



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 3653/2013

In the matter between:

JACOBA MAGARETHA ODENDAAL BOTHMA

Plaintiff

and

JOHANNES PIETER BOTHMA

Defendant

JUDGMENT: FISCHER, AJ

HEARD ON: 23 JUNE 2016

DELIVERED ON: 30 JUNE 2016

- [1] This matter comes before me as a review of taxation in terms of Rule 48(1) of the Uniform Rules of Court on the basis that the defendant is dissatisfied with the ruling of the Taxing Master, notwithstanding objection, in allowing the maximum fee of R2 130,00, as envisaged in Rule 43(8), to both the instructing country attorney as well as the Bloemfontein correspondent.

- [2] The defendant was at all material times represented by two sets of attorneys and it is common cause that the defendant instructed the country attorney who in turn instructed its Bloemfontein correspondent.
- [3] Both sets of attorneys prepared party and party bills of costs relating to the fees and disbursements alleged to be due to them by the defendant. The bills of costs were subsequently taxed by the Taxing Master pursuant to which the defendant formally recorded his dissatisfaction with the ruling of the Taxing Master in respect of the allowing of the aforementioned maximum fee to both sets of attorneys.
- [4] The contention of the Taxing Master was that, on account of the large population residing outside the seat of the court in Bloemfontein, country attorneys, as the instructing attorneys, would be obliged to make use of a Bloemfontein correspondent in initiating proceedings in terms of Rule 43, that both sets of attorneys would of necessity deliver professional services in connection with the envisaged Rule 43 application and would as such accordingly be entitled to fees for work actually done, thereby justifying allowing both sets of attorneys the maximum fee in terms of Rule 43(8) on taxation.
- [5] The attorneys in question not only supported the approach of the Taxing Master, but added that the Uniform Rules of Court in fact make provision for engaging the services of more than one set of attorneys (see Rule 70(8)) and furthermore that it could never have been the object of the Rules of court to deprive one of such

set of attorneys of “all fees”. In this regard reliance was placed on **Van Tonder v Meyer** 1980 (4) SA 1 (T).

[6] I am of the opinion that the above case does not serve as authority for the proposition that in Rule 43 applications all attorneys engaged by a party are entitled to “all fees”. What is quite evident from a reading of both the uniform rules of court as well as the relevant authorities is that a clear distinction is drawn between proceedings in terms of Rule 43 as opposed to proceedings in terms of any other uniform rule of court.

[7] Rule 43 is as such a special rule governing a specific application and the whole object thereof is to provide for an expeditious and inexpensive manner in which to enforce interim maintenance payments as well as ancillary relief *pendente lite* (see **Von Reiche and Basson v Swart** 1988 (1) SA 813 (TPA) at 815A-G).

[8] Rule 43(8) reads as follows:

“43(8) No instructing attorney in cases under this rule shall charge a fee of more than R1 491,00 if the claim is undefended or R2 130,00 if it is defended, unless the court in an exceptional case otherwise directs.”

[9] In *casu* the matter was defended both in respect of the divorce proceedings as well as the Rule 43 maintenance proceedings and what the Taxing Master did was to allow the fee of R2 130,00 for both sets of attorneys for the reasons already referred to earlier and notwithstanding the fact that the subrule refers to an “instructing attorney”.

- [10] At all material times there can only be one “instructing attorney” acting on behalf of a particular party in defended Rule 43 applications. If such an attorney was a country attorney then the Bloemfontein attorney at the seat of the court and serving as the correspondent cannot be regarded as a further “instructing attorney” for purposes of Rule 43(8). Such an “instructing attorney”, who would include the city correspondent, would be entitled to no more than a maximum fee of R2130,00 which as such relates to all fees in connection with the defended application as envisaged in terms of the rule.(see **Lombard v Lombard** 1986 (2) 310 (ECD) at 312 I-313B)
- [11] I will accept that in practice this might very well lead to hardship especially if it be accepted that the country attorney, as instructing attorney would, of necessity, be obliged to have regard to the contents of an application launched by the opposition in terms of rule 43, consult with and advise its client and thereafter arrange for a consultation with the city correspondent and counsel. The practical effect of Rule 43(8) would be that the city correspondent (who is not the “instructing attorney”) would not be entitled, on taxation, to any portion of the aforementioned maximum fee (see **Lombard** case *supra* at 313A-D.)
- [12] I am of the view that this potential hardship is provided for in the rider to Rule 43(8) in the sense that the court entertaining the Rule 43 application may, in exceptional cases(involving complexity and novelty) direct otherwise, thereby allowing a fee in

excess of the maximum of R2130,00 (see Von Reiche case *supra* at 817B-F).

- [13] In *casu* and in respect of the instructing country attorneys bill of costs (item 49), the Taxing Master taxed off an amount of R837,00 from the amount of R2967,00 thereby allowing the maximum fee of R2130,00 in respect of the Rule 43 application.
- [14] Simultaneously however the Taxing Master allowed the same maximum fee of R2130,00 for the city correspondent under item 4 of such correspondents own bill of costs, thereby doubling the maximum fee in circumstances where no argument or facts were placed before the court to the effect that this was an “exceptional case.”
- [15] The latter sum of R2130,00 allowed under item 4 in respect of the city correspondent’s bill of costs should, in the circumstances, not have been allowed.
- [16] In the result the matter is referred back to Taxing Master for the re-adjustment of the bill of costs in accordance with the preceding paragraph.
- [17] No order as to the costs of this review is, in the circumstances justified and I accordingly make no such order.

P. FISCHER, AJ

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