REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1101/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

In the matter between:

LESIBA EZEKIEL MATSAUNG **APPLICANT**

AND

MERRIAM NGOAKO MATHEDIMOSA

AND 30 OTHERS **RESPONDENTS**

REVIEW JUDGMENT – TAXATION

KGANYAGO J

[1] The 2nd, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 18th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, and 29th respondents (respondents) are dissatisfied with the rulings of the Taxing Master relating to the

items taxed off on their bill of costs. The respondents are seeking a review of the Taxing Master's rulings on items 3, 4 and 6. The respondents have made their submissions to the Taxing Master's rulings in terms of Rule 48(1) of the Uniform Rules of Court ("the Rules"). The Taxing Master has made her stated case in terms of Rule 48(5)(a) and the applicant has also made his submissions in terms of Rule 48. Thereafter the Taxing Master replied in terms of Rule 48 (5) (b).

[2] The respondents' bill of costs was as result of the wasted costs awarded to them on party and party scale on 12th February 2020. The bill was presented before the Taxing Master for taxation on 16th September 2020. The applicant opposed the respondents' bill.

[3] On item 3, the respondents have stated that a day fee charged for preparation was as per court order, and that to their understanding the Judge allowed a day fee for preparation because of the Judge's knowledge of the voluminous papers involved which was 325 pages for intervening application, and 530 pages for contempt application. That Mr Bosman appearing as counsel for the respondents, has charged a day fee for preparation in the amount of R26 000.00. It is the respondents' contention that if Mr Bosman was to claim for the actual

time spent for perusal and preparation, he will be entitled to claim for 42 hours for preparation which would be in excess of a day fee. The respondents submit that the Taxing Master erred in disallowing a day fee for preparation and only allowing for 5 hours' preparation at R2 500.00 per hour, and that resulted in her taxing off R13 500.00.

[4] On item 4, the respondents have stated that it relates to a day fee claimed for preparation by the attorney. The respondents have submitted that the Taxing Master has erred and acted on a wrong principle in disallowing the 8 hours' preparation for Ms A Pretorius (attorney), which was claimed in terms of Rule 70 and strictly according to the tariff. That the opposed contempt application together with the intervening application consisted of 855 pages and that as per their understanding of the court order, the respondents fixed their preparation fee to 8 hours/day fee and not according to the actual time spent preparing.

[5] On item 6, the respondents have stated that it relates to attorneys fee for time spent in court and charged in terms of Rule 70 and according to the tariff. It is the respondents' contention that the Taxing Master has refused to consider their case law on that issue when they referred the Taxing Master to the case of *Maseka v Law Society of*

Northern Provinces (443/06) [2010] ZANWHC 13 (1 January 2010) where it was held that an attorney who was appointed as counsel and who is from the same firm, was not an inflation of fees and that the fact that they are from the same firm does not change anything. The respondents submitted that the appearing attorney appeared in court as counsel and is therefore entitled under Rule 69 to be remunerated at the same rate as counsel, and that he was entitled, like counsel, to also have an attorney present in court to assist and instruct him during the proceedings, even if the attorney is from the same firm.

[6] According to the respondents, Mr Bosman and Ms Pretorius from Bosman Attorneys are representing 21 of the 31 respondents, but according to the Taxing Master, Mr Bosman in terms of Rule 70 is not allowed to have an attorney present in court to assist him during the proceedings, whereas the applicant has appointed more one counsel to represent him. The respondents submit that the Taxing Master is clearly acting on a wrong principle and clearly has not applied her mind when she refused to listen to any case law presented in support of any argument.

[7] The Taxing Master in her stated case on item 3 has submitted that there is a common rule that preparation form part of day fee, especially

on applications/motions as facts are argued on papers. That the court order that awarded the respondents wasted costs, has allowed for preparation aside of the day fee of the attorneys. The Taxing Master submit that according to the respondents' understanding, the court order was allowing preparation on day fee, which was not correct as he had to check how many documents were perused in order to get the hours spend on preparation. The Taxing Master further submitted that she was surprised by the respondents in that in the review application they have stated the number of papers perused, but during taxation Ms Pretorius was not able to tell how many documents were perused and for how long, as Ms Pretorius argument was that the attorney must have a day fee for preparation. That resulted in the Taxing Master's discretion of allocating 5 hours at R2 500.00 per hour as reasonable looking at the papers filed in the court file.

[8] On item 4 the Taxing Master has stated that she disallowed the whole amount in *toto,* the reason being that according to the court order it did not allow costs for two attorneys or counsel to appear, and still the understanding was that the court order did allow a day fee for preparation and was on party and party scale.

[9] On item 5, the Taxing Master stated that she ruled that R2 500.00 per hour was reasonable. The Taxing Master submitted that in terms

of Rule 69 (1), save where the court authorizes fees consequent upon the employment of more than one advocate to be included in a party and party bill of costs, only such fees as are consequent upon the employment of one advocate shall be allowed as between party and party. That it follows that the Taxing Master has no discretion to allow fees of more than one counsel in conflict with the provisions of the Rule.

