



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

(Western Cape Division, Cape Town)

Before the Honourable Ms Justice Mantame

[REPORTABLE]

**Case No: 12847/2020 &
11484/2022**

In the matter between:

MILNERTON RIDING CLUB N.O.

Applicant

VS

MILNERTON RIDING SCHOOL (PTY) LTD

First Respondent

MICHELE VILJOEN

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

JUDGMENT DELIVERED: 23 NOVEMBER 2022

MANTAME J

Introduction

[1] The applicant brought this review of taxation in terms of Rule 48(5)(a) of the Uniform Rules of Court dated 11 March 2022 consequent to the rulings made by the Taxing Master after the first and second's respondent's bill of costs was taxed. There is no date for the filing of the written submissions by the applicant as they do not bear a court stamp. There is only an allegation on the email dated 11 March 2022 from the applicant's attorneys to the first and second respondents' attorneys that same would

be filed in court on 14 March 2022.

[2] The applicant seeks an order reviewing Items 1 – 52 and Items 17, 18, 19, 20, 25, 26, 44, 47, 48, 49, 50, 51, 56, 58, 63 & 66 of the taxed bill of costs. The Taxing Master duly supplied his stated case as required in terms of Uniform Rules of Court 48 (3) dated 15 February 2022 and filed on 17 February 2022.

[3] This review of taxation was not opposed by the respondents.

No application for condonation

[4] Both the applicants' application for review of taxation and the Taxing Master's stated case were filed out of time and none of these parties have filed an application for condonation as their papers were filed out of stipulated time frames by the rules of court. Nevertheless, upon considering the correspondence that was exchanged between the parties, it appears that the applicant was aware that it was out of time in filing this review application and requested the attorneys of the first and the second respondent to consent to the extension of time and which such request was declined on the basis that it was not the correct person/party to consent to such request. Be that as it may, the applicant did not seek an indulgence to this court nor explain for the delay in filing this application. On a cursory look on their correspondence, the applicant put blame squarely on the "unpredictably load-shedding", nothing more and nothing less.

[5] In the interest of time, justice and fairness, despite the fact that no indulgence was requested for the applicant's failure to file these written submissions within 15 days after the Taxing Master's stated case, this Court will proceed to deal with the merits.

Issues for determination

[6] The issues for determination are whether the Taxing Master should have considered the costs holistically including the costs related to the merits, more so that, the first and second respondents' attorney are not entitled to claim costs in circumstances where the said attorneys were not on record on the concerning days; or whether to only allow for items related to urgency, given the fact that the application was struck from the roll for lack of urgency and the merits remained undecided.

Discussion

[7] It is therefore common cause that the taxed bill of costs emanates from two (2) cost orders that were granted by Allie J on 17 September 2020 and Dolamo J on 29 September 2020 and the latter striking off the applicants' urgent application from the roll due to lack of urgency.

[8] A review of taxation, is therefore, not strictly a 'review' in the sense of the court interfering only with the exercise of an improper discretion; the powers of the court are wider than the known and recognized grounds to which a power of review is limited at common law.¹ However, a reviewing Court in this instance has to ascertain whether the Taxing Master in his taxation of a bill of costs exercised his discretion judicially in the sense that he acted reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case.²

[9] With regard to Items 1 – 52, the applicant objected on the basis that the first and second respondent attempted to recover costs for attendances predating their having

¹ Protea Life Co Ltd v Mich Quenet Financial Brokers 2001(2) SA 636 (O) at 642 C - D

² City of Cape Town v Arun Property Development (Pty) Ltd 2009(5) SA 227 (C) at 232 F – G; Trollip v Taxing Mistress, High Court 2018 (6) SA 292 (ECG) at 298 D - I

mandated a legal representative to act. The attorneys for the first and second respondent formally, it was stated came on record only on 28 September 2020, and thus cannot recover costs prior thereto and from as early as 12 September 2020 as the first and second respondents were unrepresented at the time.

[10] On considering the record, it is common cause that the notice to oppose dated 12 September 2020 was signed by the second respondent personally and was entered on record on behalf of first and second respondent. Although the first and second respondent attorneys did not come on record on that day, on perusal of the bill of costs, it appears that the attorneys of the first and second respondents were actively involved in the opposition of the matter subsequent thereto. However, in reality, what could be gathered from the record is that the second respondent proceeded to file the opposing affidavits on behalf of the respondents in her name.

[11] On further consideration of the taxed bill of costs, it is pertinently clear that the attorneys for the first and second respondent received the applicant's urgent application on 12 September 2020 based on their attendances pursuant thereto. The attorneys perused the urgent application, consulted with their client and arranged appointments with further witnesses on the day of receipt of the application. The attorneys further drafted a brief to Counsel on 16 September 2020. On 17 September 2020 the first and second respondent's attorneys liaised with the applicant's attorneys, requesting the matter to stand down. Indeed, on 17 September 2020 Allie J postponed the matter for the parties to engage in settlement negotiations. It appears, the parties could not reach settlement. On 23 September 2020 the respondent's Counsel, Advocate Potgieter prepared opposing affidavits.

[12] The first and second respondent's attorneys proceeded to peruse replying affidavit and further drafted instructions to Counsel. It is common cause that the first and second respondent's attorneys and Counsel formally came on record on 28 September 2020.

[13] It is a long standing rule that an unrepresented litigant is not entitled to legal costs. If at all it claims costs, such costs would be confined and /or restricted to necessary costs or disbursements, such as travelling costs to court and so on. Legal costs are only reserved for legal practitioners. Attorneys and advocates who elect to render their services behind the scenes run a risk of being unable to recover their costs. For legal representatives to be entitled to legal costs it follows that they must formally put themselves on record. I agree with the applicant's sentiments that the first and second respondents were not legally represented from 12 September 2020 up until 28 September 2020 and it then follows that they are not entitled to the legal costs as set out in paragraph [2] above, i.e. Items 1 – 52 and Items 17, 18, 19, 20, 25, 26, 44, 47, 48, 49, 50 and 51 of the taxed bill of costs.

[14] Be that as it may, it is my considered view that the first and second respondents are entitled to the costs incurred from Items 53 – 66 as they had put themselves on record during that period.

[15] On closer scrutiny of the bill of costs whose items are sought to be reviewed *inter alia*, is titled the "*Memorandum of fees and disbursements due to: Attorneys for first and second respondents' as between party and party*". If the first and second respondents

do acknowledge that the legal costs they are entitled to are their party and party costs, it then follows that they are not at liberty to claim legal costs in circumstances where they were not party to the proceedings. It is my considered view that the other party deserve to know the party it is litigating with, more especially if the losing party would be required to pay the costs of the winning party.

[16] Although the legal representatives are deemed to know the rules related to the recovery of legal costs from an ethical perspective, at the same time, this Court cautions them not to over-stretch what they are entitled to and /or become over-expectant about what is due to them. Otherwise, an attorney or advocate who is dishonest about his or her attendances and or entitlement would render himself guilty of misconduct.

[17] For the reason stated above, in part the review of taxation succeeds.

17.1 In the result, it is therefore ordered that Items 1 – 52 and Items 17, 18, 19, 20, 25, 26, 44, 47, 48, 49, 50 and 51 of the taxed bill of costs are reviewed and set aside.

17.2 Items 53-66 stand.

17.3 No order as to costs.

MANTAME J

WESTERN CAPE HIGH COURT