FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 877/2014

In matter between:

SIEGREFRIED VAN BILJON Plaintiff

And

SUSARA RAUTENBACH Defendant

REVIEW JUDGMENT

JUDGMENT BY: I. MOTLOUNG, AJ

DELIVERED ON: 3 SEPTEMBER 2014

Introduction

[1] This is a review of an order made by the taxing master (master) on the 18 June 2014, made in terms of Rule 48 of the Uniform Rules of the court.

Facts briefly

[2] The court having made a costs award in favour of the applicant, the applicant subsequently duly served a notice of taxation set down for the 18 June 2014 on the respondent. The respondent filed a notice to oppose the said taxation and on the 18 June 2014 (date of set-down) both parties were legally represented at the taxation. The respondent's representative, Ms Dauth, indicated that she was ready to proceed with the taxation whilst the applicant's representative, Ms Prinsloo, objected to the taxation, alleging that the parties had reached settlement regarding the amount of the costs awarded by the court. The respondent''s Ms Dauth denied that the parties had settled the matter, and indicated that she was ready to proceed with the taxation.

[3] Faced with these divergent positions, the master then asked the respondent's Ms Dauth whether she had proof of the fact that the matter was not settled, and Ms Dauth could not produce such proof.

The master then ruled that absent such proof, she accepted that the the offer was made by the applicant, and was not going to proceed with the taxation of the bill in front of her, but would only note the objection registered by the respondent's Ms Dauth, to the effect that the respondent wanted the master to proceed with the taxation. This ruling is stated in the following terms in the Stated Case prepared by the Master in terms of subrule 48(3)(a):

"I accepted the fact that an offer was made and I noted it on the bill. The taxation did not proceed.
An objection was noted by EG Cooper Majiedt Attorneys
EG Cooper Majiedt Attorneys requested a stated case to be decided by a judge".

[4] The respondent, obviously aggrieved by the master's ruling, filed a notice of review of the said ruling (entitled Notice of Review of Taxation in Terms of Rule 48), to which the master responded by filing the requisite Stated Case in terms of subrule 48(3).

[5] Annexed to the respondent's notice of review was also correspondence exchanged between the attorneys of the parties, dated the 28 May 2014 and 10 June 2014, and marked annexures "B" and "C" respectively. These emails showed that the respondent's attorneys did make an offer of R55 000.00 (as alleged before the master) but that the said offer was rejected by the applicant's attorney who, instead of accepting the offer, made a counter-offer (of R60 000.00) for settlement of the matter. As stated above, the respondent duly served and filed the above-stated notice of review.

The applicant has not responded anyhow to the said notice after receiving the master's Stated Case. This means that the review papers herein comprise of the respondent's notice of review and the master's Stated Case only.

The issue to be decided

[6] The issue or question to be decided is whether the application for the "review of the taxation" has to be granted or not.

Stated differently, the question to be answered is whether the respondent has made out a case for review in terms of Rule 48 or not.

The applicable legal principles

[7] The following are the relevant Rule 48 provisions:

7.1. Rule 48(1) – "Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed mero motu by the taxing master , may within 15 days after the allocator by notice require the taxing master to state a case for the decision of a judge.

7.2. Rule 48(2) – "The notice referred to in subrule (1) must –

(a) Identify each item or part of an item in respect of which the decision of the taxing master is sought to be reviewed;

(b) Contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed mero motu by the taxing master;
(c) Contain the grounds of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and
(d) Contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof".

[8] It is clear that the Rule envisages a situation where a review in terms thereof is directed at challenging a ruling or rulings made by the taxing master on an item by item basis, after which the master made an allocatur, and that the notice of review must similarly be based on an item by item basis. The situation presenting itself on the facts of this case is clearly not one envisaged by the Rule, strictly speaking. On the facts of this case, the master did not conduct any taxation but instead refrained from doing any taxation, and thus refrained from making any specific rulings regarding all items in the bill to be taxed, and consequently ended up without any allocatur. Consequently, even the objection noted by the respondent to the master's ruling is not on an item by item basis as required by the Rule.

[9] Erasmus in Superior Court Practice (at pg B1-350 of Service 40) states the following in discussing the Rule:

"A review of taxation under this rule is limited to those cases where there was an objection and those where the taxing master allows an item mero motu…[and] No bill of costs , or any item thereof, can be reviewed unless the taxing master has affixed his allocatur to the bill [and] The notice must contain the particulars laid down in subrule (2)", and refers to Pretorius v Cohen 1953 (3) SA 639 (O) and other decisions in support of the said propositions.

[11] In a decision of this division, in S.A. Fine Worsted (Pty) Ltd v Niemeyer 1956 (2) SA 49 (O), the court distinguished the Pretorius decision mentioned above and found that even though the master had not affixed his allocatur at the time that the notice of review was lodged, this did not bar the court from conducting a review of the disputed taxation. The court consequently dismissed a point-in-limine that had been raised against the notice that had been filed prematurely before the master could affix his allocatur.

