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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 24/08/2007

CASE NO: 3915/2007
UNREPORTABLE

In the matter between:

ROAD ACCIDENT FUND — APPLICANT

And

THE TAXING MASTER — 1ST RESPONDENT
MACROBERT INC — 2ND RESPONDENT

JUDGMENT

SERITI, J

1. Introduction

The matter came to court by way of motion.

In the notice of motion the applicant is praying for an order reviewing and setting aside certain taxed bills of costs mentioned in the notice of motion. The said bills of cost were taxed by first respondent on 20 June 2006 and 25 July 2006.

2. Founding Affidavit

It was attested to by Mr Theunis Lodewyk Combrink, a senior legal costs officer employed by the applicant.

He alleges that the second respondent is a law firm which acted on behalf of the applicants in the matters where the bills of costs forms part of the subject under consideration.

Purpose of this application is to seek an order reviewing and setting aside the taxation by the taxing master in the matters referred to in the notice of motion.

The grounds of review in this application are based on the submission that the taxing master did not exercise his discretion properly alternatively did not exercise his discretion at all alternatively that he exercised his discretion on a wrong principle. The bill of costs which were taxed on 20 June 2006 and 25 July 2006 respectively relate to costs orders granted against the Road Accident Fund in motion applications brought by the several applicants to compel the Road Accident Fund to comply with their duties pertaining to certain outstanding payments due to the applicants.

The applications referred to above were heard in the unopposed motion court and consequently the costs were awarded on an unopposed scale.

In terms of rule 70(4) of the Uniform Rules of Court, it was not necessary for the Road Accident Fund to be given notice of taxation, and as a result thereof, the bills of costs were taxed without any opposition and in the absence of the Road Accident Fund.

After receipt of copies of the taxed bills of cost together with the relevant allocaturs he instructed their current attorneys of record to address a letter to the second respondent requesting them to consent to the setting aside of the allocaturs and the taxations because there were few items on the various bills which should not have been allowed by the taxing master.

Their attorneys of record directed a letter dated 14 September 2006, copy of which is attached to the founding affidavit.

The second respondent replied and stated that they are not prepared to consent to the setting aside of the said allocaturs. Thereafter, the current application was prepared as there was no other remedy available to the applicant.

Rule 70 of the Uniform Rules of Court imposes a duty on the taxing master to exercise his discretion judicially and to properly take into consideration all relevant facts and circumstances and allow only costs reasonably incurred, whether or not the bill of costs is opposed.

He referred to the various bills of costs and pointed out items which, in his view the taxing master ought not to have allowed, and alleges that the fact that the taxing master allowed them, that means that the taxing master did not exercise his discretion properly or at all or relied on a wrong principle.

He therefore requests the court to set aside the taxations and refer the bills of costs back to the taxing master for taxation *de novo*.

3. Report by the Taxing Master

The report was attached to the papers.

In the said report, the taxing master stated, *inter alia*:

> "After perusing the applicant's founding affidavit the taxing master does agree, that with the arguments given by the applicant (which were not before the taxing master at the first taxation), the applicant might have a great deal of success if argued before a taxing master.

Therefore the taxing master has no objections if the bills are re-taxed."

4. Answering Affidavit

It was attested to Mr Deirdre Lambrechts, an attorney practising at the second respondent.

As background information, he alleges that the second respondent acted on behalf of certain clients in instituting claims for personal injuries sustained due to the negligent driving of a motor vehicle in terms of the Road Accident Fund Act, 56 of 1996.

The matters were settled, but the applicant delayed is making the necessary payments nor settling the bills of costs.

As a result of the delay of the applicant, the clients were left with no option but to apply for orders compelling the applicant to comply with the settlement agreements. The applications to compel were brought by the second respondent on behalf of their clients.

All the applications to compel the applicant were served on the applicant via the sheriff of this court but there was no response from the applicant. The applicant or their legal representative failed to attend court despite the fact that applicant was informed about the dates of hearing of the various matters.

The orders obtained, were served on the applicant and the applicant chose not to comply with the said court orders.

Later bills of costs were drawn up and placed before the taxing master for taxation.

On 20 June 2006 and 25 July 2006 the various bills of cost were properly taxed by the taxing master. The applicant was not present during the taxation of the said bills of costs.

The applicant later after the sheriff had attached the applicant's property, the applicant paid the full amounts.

It is strange to note that after full unconditional payments were made and after a lapse of six months, the present review application was launched.

Prior to responding to the founding affidavit, he raises the following points *in limine*.

(i) A. <u>First Point</u>

The amounts owing in terms of the bills of costs have been paid unconditionally by the applicant to the second respondent during August 2006.

(ii) All the amounts received by the second respondent have already been allocated to the relevant clients of the second respondent and their matters were finalised during September 2006.

(iii) The said clients have a direct and substantial interest in the subject matter of this application and should have been joined as respondents.

(iv) If an order is granted, the rights of the said clients could be prejudicially affected.

(v) The applicant's failure to join the said clients amounts to a non-joinder.

