THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 357/2021

In the Rule 17 Review of Taxation between:

FRAMATOME **APPLICANT**

and

ESKOM HOLDINGS SOC LIMITED **RESPONDENT**

Neutral citation: *Framatome v Eskom Holdings SOC Limited*

Coram: MABINDLA-BOQWANA JA

Delivered: 28 February 2024

Summary: Review – taxation of bill of costs – foreign based litigant – Taxing Master disallowing fees charged by its foreign based attorneys.

ORDER

1 The disallowance of item 142 is reviewed and set aside.

2 The *allocatur* is remitted to the Taxing Master for reconsideration on the basis of the principles set out in this judgment.

3 There is no order as to costs.

JUDGMENT

Mabindla-Boqwana JA

[1] This is a review of taxation in terms of rule 17 of the Rules of the Supreme Court of Appeal (SCA Rules). The applicant, Framatome, was the appellant in an appeal before this Court arising out of an application it had brought in the Gauteng Division of the High Court, Johannesburg (high court). Framatome is a company registered in France. It conducts construction and refurbishment of nuclear plants around the world. On 5 September 2014, it entered into an agreement with Eskom Holdings SOC Limited (Eskom) for, inter alia, the replacement of the steam generators at Koeberg Nuclear Power Station Unit 1 and Unit 2.

[2] In December 2019, Framatome brought an application in the high court seeking declaratory orders and consequential relief relating to the enforcement of a decision made by an adjudicator in a contractual dispute between it and Eskom. The high court dismissed the application with costs including costs of two counsel. Framatome then took the matter on appeal to this Court, which appeal was upheld with costs including the costs of two counsel. The cost order in the

high court was also overturned in favour of Framatome. Thereafter, Eskom unsuccessfully petitioned the Constitutional Court.

[3] Framatome alleges that throughout its litigation in the high court, this Court and the Constitutional Court, it instructed as its principal instructing attorneys, Reed Smith LLP (Reed Smith), which has its head office in the United States, and also offices in other parts of the world including France and the United Kingdom. Reed Smith, based in France, in turn appointed local attorneys Webber Wentzel as Framatome's South African based attorneys. Webber Wentzel did not have direct contact with Framatome but received its instructions from Reed Smith. For the purposes of the appeal before this Court, Webbers in Bloemfontein was appointed as correspondent attorneys.

[4] Framatome presented bills of costs in the high court, this Court, and the Constitutional Court. The bills included fees charged for professional services rendered by Reed Smith. In the high court no ruling was made by the Taxing Master as the bill was settled between the parties. That bill included Reed Smith's costs in the amount of €55 575 (R 1 111 500). In this Court, the Taxing Master disallowed *in toto*, an item comprising a fee of R102 charged by Webber Wentzel as well as the disbursement of R 703 842.16 relating to Reed Smith's costs (item 142).

[5] The reasons given by the Taxing Master in disallowing the item are, firstly, that every bill should be accompanied by an appropriate certificate from a Taxing Master of the Court which has jurisdiction over the foreign attorney and this instance no such certificate had been made available. Secondly, the voucher presented for taxation included work of three foreign attorneys in France, and for this reason the Taxing Master determined that it would be unreasonable for a successful party to claim more than what it is entitled to. Thirdly, allowing the

voucher of the foreign attorneys would result in a duplication of the litigation related professional services rendered by the foreign based attorneys.

[6] This Court will only interfere on review of a taxation when it is satisfied that the Taxing Master was clearly wrong, that is, when 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 its ruling.[1]

[7] Framatome submits that, the Taxing Master was clearly wrong as the leading case on this issue, *Grindlays International Finance (Rhodesia) Ltd v Ballam,*[2] which it relied on, did not lay down a general rule that every bill of costs by foreign attorneys without exception must be accompanied by a certificate. Contrary to the Taxing Master's view as supported by Eskom, so it is contended, *Grindlays* is in fact supportive of Framatome's case in relation to the principles it set out. Framatome further contends that Eskom had agreed to pay costs which included Reed Smith in respect of the high court bill, it should apply the same principle in the taxation of this Court's costs. It further submits that any litigant has a fundamental right to consult an attorney in the jurisdiction where it is located and contends that the Taxing Master was obliged to follow the leading judgment of *Grindlays*.[3]

[8] Eskom disagrees. It submits that *Grindlays* is distinguishable from the present matter because it dealt with taxation of the bill in a court of first instance and considerations are different on appeal due to the fact that an appeal is based and considered on the record of proceedings in the court *a quo* with nothing new to add. While assistance of a foreign attorney may be necessary in the court *a quo*, it does not necessarily follow that such assistance is required in an appeal.

