BUSY FIVE ENTERPRISES PTY LTD v MINCHIN ampamp KELLY BOTSWANA IN RE NMC BOTSWANA PTY LTD v BUSY

Citation: 2010 3 BLR 309 HC

Court: High Court, Lobatse

Case No: Civ App 475 of 2007

Judge: Newman J

Judgement Date: July 13, 2010

Counsel: B Vandecasteele for the applicant.rnDr H Lever SC with him J M Griffiths for the respondent.

Flynote

Costs - Bill of costs - Taxation of - Review - Scope of review - Confined to review of ruling on 'any item or part of any item which was objected to' - Rule not permitting all-encompassing review - Rules of the High Court (Cap 04:02) (Sub Leg), Order 58 rule 1.

Costs - Bills of costs - Taxation of - Taxing master - Powers of - Taxing master to determine amount of liability, on assumption that liability exists - Not empowered to determine liability - Rules of the High Court (Cap 04:02) (Sub Leg), Order 58 rule 1.

Headnote

The applicant was an erstwhile client of the respondent attorney. At the applicant's request, the respondent produced a bill of costs which was presented for taxation by the taxing master. At the taxation hearing, the applicant objected to certain charges contained in the bill, namely, those which it alleged had been incurred through the respondent's own negligence and those relating to engaging the services of a senior advocate without his (the applicant's) knowledge or approval, and which had been unnecessary. After hearing argument on the issue, the taxing master ruled that negligence on the part of the respondent had not been established and that engaging the services of counsel had not been shown to have been unnecessary. Dissatisfied with those rulings, the applicant called upon the taxing master to state a case for the decision of a judge, as contemplated in Order 58 rule 1 of the Rules of the High Court (Cap 04:02) (Sub Leg). On review, the applicant sought an order that it was not liable for the disputed costs, for the same reasons advanced to the taxing master, and an order reviewing and setting aside the taxation. It was argued for the applicant that, at the taxation hearing, the applicant had objected to the

entire taxation process and to the respondent's entitlement to any costs, which was not something that the taxing master had been competent to adjudicate upon.

Held:
(1) The contested issue of the applicant's liability to pay the respondent's bill was beyond the permissible functions of the taxing master, as expressed in Order 58 rule 1 of the Rules of the High Court. Berman & Fialkov v Lumb 2003 (2) SA 674 (C) at pp 681-682 applied.

(2) Order 58 rule 1 of the Rules of the High Court did not envisage an all-embracing objection. It was applicable only where there was objection to a specific item or items of the taxation and those items had been objected to at the taxation hearing. Permanent Secretary, Ministry of Health and Another v Acquah-Dadzie and Another [2003] 1 B.L.R. 270 at p 277 applied.

(3) In the
circumstances, the bill of costs had to stand save that the taxation master's
ruling on liability had to be set aside.

Case Information

Cases
referred to:

Berman
& Fialkov v Lumb 2003 (2) SA 674 (C)

Permanent
Secretary, Ministry of Health and Another v Acquah-Dadzie and Another
[2003] 1 B.L.R. 270

Sikhakhane
& Co v Phoi [1997] B.L.R. 863

A REVIEW of
taxation. The facts are sufficiently stated in the judgment.

B
Vandecasteele for the applicant.

Dr H
Lever SC (with him J M Griffiths) for the respondent.

Judgement

NEWMAN J:

The
respondent is the erstwhile attorney of record for the applicant in proceedings
instituted against it by NMC Botswana (Pty) Ltd. By letter dated 12 June 2008,
the applicant terminated the services of the respondent, and called upon the
respondent to tax its bill of costs. The taxation took place before the taxing
master on 28 May 2009.

At the
commencement of the taxation hearing, the applicant's legal representative
raised the point that the respondent was not entitled to the costs being
claimed, as they had been incurred through its own negligence. It was further
contended that the respondent has briefed an advocate on its own initiative,
and without obtaining the applicant's prior approval. After hearing argument on
the issue, the taxing master ruled that negligence on the part of the respondent had not
been established, and the engagement of Advocate Lever SC had not been shown to
have been unnecessary. It is apparent that, in reaching her decision, the
taxing master was guided by the provisions of Order 74 rule 3 of the Rules of
the High Court (Cap 04:02) (Sub Leg) ['the Rules']. In the event, the sum taxed
was P54 447.78, inclusive of VAT.

On 16 June 2009,
the applicant issued a notice in terms of Order 58 rule 1, calling upon the
taxing master to state a case for decision by a judge of this court. That rule
provides as follows:

'58(1). Any party dissatisfied with the ruling of the
taxing master as to any item or part of an item which was objected to may
within 14 court

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days of the allocatur require the taxing master to
state a case for the decision of a judge, which case shall
set out each item or part of an item together with the grounds of objection
advanced at the taxation, and shall embody any relevant findings of fact by the
taxing master...'