[10] On item 6 the Taxing Master has stated that as she had already ruled on item 4 that the court order did not allow for two sets of attorneys/counsel to appear, so too she did not allow the day fee of Ms Pretorius. The Taxing Master submitted that Rule 69 allows for attorneys with right of appearance to charge as counsel, but that it does not say an attorney changes to be an advocate, and that there is still a difference as the client consult with the attorney directly and counsel will need the attorney to be present.

[11] The applicant's in his submission on item 3 agrees with the Taxing Master's stated case. The applicant further confirms that during taxation, the respondents have failed to provide any information as to the amount of pages that Mr Bosman prepared on, and that the Taxing Master assessed the hours based on the papers in the court file. On item 4 the applicant has submitted that the costs of preparation and

attendance at court of Ms Pretorius is a duplication of costs. On item 5 the applicant has stated that Mr Bosman as an attorney with right of appearance, steps into the shoes of counsel and must then be treated as counsel. That counsel in the same position will not be entitled to recover more than a day fee and more hours on top of the 10 hours allowed for a day fee. On item 6 the applicant has submitted that the attendance of Ms Pretorius is a duplication of costs, and that Mr Bosman did not need Ms Pretorius to instruct him. That both Mr Bosman and Ms Pretorius have got right of appearance in the High Court and that there was no need for both of them to attend to the matter, and that the purpose of an attorney's appearance at court with counsel is to provide counsel with instructions as counsel does not have direct contact with the client.

[12] The proceedings set down for the 12th February 2020 could not proceed at the instance of the applicant and that resulted in a wasted costs order been awarded against him. The said court order read as follows:

"1. The rule nisi is extended to 24 June 2020.

2. The intervention application issued out of this Honourable Court under case number 1101/2019 is set down for hearing on 8 June 2020.

3. Applicant is ordered to pay the wasted costs occasioned by the extension of the rule nisi costs on party and party scale, for a day fee preparation.

4. In the event the intervention application is successful, the applicant in the contempt application is ordered to do a further index and paginated of the contempt application file, on or before 12 June 2020."

[13] It is clear that the postponement of the 12th February 2020 was occasioned by the applicant. The general rule with regard to postponement is that a party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay wasted costs. (See *Subline Technologies v Jonker*[1])**.** Wasted costs are costs occasioned by postponement or costs previously incurred in preparing for trial and also appearing in court, but has been rendered useless by reason of postponement. The costs awarded against the applicant was on party and party scale. Party and party costs are costs awarded against a losing party in a litigation and are taxed in terms of Rule 70 with a view to full indemnity to the successful party, but limited to costs necessary or proper for the conduct of the litigation. (See *Ben McDonald Inc v Rudolf ans Another*[2]*)*. When awarding a wasted cost against the party who caused the matter not to proceed, the purpose for that is to indemnify the innocent party to extent that he/she not out

[1] 2010 (2) SA 522 (SCA)
[2] 1997 (4) SA 252 (T)

of pocket as result of the postponement occasioned by the other party. The Taxing Master in taxing a wasted cost bill on party and party scale has to be satisfied that indeed the costs claimed will not leave the innocent party out of pocket to the extent of costs necessary or proper for the conduct of litigation.

[14] It is trite that when a court reviews a taxation, it must be satisfied that the Taxing Master was clearly wrong before it will interfere with the rulings made by him/her. The court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only where it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his/her rulings. (See *President of RSA v Gauteng Lions Rugby Union*[3]*).*

[15] Item 3 of the respondents' bill relates to preparation which the respondents have claimed a full day fee of R26 000.00 without specifying the time spend in preparing for trial. According to the respondents they claimed the day's fee as per the court order, that had they claimed the actual hours spent, it would have amounted to 42

[3] 2002 (2) SA 64 (CC) at 73D-C

hours for preparation. According to the Taxing Master's interpretation of the court order, it allowed preparation separately from the day's fee, and that as the attorney for the respondent was unable to tell how many documents she had perused and time spend in preparing for trial, she used her discretion and allowed 5 hours' preparation at R2 500.00 per hour as reasonable. The Taxing Master submitted that in taking that discretion, she was looking at the papers filed in the court file. That resulted in the Taxing Master taxing off R13 500.00 on item 3.

[16] The wording of the court order state that the "costs on party and party scale, for a day fee preparation." The court order does not state that the respondents are awarded wasted costs which will include preparation costs. The manner in which this order has been drafted is open to many interpretations. On the face of this order, its literal meaning is that the respondents wasted costs is limited to preparation costs for a day fee without any appearance fee. However, the general rule of interpreting court orders is to determine the purpose for the order, and the court's intention will be ascertained primarily from the language of that order. The order must also be read as a whole in order to ascertain the intention of the court in making that order.

[17] In this case, the postponement was caused by the applicant, and the intention of the court was to indemnify the respondents not be out of pocket for the work done by their attorney which was in the form of wasted costs for that day. Normally wasted costs for the day will be appearance fee, but before appearance there is work normally done by the legal practitioner in the form preparation. For the legal practitioner to also be entitled to that fee, there must makes an order for that. Reading the court order of the 12th February 2020 as a whole and its purpose, the intention of the court was to award wasted costs which included preparation costs for that day, but for poor draftsmanship of the draft order, it ended up open to more than one interpretation.

