (C) at 681-682 and *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* 1939 WLD 159 at 165).

¹⁴ *Bindco* (note 10 above)

and no other costs in relation to the application.

[40] There is accordingly cause for me to interfere with the Taxing Master's decision in that he was actuated by an improper motive and adopted some unsound principle and failed to apply his mind by incorrectly taxing all the costs.

COSTS

[41] I have exercised the discretion in terms of Uniform Rule 48(7) and I am of the view that it would be reasonable to find that the applicants be entitled to the reasonable costs to draft their stated case on a party and party scale.

ORDER

[42] In the result, I make the following order;

1. The Taxing Master's allocatur is set aside and the matter is referred back to the Taxing Master for taxation afresh in light of this judgment and in the light of such information and arguments as the parties may present on that occasion.
2. The applicants are to be awarded costs to draft their stated case on the party and party scale.



D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time to be 10h00 on 11 April 2022