In its
notice, the applicant expressed its dissatisfaction with the taxing master's ruling to
proceed with taxation of the bill in the face of its objection. The objection
raised by the applicant had been that the claimed costs had resulted from
additional legal services and expenses caused by the respondent's negligence,
in failing to file an opposing affidavit timeously, and in engaging the
services of an advocate without the applicant's knowledge or consent.

In November
2009, a stated case was furnished to the parties, together with a record of the
taxation proceedings and ruling of the taxing master. Pursuant thereto, written
contentions were submitted by each party, in terms of Order 58 rule 2(1). In
its written contentions, the applicant submitted that the taxing master had not
had all the relevant facts and circumstances before her, in order to properly
determine whether the applicant was liable to pay the respondent's fees and
disbursements, and that, in any event, the determination of such issue was the
function of the court, and not the taxing master. The applicant then called
upon this court to hold, for the reasons previously contended, that it was not
liable to pay the respondent's costs, and that the taxation should accordingly
be set aside, with costs. In addition, an order was sought that the respondent be required to
refund to the applicant two amounts, of P31 982.91 and P24 722.

At the
hearing before me on 28 June 2010, Mrs Vandecasteele submitted, on the
authority of Sikhakhane & Co v Phoi [1997] B.L.R. 863, that it had
been incumbent on the respondent to proceed by way of action for recovery of its
fees and that, only in the event of a costs order being thereby granted, would it have been competent
for the respondent to tax its bill. The applicant's attorney did, however,
withdraw the claims of her client for a refund of the two amounts referred to
above.

In its
written contentions, dated 23 November 2009 and 9 June 2010, the respondent
endeavoured to explain the factual basis for its entitlement to fees and
disbursements, for the services rendered on behalf of the applicant. In other words, it
tried to show that it had not been negligent in its handling of the applicant's
case, and that the engagement of counsel had been proper and appropriate. At
the hearing before me, Advocate Lever, who appeared for the respondent,
countered the submissions of Mrs Vandecasteele, by pointing out that she had
been the one who had initially called for the respondent's fee note to be taxed
and that her claim to have objected to each and every item of the bill at the
taxation hearing had not been correct. Instead, she had objected to the
taxation process and to the respondent's legal entitlement to any costs, which
was not something that the taxing master had been competent to adjudicate upon.
It was further contended by Advocate Lever that, as a fee note is not
liquidated until taxed, the correct procedure would be for an attorney,
firstly, to tax his bill, and to then sue for its recovery, in the event of
non-payment. Accordingly, it was

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submitted
that the review was misconceived, and should be dismissed with costs.

I am in
agreement with the view expressed by each counsel, in oral argument, that the
contested issue of the applicant's liability to pay the respondent's bill was
beyond the permissible functions of the taxing master, as expressed in Order 58
rule 1. Having so stated, it is evident that both parties have performed an
'about-turn', as both had advanced reasons to the taxing master, at the hearing, as to

why she should make a determination on the question of liability.

In Berman
& Fialkov v Lumb 2003 (2) SA 674 (C), the parties argued before the
taxing master the legality of an agreement regarding fees payable by the
plaintiff to its attorneys, in connection with certain litigation, and the
master made a ruling in regard thereto. In a subsequent action, it was held
that the decision
on the validity of the agreement fell outside the ambit of the taxing master's
powers, such issue being for the court's determination. In that case, Van
Reenen J observed at pp 681-682 that:

'Although the taxation of a bill of costs is an integral
part of the proceedings before a Court and the Taxing
Master performs a judicial and not an administrative function ... his/her
powers ... and functions are not unlimited. The general functions of the Taxing
Master were described as follows by Ramsbottom J in Martens v Rand Share and
Broking Finance Corporation (Pty) Ltd 1939 WLD 159 at 163:

"(T)o decide whether the services have been performed,
whether the charges are reasonable or according to tariff and whether
disbursements properly allowable as between party and party have been made; his
function is to determine the amount of the liability, assuming that liability
exists, and the fact that he requires to be satisfied that liability exists
before he will tax does not show that there is any liability. The question of
liability is one for the Court, not for the Taxing Master."

It is because a Taxing Master's functions are circumscribed
that Courts have held that, for instance, ... the question whether an attorney
acted without a mandate or exceeded it falls outside the ambit of a Taxing
Master's functions (see Botha v Themistocleous 1966 (1) SA 107 (T) at
111E-F)...'

The stance
taken by the applicant's attorney, at the taxation hearing, was described by the
taxing master in the body of the stated case, as follows:

'Counsel for Busy Five had not specifically singled out
items in the bill which she objected to. She stated that all costs should not
be allowed.'