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[1] See *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F-G.
[2] *Grindlays International Finance (Rhodesia) Ltd v Ballam* 1985 (2) SA 636 (W).
[3] Ibid.

[9] It further contends that *Grindlays* requires, as a condition, before a Taxing Master can consider a foreign attorney, that such bill be accompanied by an appropriate certificate from the Taxing Master of the court having jurisdiction over the foreign attorney.

[10] It is further contended by Eskom that insofar as the 'voucher' setting up the costs claimed by the foreign attorney is concerned, it is evident that the costs are claimed for three foreign attorneys and are accordingly unnecessarily increased. No basis exists in South African law for claiming the costs of three attorneys from the same firm doing the same work (in addition to two sets of South African attorneys doing the work also claimed). The fees claimed for the foreign attorneys are nothing more than a duplication of the work claimed for and done by the South African attorneys and accordingly cannot be allowed. In addition, it is asserted that perusal by two attorneys of record should not be allowed as between party and party. It is further submitted that in any event all applicable attendances have been claimed in full by the South African attorneys.

[11] As to the judgment, *Grindlays*, relied upon in this review by Framatome, it is necessary to discuss it in some detail. The plaintiff in *Grindlays* was a company incorporated in Zimbabwe with its head office in Harare. It instituted an action in the Gauteng Division of the High Court, Johannesburg, where the defendant was domiciled. The defendant made an offer of settlement without prejudice and tendered to pay costs to the date of settlement. The tender was accepted, and the plaintiff submitted two bills of costs for debate before the Taxing Master in Johannesburg, one from local attorneys and another from attorneys in Harare.

[12] The Johannesburg bill was taxed but the defendant's attorney objected to the form in which the Harare bill had been prepared. The Harare bill was redrafted and submitted for taxation. It was accompanied by a certificate from the Deputy Registrar and Taxing Officer of the High Court of Zimbabwe, who certified that he was satisfied that the fees in the bill of costs were in accordance with the tariff prevailing in the High Court of Zimbabwe. The certificate also contained the following:

'This certificate does not imply that the within bill of costs has been taxed by me and the reasonableness thereof is a matter for consideration by the Taxing Master concerned.'[4]

[13] The defendant objected to the taxation of the Harare bill of costs, which objection was upheld by the Taxing Master. The Taxing Master concluded that he was not empowered to tax the Harare bill but could merely assess it as a voucher forming part of the Johannesburg bill of costs. Dissatisfied with the ruling of the Taxing Master, the plaintiff took such ruling on review.

[14] The matter served before Kriegler J who having regard to the definition of 'attorney' in Rule 1 of the Uniform Rules of Court,[5] and the Attorneys Act 53 of 1979[6] (now repealed),[7] held that 'the foreign attorney . . .practising outside the Republic of South Africa and not subject to the discipline of any one of the Divisions of the [High] Court of South Africa, cannot, . . .be regarded as a person whose bill of costs a Taxing Master is empowered by Rule 70(1)*(a)*[8] to tax'.

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[4] Ibid at 639.

[5] According to Rule 1 then '"Attorney" was defined as 'an attorney admitted, enrolled and entitled to practise as such in the division concerned.' It has since been amended as 'a legal practitioner as defined, admitted and enrolled as such, under the Legal Practice Act, 2014 (Act No. 28 of 2014)'

[6] The now repealed Attorneys Act 53 of 1979 defined 'attorney' as 'any person admitted to practise as an attorney in any part of the Republic. . .'

[7] In terms of the Legal Practice Act 28 of 2014, an attorney 'means a legal practitioner who is admitted and enrolled as such under this Act.'

[8] Rule 70(1)*(a)* states that 'The taxing master shall be competent to tax any bill of costs for services actually rendered *by an attorney* in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do.' (Emphasis added.)

[15] The plaintiff in that case had argued that, although the Harare attorney 'is not an attorney as contemplated by Rule 70(1)*(a)* and that its bill is not one amenable to taxation thereunder, it is capable of taxation and ought to be taxed *as a schedule of expenses* necessarily and properly incurred by the plaintiff in the conduct of the suit in question and ought to be "assessed" or scrutinised by the Taxing Master as he would scrutinise any other disbursement contained in the Johannesburg attorney's bill of costs.'[9] (My emphasis.)