[12] In Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) (Formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd 1999 (4) SA 503 (W), the court faced with a number of irregular steps (in the sense of not being compliant with the strict wording of Rule 48), even explored various options regarding how to deal with the matter at hand, and finally decided to get seized with the review notwithstanding the various non-compliances by the parties to the review. The court stated the following amongst others at 516J to 518E:

"It is apparent that the parties' respective attorneys, by simply ignoring the terms of Rule 48, have complicated this matter in such a way that it is difficult to get to grips with the main disputes arising directly out of the bill of costs, without first trying to resolve the procedural wrangle in which the have become enmeshed".

The court went on to explore what it termed the "first solution" and thereafter what it termed the "alternative approach to finding a solution", and thereafter remarked that:

"Rule 48(2) gives me fairly wide powers discretionary powers".

The court concluded by stating the following:

"I consider that the appropriate way in which to deal with the present matter is the way that will place before me the essential contentions of the parties and the taxing master with the minimum further expenditure of time and costs. In my view, the material with which to achieve this is at hand. The taxing master has made his position clear enough, and it does not appear to me that there is anything further that I should require of him. As to the parties, instead of putting them to the expense of

briefing advocates or attorneys to address me in my chambers, or to argue the matter before the court, when they will in all probability seek to repeat the material already available to me in written form, I should simply have regard to what the defendant has set out in its late "response to taxing master's stated case", and to what the plaintiff has set out in his so-called "reply to the defendant's response to taxing master's stated case".

This approach amounts in substance to granting each of the parties an indulgence for certain respects in which each of them has failed to comply with the requirements of Rule 48 …It goes without saying that I would not grant the defendant the indulgence which is involved in having regard to its contentions which were out of time, without at the same time granting the plaintiff the indulgenge which is involved in having regard to his "reply to defendant's response" [which the learned judge referred to as the parties' own "ingenious innovations" at some stage]. This disposes of the point made in Ms Stein's letter dated 25 June 1997 to the effect that Rule 48 makes no provision for the delivery of such a document".

The court then went on to deal with the disputes raised, albeit irregularly raised. Before doing so, the court expressly stated that:

"I turn to the disputes raised in this irregular manner".

[13] In discussing the powers of the review court to interfere with the rulings of the master, Erasmus has the following to state at B1-348 to B1-349:

"The general principles governing interference with the exercise of a taxing master's discretion have been stated as follows:
"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of opinion that the taxing master was clearly wrong but only do so if it is in the same position as, or

better position than, the taxing master to determine the point in issue …The court must be of the view that the taxing master was clearly wrong",

quoting from Visser v Gubb 1981 93) SA 753 (C) at 754H – 755C, and also stating that these principles have been stated and restated in a wealth of other decided cases referred to by the learned authors.

14] Erasmus goes on to state at B1-349 that:

"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 recognised grounds to which a power of review is limited at common law" (my emphasis),

and refers to the Appelate Division decision of Legal and General Assurance Society Ltd v Lieberum NO 1968 91) SA 473 (A) at 478G, in which he states that the AD put this proposition beyond doubt.

[15] In the Lieberum decision mentioned above, the court stated the following at 477E-F, stating the approach to be followed:

"Now it is settled law that where a matter is left to the discretion or determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion for his own…There are circumstances in which interference would be possible and right. If for instance, such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the court might grant relief" (my emphasis).

[16] In my view, the sum total of all the views and sentiments expressed by the above-mentioned authorities is that a court of review in terms of Rule 48 has very wide powers – so wide that notwithstanding the wording of the rule – even a situation or circumstances not falling under the Rule, strictly speaking, should be dealt with by a review court, as long as the issue arises from taxation proceedings or a ruling made by the master. On this approach, despite the fact that the ruling made by the master herein was not on an item by item basis, and that the objection was not on an item by item basis, and that there was no allocatur finally made by the master, this court should be able to deal with the review against the master's ruling as it stems from or arises from taxation proceedings.

[17] In the Stated Case, the master takes the view that:

"The tests I as taxing master used was a test of objectivity as set out in Kruger, J in Taxation of Costs in the Higher and Lower Courts: A Practical Guide.
It is my humble submission that I exercised my discretion through assessing and considering all the relevant facts and circumstances before I made my decision".

I do not agree with the master's view that he applied a discretion he had. None of the provisions of the Rule conferred such a discretion upon him. Furthermore, even if the master had such professed discretion, which in my view he never had, he followed a fundamentally flawed and wrong approach by asking the wrong question from the wrong party. It is trite that in our law, the general rule is that he who alleges must prove. Therefore, I do not understand why the master did not ask the applicant, as the party that alleged the existence of the settlement agreement, to produce proof of the alleged settlement, and instead asked the respondent to produce proof that no settlement had been reached. This was a misdirection on the part of the master (even if one assumed that he had the powers or discretion to exercise in respect of the dispute, which he did not have).