I am of the
view that an all-embracing objection, of this nature, is not what is envisaged
by Order 58 rule 1. As Lesetedi J explained, in Permanent Secretary,
Ministry of Health and Another v Acquah-Dadzie and Another [2003] 1 B.L.R.
270, at p 277:

'... Order 58 rule 1 is only applicable in the following
situations: Firstly,

where the applicant is dissatisfied with a ruling of the
taxing master as to "any item or
items" of the taxation... Secondly, Order 58 rule 1 can only be adopted
where the item or items complained of were objected to.'

Having
instituted these review proceedings under Order 58 rule 1, Mrs Vandecasteele
sought to extricate herself from this difficulty by contending that this court has the power, under
its inherent jurisdiction, to review the decision of the taxing master. Acquah-Dadzie
case, supra, was cited as authority for this proposition. That court did indeed
hold that a review of the decision of the taxing master could be brought under
Order 61 of the rules, provided that the taxing master's conduct does not
otherwise fall within the purview of Order 58 rule 1. In the present case,
however, the applicant has not

brought the review application in terms of Order 61, but under the provisions of Order 58.

Mrs Vandecasteele was also not correct in her assertion that, by submitting its bill for taxation, without a court order, the respondent had attempted to 'ambush' the applicant, by depriving it of its right to challenge the respondent on the issue of liability. With respect to the applicant's attorney, Sikhakhane's case, supra, is not authority for such proposition. In that case, Nganunu CJ, at pp 865-866, explained in some detail the distinction between the taxation of a bill of costs between litigating parties, and one drawn by an attorney against his own client:

'In a case where one party claims costs against the other litigating party, the bill of costs, unless there is agreement between the parties, would be taxed by the Registrar following an order from the court granting the costs of suit. The taxation by the Master would, in that event, be merely a process of ascertaining the actual quantum of the bill of costs, which a court of law has already decreed as a liability of one of the parties to the suit. Such a taxed bill would be enforceable by execution because it follows upon a judgment of a court. In regard to the attorney and own client bill of costs, the situation is different, for clearly, as happened in this case, there is an underlying expectation that the client will pay his attorney without the necessity of going to court. The usual practice with attorneys is that if the client objects to the quantum of the bill rendered by his own attorney he may tax it with the Registrar. Again there may be an underlying agreement or expectation that once the bill is taxed the client will pay. This of course does not remove the client's right to challenge the Registrar's determination of the costs by way of review... The Registrar's taxation is a process intended to remove the objections on both sides and come out with an acceptable result, only subject to the further process of review if any party is still not satisfied.... There was no authority quoted to me which shows that once the bill of costs between an attorney and his client has been taxed, it stands in the same status as the bill of costs taxed between party and party after the award of costs by a court. In the present case there has been no award of costs against the client in favour of his previous attorneys. It is my view that one cannot execute on the taxed bill of costs in these circumstances ... I believe that an order of court granting such

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costs to the attorney would be necessary before execution can be sued out.' (My emphasis)

Berman's case, supra, is also on point. In that matter, at p 681, van Reenen J observed that:

'My understanding of the legal position expounded in Benson and Another v Walters and Others 1984 (1) SA 73 (A) at 84 A-B, is that taxation is not a prerequisite for the institution of an action based on a bill of costs but if the fact that it has not been taxed is raised in the plea, the action cannot proceed and has to be stayed until taxation has been completed ...'

I have taken the opportunity to peruse the original of the bill taxed on 28 May 2009, and it is evident that the taxing master considered, and ruled on, each and every item claimed by the respondent. In the course of doing so, she struck out approximately 20 items and reduced more than 40 others. In all the circumstances, I am satisfied that, save in one specific regard, she performed her duties as taxing master diligently and without fault. The proviso pertains to the ruling delivered by her on the issue of liability. As I have stated, she was wrong to have involved herself in that issue, just as the parties' attorneys were wrong in calling for a ruling from her.

In the
premises, I am of the view that the bill of costs must stand, as taxed on 28 May 2009, but that the ruling of the taxation master in regard to the issue of liability, should be set aside.

In the
event, the application has succeeded in part only. In all the circumstances, the appropriate order would be for each party to bear its own costs of this review.

Accordingly,
the order of this court is as follows:

1. The
ruling of the taxing master, delivered on 28 May 2009, in regard to the issue of the applicant's liability for payment of the respondent's fees and disbursements, in terms of its bill of costs, is set aside.

2. The
bill of costs taxed by the taxing master on 28 May 2010 is hereby confirmed.

3. Each
party shall bear its own costs of this review.

Taxing
Master's Ruling on liability set
aside. Bill of costs confirmed.