B. Second Point

The applicant should have utilised rule 48 of the Uniform Rules of Court, instead of Rule 53.

C. Third Point

If the court allows the applicant to bring the application in terms of rule 53, such review application should have been brought within a reasonable period of time. The bills of costs the applicant is complaining of, were taxed on 20 June

and 25 July 2007. Notice of motion was delivered only on 7 February, which is about seven months after the bills of cost were taxed. There was an unreasonable delay before the review application was launched.

D. Fourth Point

The taxed costs have already been paid by the applicant and the said matters have been finalised. These matters are therefore *res judicata*.

He further states that if the points *in limine* are not upheld, he will hereunder deal with the issues raised in the founding affidavit.

He states that the bills of costs were properly taxed by the taxing master. The taxing master exercised his discretion properly and with due regard to the matters at hand.

The applicant did not file any replying affidavit.

5. Findings

Most of the facts of this case are common cause.

The second respondent in its capacity as attorney of record, acting on behalf of several claimants, brought an application to compel the applicant to perform or carry out certain tasks. The applications were granted with costs.

The second respondent, acting on behalf of its several clients prepared and taxed several party and party bills of costs, which bills were taxed by the first respondent.

Copies of the taxed bills of costs attached to the papers clearly indicates the different names of the applicants (who were clients of the second respondent) and indicates that the respondent is the Road Accident Fund, the current applicant.

The various applicants, on whose behalf the second respondent was acting are not parties to this application and the second respondent raised a point *in limine* of non-joinder.

In her heads of argument and during oral argument, the applicant's counsel submitted that the second respondent rendered certain bills of costs for taxation for professional services rendered by them. It is not the second respondent's clients who rendered the said bills of costs and therefore the applicant is not obliged to join the respective client's of the second respondent.

The abovementioned submission by the applicant's counsel cannot be sustained.

An attorney in a matter acts for and on behalf of his/her client. The same applies when a party and party bill of costs is taxed.

When accounting to his/her client, the attorney accounts to the client the capital amount received and the party and party costs recovered. At a practical level, the attorney subtract, from the attorney and client fees, the recovered party and party costs and the balance is paid by the client, either from the capital amount or by other means.

During oral argument, the applicant's counsel submitted that the respective clients of the second respondent have only a financial interest and not a substantial interest and therefore it was not necessary to join them.

The above submission cannot be upheld. In fact, the respective clients have a substantial interest in the outcome of the case. The various bills of costs were taxed for and on their behalf. The attorney who was entitled to recover the attorney and client fees from the respective clients, can recover the said fees from the clients whether or not the party and party fees have been recovered, particularly if their mandate is terminated prior to the taxation or the recovery of the party and party costs.

My view is that the respective clients of the second respondent have a substantial interest in this case and should have been joined in these proceedings.

Another issue that I would like to deal with is the other point *in limine* taken by the second respondent, namely that the review proceedings were not brought within a reasonable period.

The bills of cost in question were taxed on 20 June 2006 and

25 July 2006. Review proceedings were launched on 5 February 2007, which is almost 6½ and 5½ months from 20 June 2006 and 25 July 2006, respectively.

In the answering affidavit the second respondent alleges that during September 2006, that is after receipt of the party and party, it accounted to its clients.

On 14 September 2006 the applicant's attorneys wrote a letter to the second respondent wherein they, *inter alia* complained about the taxations and advising that they have instructions to bring an application to set aside the allocaturs of the taxed party and party bills. In a letter dated 22 September 2006, the second respondent, *inter alia*, refused to consent to the setting aside of the allocaturs.

On the papers it is not clear what the applicant did from September 2006 up to February 2007.

During oral argument the applicant's counsel submitted that applicant was unable to bring the review application timeously because of special circumstances. The said special circumstances are not set out in the papers.

As stated earlier, the second respondent accounted to its various clients during September 2006. The review application was launched almost five months after the second respondent has accounted to its clients.

During oral argument the applicant's counsel stated that the applicant was presented with the allocaturs on Friday, 30 June 2006.

My view is that in the circumstances of this case there was an unreasonable delay in launching this review application.

If the review is entertained and the allocaturs are set aside, it will cause prejudice to both the second respondent and its respective clients.

In the light of my findings on the two points *in limine* discussed above, I do not believe that it is necessary to deal with other arguments raised in this matter.

Applicant's counsel referred me to the postponement of 11 April 2007. Apparently, this matter was set down on the unopposed roll of 11 April 2007. That was done prior to the receipt of the notice of intention to oppose from the second respondent and their answering affidavit.

My opinion is that I should not make any order as to costs relating to 11 April 2007.

The court therefore makes the following order:

1. Application is dismissed.

2. Applicant is ordered to pay, on a party and party scale the costs of the second respondent.

W L SERITI
JUDGE OF THE HIGH COURT

3915/2007

Heard on:	15 August 2007
For the Applicant:	Adv L A Pretorius
Instructed by:	Maponya Incorporated, Pretoria
For the Respondent:	Adv M Barnard
Instructed by:	MacRobert Incorporated, Pretoria
Date of Judgment:	24/08/2007