[18] The respondents in drafting its bill of costs was therefore supposed to have specified the actual hours spend in preparing for that wasted day, in order to enable the Taxing Master to assess whether the said costs for preparation were necessary or proper for the attainment of justice or for defending the rights of the respondents. It is the Taxing Master's duty to determine whether the services for the fees charged as it appears on the bill of costs have actually been rendered. In order to discharge that duty, the Taxing Master is also entitled to demand proof that the services were actually rendered. In my view, the Taxing

Master's approach in taxing off item 3 in the manner in which she did cannot be faulted.

[19] On item 4 the respondents ground of review is that the Taxing Master has applied a wrong principle in disallowing 8 hours' preparation for Ms Pretorius. The Taxing Master has submitted that she disallowed the whole fee for Ms Pretorius as the court order did not allow fee for two attorneys or counsel.

[20] Mr Bosman and Ms Pretorius are from the same law firm. According to the respondents' bill, both attorneys have charged a globular preparation fee for the 11th February 2020 which they both refer it as a day fee. They are both representing the same respondents, and Ms Pretorius status was that of an instructing attorney to Mr Bosman who was the attorney presenting the matter on behalf of the respondents. It is normal for more than one advocate to appear for the same party in court. However, it is not given that both advocates will be awarded costs in their favour. For all of them to be able to recover the costs from the unsuccessful party, the court must specifically make that order. Without that order, the Taxing Master will be entitled to allow the costs of one counsel. This approach will also apply in a situation where more than one attorney appeared for a party in court. Therefore,

on this issue, the Taxing Master cannot be faulted on her approach in disallowing the fee of Ms Pretorius.

[21] Item 6 relates to the appearance fee of Ms Pretorius which the Taxing Master has taxed off in whole as the court order did not allow fees for two set of attorneys/counsel. The respondents have submitted that Mr Bosman and Ms Pretorius are representing 21 of the 31 respondents, but that according to the Taxing Master, Mr Bosman is not allowed in terms of Rule 70 to have an attorney present in court to assist him during proceedings, whilst at the same time the applicant has appointed more than one counsel to represent him. It is the respondents' contention that Mr Bosman appeared in court as counsel and that he is entitled to be remunerated as counsel, whilst Ms Pretorius appeared as an attorney who assist and instruct Mr Bosman during the proceedings. Both Mr Bosman and Ms Pretorius have got right of appearance in the High Court.

[22] The right of appearance of attorneys in the High Court was introduced by the *Right of Appearance In Courts Act*[4]*,* and is now been regulated by section 25 of the *Legal Practice Act*[5] *(LPA*). The LPA

[4] 62 of 1995
[5] 28 of 2014

makes provisions for three types of legal practitioners, namely, attorney, advocate and an advocate with a fidelity fund certificate. In terms of *Regulation 33 of Rules and Regulations in Terms of The Legal Practice Act 28 of 2014 (Regulations*), an advocate with a fidelity fund certificate may render all those legal services which advocates were entitled to render before the commencement of the LPA, and may perform such functions ancillary to his or her instructions as are necessary to enable him or her properly to represent a client. An advocate with a fidelity fund certificate is in the same position as an attorney as he/she is allowed to keep a trust account and take instructions directly from clients. An advocate without a fidelity fund certificate is not permitted to keep a trust account or to take instructions directly from clients, he/she must be briefed by an attorney.

[23] According to the respondents' submissions, the status of Ms Pretorius during court proceedings was that of an instructing attorney, whilst that of Mr Bosman was that of an advocate. Both Mr Bosman and Ms Pretorius have enrolled with the Legal Practice Council (LPC) as attorneys and have direct access to their clients. They are able to take instructions directly from their clients and they don't need a go-between. The same will apply to apply to an advocate with a fidelity fund certificate. For both attorney and advocate with fidelity fund

certificate does not need anyone to instruct them regarding the matter as they are able to take instructions directly from their client. There is nothing preventing more one attorney assisting each other in representing one client. However, it is not given that both attorneys will be able to recover costs on party and party scale from the losing party. They will have to make application before court why the costs of more one attorney was justified in that matter, and the court must specifically make that order.

[24] The court order of the 12th February 2020 did not make provision for a fee of more than one legal practitioner. The Taxing Master has no discretion to allow a fee of more than one legal practitioner without an order of court. The Taxing Master in this matter can therefore not be faulted in the approach that she followed in disallowing the appearance fee of Ms Pretorius. I am therefore satisfied that the Taxing Masters rulings in this matter were not wrong, and I don't find any reason to interfere with them.

[25] In the result I make the following order

25.1 The respondents review application is dismissed.

25.2 No order as to the costs.

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MF KGANYAGO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

FOR THE PARTIES

1. For the Applicant : Malose Matsaung Attorneys
2. For the 2nd, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 18th-22nd Respondents: Bosman Attorneys
3. Delivered electronically on : 30th August 2021