Application of the legal principles to the facts of this case

[18] The master clearly decided on a matter which was outside his mandate in terms of Rule 48. He did not decide on any specific items but decided on a factual dispute applying generally to the whole bill, without having to resort to the rules of taxation. The dispute that faced the master was not as regards the items in the bill, but as regards whether there was an offer and acceptance thereof, resulting in a binding settlement agreement.
In deciding the said issue, the master acted ultra vires and thus his action or conduct falls to be reviewed and set aside by this court, as having been irregular. In my view, the master's conduct was clearly wrong as he applied his discretion in respect of a dispute not falling within his authority. He decided whether a settlement agreement had been concluded by the parties or not, when nothing in the Rule confers such powers on him.

[19] The master should have proceeded with the taxation that had been duly set down before him, to which there had been formal opposition noted as required by the Rule.

[20] The master indeed erred in not seeking to proceed with the taxation and then deal with whatever eventuality that could arise, like an application for postponement etc. Subrules 70(1) and 70(4) state the circumstances under which the master shall not proceed to taxation, and those circumstances are not present in this case. The applicant was thus entitled to insist on the taxation proceeding, and the master should have proceeded with the taxation of the bill of costs.

Relief

[21] The applicant seeks an order referring the taxation back to the master, so that the master may proceed with the taxation of the bill of costs.

[22] I am unable to find any compelling reason as to why the review that must be made of the master's decision must be made through the ordinary review mechanisms

or procedures, other than the one provided for under Rule 48, although the kind of ruling made by the master's does not appear to fall within the strict wording of the Rule. To the contrary, for expediency and other considerations, I find it to make for basic sense to allow such review to be made by either a judge in chambers or by the court in terms of Rule 48. After all, my understanding of the authorities referred to above is that it is desirable that any situation, novel or not, arising from or connected with or in connection with a ruling made by a master after a matter has been duly set down for taxation before him, be accommodated under this Rule. In this respect I am in full agreement with the approach taken by Blieden J writing for the full bench in RAF v Le Roux 2002 (1) SA 751 W at 753 C – E, when the full bench could not find a specific procedure provided for in section 22 of the Supreme Court Act 59 of 1959:

"The first question which arises is whether the words "on the hearing of an appeal" literally mean what they say. In other words, whether it is only at the hearing of the appeal that the court can "receive further evidence"or whether such further evidence can be tendered at any time or after the hearing of the appeal, but before the delivery of judgment, as has occurred in the present case. Neither I nor my colleagues in the appeal, nor counsel, were able to find any authority which deals specifically with this point. However, because of the nature of the present application it is necessary to answer this question.

I shall deal with the issue on the basis that the present application can be brought even though the actual hearing of the appeal has ended, but judgment has as yet not been delivered. This is not to be construed to mean that this court finds that the present procedure is permissible. A court of appeal will allow the leading of further evidence on appeal only in special circumstances because it is of public interest that there should be finality to litigation" (my emphasis), citing Simpson v Selfmed 1995(3) 816 (A) as authority for the said proposition.

[23] Applying the above-mentioned approach (taken by the court in the Le Roux decision mentioned above) mutatis mutandis, I find I am entitled to utilize the Rule 48 procedure to grant the respondent the relief it seeks.

Costs of the review

[24] There is no reason why the ordinary rule of costs following the result should not apply. In this case the applicant was the substantive cause of the irregularity, by incorrectly alleging that the respondent's offer had been accepted.
Annexure "C" proves that the offer had not been accepted. Furthermore, after the master submitted the Stated Case, the applicant had the right to reply thereto (by stating its case) in terms of subrule 48(5)(a), and the respondent did not do so – meaning that the respondent's case, as amplified or modified by the Stated Case, is the only case or facts before this review.
There exists nothing to countenance the respondent's case as regards the misdirection by the master, and that the applicant incorrectly caused it by alleging there was settlement when there was none, thus occasioning the wasted costs of the 18 June 2014, by effectively postponing the taxation.

[25] Consequently, I hereby make the following order:

25.1. The taxation proceedings before the taxing master of the 18 June 2014 are reviewed and set aside.

25.2. The matter is remitted back to the taxing master to proceed with the taxation of the bill of costs, and the ordinary rules pertaining to taxation shall apply.

25.3. The applicant is ordered to pay the costs of the review, together with the wasted costs of the 18 June 2014 occasioned by the non-taxation of the bill of costs.

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MOTLOUNG, AJ

On behalf of the applicant: Van der Merwe & Associates
Bloemfontein

On behalf of the respondent: EG Cooper Majiedt Attorneys
Bloemfontein