[16] Kriegler J held that a bill from Zimbabwe could not be dealt with as if it emanated from a Division of a High Court in South Africa. There was no reason why it should not be dealt with in the same way as one emanating from other foreign countries. He added:

'I hasten to add that a Zimbabwean attorney's bill of costs (and any other foreign attorney's bill) can certainly be taken into account in a South African taxation of a domestic bill of costs. *A South African Taxing Master will consider such a foreign bill in exactly the same way as he would consider any voucher for work done in connection with a law suit, the costs of which he is obliged to tax. He will not take it at face value. He will scrutinise the foreign bill and will, depending upon the circumstances, place a greater or lesser degree of reliance upon a certificate emanating from the office of his opposite number in the foreign Court.* Thus, in the instant case, the Taxing Master would be entitled to scrutinise the Zimbabwe bill of costs in the knowledge that the Deputy Registrar of the High Court of Zimbabwe, which shares a common tradition with the Supreme Court of South Africa, has certified that the fees set opposite the various items in that bill are in accordance with the prevailing Zimbabwean tariff. As far as all foreign bills of costs are concerned, I am in agreement with the learned authors of *Jacobs and Ehlers* (loc cit at 264), that:

"A Taxing Master is entitled to scrutinise the bill of a foreign attorney and should not accept it as a mere voucher without any attempt to tax the various items."

. . .

If the Zimbabwean bill had been a bill of costs capable of taxation in terms of Rule 70(1)*(a)* it would have been possible for the Taxing Master to have taxed it notwithstanding the

[9] *Grindlays* fn 1 at 647.

completion of the Johannesburg bill of costs. As it is not capable of such independent taxation but must form part of the Johannesburg bill of costs, it could not be taxed by the Registrar once the Johannesburg bill had been completed and its *allocatur* had been signed.'[10] (My emphasis.)

[17] Because the defendant had consented to the separate scrutiny and debate of the Zimbabwean bill of costs, the matter was referred back to the Taxing Master whom the judge authorised and directed to proceed to scrutinise the bill of costs presented by the plaintiff's attorneys in respect of the work done by the Zimbabwean attorneys, applying the criteria and principles applicable to the evaluation of disbursements claimed in a bill of costs submitted for taxation in that Division and paying particular regard to the risk of duplication of charges.

[18] Several key principles may be extracted from *Grindlays.* The first is that a foreign attorney's bill of costs cannot be taxed independently of the South African attorney's bill because a foreign attorney is not an attorney for the purposes of the taxing rules. That bill however can be taxed as a voucher forming part of the bill of the local attorney. The voucher must be scrutinised by the Taxing Master, as is the case with any other disbursement.

[19] The second is that the foreign attorney's bill will not be taken at face value, the Taxing Master will scrutinise it, and depending on the circumstances, place a greater or lesser degree of reliance upon a certificate emanating from the office of their counterpart in the foreign court. In *Grindlays*, the Zimbabwean attorney's bill was accompanied by a certificate. In that situation, the Taxing Master would scrutinise the bill in the knowledge that it had been certified by their counterpart in Zimbabwe, that the items in the bill accord with the tariff prevailing in that country. In that instance, the fact that there was certification from an officer from a country sharing a common tradition with the South African courts, might in the

[10] Ibid at 648.

process of scrutiny by the Taxing Master result in greater weight being accorded to the certificate. Clearly, this is a matter to be determined on a case by case basis.

[20] There is nothing that militates against the adoption of the approach by Kriegler J in this case. The fact that the *Grindlays* case was determined in relation to a bill of costs in the high court as opposed to a court of appeal should be of little moment in this case, regard being had to the principle of how a foreign bill of costs should be treated. What Kriegler J held is useful and there is no reason it cannot be adopted in relation to this case.

[21] Thus, I agree with Framatome that *Grindlays* did not lay down a formal requirement that if no certificate is present, the Taxing Master is absolutely barred from scrutinising the foreign bill of costs. To the extent that the Taxing Master understood this to be the case, she was clearly wrong. This is because despite the existence of the certificate, the Taxing Master must independently scrutinise the bill. Secondly, the bill is treated as a voucher like any other disbursement. The certificate does play some role as it certifies that the fees billed by the foreign attorney are in accordance with the tariff prevailing in that country.

[22] Absent the certificate, does that mean the applicant must be deprived of their costs, even if reasonably incurred? The answer must surely be 'no'. This is because costs are awarded with a view to enable a successful party, or a party so awarded to recover the expenses to which such party has been compelled to incur either to initiate or defend litigation.

[23] The indemnity is for costs reasonably incurred. In terms of Note 1 of the tariff in Rule 18 of the SCA Rules:

'. . . the taxing master shall on every taxation allow such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the

rights of any party, but, save as against the party who incurred them, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence or mistake, or by payment of a special fee to counsel or by other unusual expenses.'

[24] It seems to me therefore, unjust to hold that a party, whose foreign attorney's bill is not accompanied by a certificate, under whichever circumstances is barred from having those fees assessed in the same way as a voucher by the Taxing Master. In respect of attorneys from countries with legal systems where a certificate can be procured, it seems desirable that a foreign attorneys' bill be accompanied by a certificate.

[25] In the context of what is presented before me, it seems desirable that verification be obtained from an independent third-party with knowledge and expertise of the billing system or methods applicable in the foreign country concerned (other than the attorneys or parties involved). The independent third party should set out how the billing system is regulated in that country, how the billing rates are set out and enforced, and whether the billing rates charged by the foreign attorney in question are comparable to the rates as regulated or of firms in that country, city or region, whichever method is applicable. This is to assist the Taxing Master in the task of objectively assessing the disbursements. I do not think the memorandum prepared by the very law firm that is the subject of taxation, assists in obtaining objectivity in the assessment of its fees.

[26] It should be the responsibility of the applicant to provide the Taxing Master with that information. The Taxing Master may call upon any other attainable information or documents that may assist him or her in exercising their discretion when assessing the reasonableness of the costs incurred.

[27] It is important not to conflate the issue of (a) whether the certificate was required with the questions of (b) whether the costs were reasonably incurred, or (c) whether the costs were unnecessarily expended by employing foreign attorneys. The latter two are different questions, to whether a foreign attorney's bill cannot be assessed at all, for lack of a certificate. The question of the certificate is also different from whether it was necessary for multiple attorneys to do the work or there was duplication.

[28] In view of my findings regarding the certificate, it is not necessary to deal with the other reasons advanced by the Taxing Master for the disallowance of item 142. The reason being that the Taxing Master did not scrutinise the foreign attorneys bill but simply disallowed the item, primarily on the principle that no certificate was attached. It seems other reasons were given globally on the back of the primary reason without giving detail of why, for instance, use of multiple attorneys amounted to duplication and injustice to Eskom.

[29] In this regard, it is not proper for me to simply allow the item without Framatome taking the steps that I have proposed, to assist the Taxing Master to make an appropriate assessment. And without the Taxing Master having scrutinised the foreign attorneys bill as suggested in *Grindlays*.

[30] For its part, Framatome set out the reasons warranting the involvement of Reed Smith in the litigation, which is said to be, amongst other things, its technical expertise in the nuclear sector and knowledge of the project between the parties. I make no comment as to whether their involvement was required on appeal. What work they did in the appeal and whether it was necessary or amounted to a duplication of work, is for the Taxing Master to reasonably assess. It may be that the Taxing Master may, in some instances, find that work was duplicated.

[31] It is therefore appropriate for this matter to be remitted to the Taxing Master for item 142 to be reconsidered along the principles set out in this judgment. As with any voucher, the Taxing Master is entitled to ask for more information or evidence that would assist her in fulfilling her quasi-judicial function.

[32] Even though Framatome is successful in the review, my view is that each party should pay its own costs, due to the findings that, absent the certificate, it is desirable that verification be obtained from an independent third-party, which Framatome must provide to the Taxing Master on the date to be determined by the Taxing Master.

[33] I, accordingly, make the following order:

1 The disallowance of item 142 is reviewed and set aside.

2 The *allocatur* is remitted to the Taxing Master for reconsideration on the basis of the principles set out in this judgment.

3 There is no order as to costs.

N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Written Submissions

For the applicant:	Webber Wentzel, Johannesburg Webbers Attorneys Inc., Bloemfontein
For the respondent:	Edward Nathan Sonnenbergs Inc., Johannesburg Lovius Block Attorneys, Bloemfontein.