HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

22/12/17

CASE NO: 78429/2014

PAUL MOEKETSI TATI Applicant

and

NKOKA TRAINING CC First Respondent

RIAN VENTER Second Respondent

ELIZABETH MARIA VENTER Third Respondent

THE TAXING MASTER OF THE NORTH GAUTENG HIGH COURT Fourth Respondent

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ORDER

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1. It is declared that the applicant was entitled to instruct Motlanthe Inc. to act on behalf of the first respondent in terms of section 50 of the Close Corporations Act 69 of 1984, in the application under case number 41550/2013;

2. The attorney and client bill of costs between the first respondent and Motlanthe Inc. is remitted to the fourth respondent, the taxing master, for taxation;
3. The second and third respondents are ordered to pay the costs of the application in their personal capacities, jointly and severally, the one paying the other to be absolved.

JUDGMENT

MAKGOKA, J

[1] The applicant seeks a declaratory order that he was entitled to instruct a firm of attorneys to act on behalf the first respondent, a close corporation of which he and the second and third respondents are members. Ancillary thereto, he seeks an order remitting the attorney and client bill of costs between the close corporation and the attorneys back to the fourth respondent, the taxing master of this court, for taxation.

[2] The relief sought by the applicant is opposed only by the second and third respondents. For the sake of convenience, I shall refer to the second and third respondents simply as 'the respondents'. Instead of an answering affidavit, the respondents have filed a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court (the rule 6(5) notice), supported by an affidavit.

[3] The genesis of the application is an application that served before this court at the instance of the applicant against the second and third respondents. In that application, under case number 41550/2013, the close corporation was cited as the first applicant, and the applicant was the second applicant. The current respondents were, respectively, the first and second respondents. As stated already, the three parties are members of the close corporation. The applicant complained in that application that the respondents were acting in breach of their fiduciary duties towards the close corporation as contemplated in sections 42(1) and 42(2) of the Close Corporations Act 69 of 1984 (the Act).

[4] It is not necessary to go deep into the merits of that application. The following suffices. While members of the close corporation with the applicant, the respondents registered an entity with a confusingly similar name to that of the close corporation. That entity was positioned in direct competition with the close corporation and to the detriment of the close corporation, and allegedly for the financial benefit of the respondents. Their conduct was said to be in breach of their fiduciary duties and in contravention of section 42 of the Act. The application was successful and the respondents were ordered to pay the costs of the application.

[5] Subsequently, the attorneys who acted for the close corporation and the applicant, Motlanthe Inc., submitted an attorney and own client bill of costs to the

respondents for payment. In response, the respondents declined to pay the bill, and insisted that the bill should be submitted for taxation. On 30 May 2014 Motlanthe submitted the bill to the taxing master, together with the party and party bill of costs, for taxation. The party and party bill was taxed, and subsequently paid by the respondent. However, the attorney and client bill was opposed on behalf of the respondents on the following bases:

'16.1 The attorneys presenting the bill of costs for payment were appointed by the [applicant] who is a member of the [close corporation];

16.2 The applicant appears to have entered into a fee agreement with the said appointed attorneys;

16.3 A copy of the fee agreement/mandate is required;

16.4 A copy of the minutes of the meeting/special resolution of [the close corporation] whereby the applicant is authorized to appoint attorneys and enter into a fee agreement is required;

16.5 A copy of the resolution of the close corporation in terms of which the applicant is authorized to institute legal action against the respondents on behalf of the close corporation is required.'

[6] In response, the applicant insisted that he acted in terms of section 50(1)(b)(i) of the Act which provides that where a member of a close corporation acts in breach of a fiduciary duty to the close corporation, 'any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such a member…'

[7] As a result of the dispute between the parties, the taxing master declined to tax the bill. Subsequently, the applicant sought written reasons from the taxing master for her decision. In response, the taxing master sent an email from the costs consultants employed by the respondents to oppose the bill. In that email, dated 19 June 2014, the following is stated:

'The mandate by the close corporation to the attorneys to launch the application and to charge fees higher than the prescribed rate have been objected to. Also, the fees of counsel and the services rendered by counsel are in dispute as it appears as if they have done work ordinarily reserved for attorneys. The mandate to counsel is also required. As the mandate is in dispute, the taxing master has no authority to tax the bill of costs.'

[8] A further letter to the taxing master yielded the same response in a form of an email by the respondents' attorneys. However, after insistence by Motlanthe Inc., for the taxing master to furnish her own reasons for declining to tax the bill, instead of that of the respondents, the taxing master eventually stated the same reason as the respondents: she could not tax the bill where the mandate to take legal action was disputed. As a result of the taxing master's stance, the applicant launched this application for the relief referred to in para 1 above.

[9] As stated already, the respondents filed a rule 6(5) notice, in which they contended that (a) the applicant does not have locus to seek the relief set out in the

notice of motion; (b) the applicant is precluded from enforcing 'a costs order which was not granted by the court; the notice of motion is vague and embarrassing and does not sustain a cause of action.

[10] The main thrust of the respondent's opposition is that the costs order granted on 15 October 2013 made no provision for attorney and client costs. It is also contended that the applicant does not have locus standi to bring this application as the current application is not one envisaged in either of sections 42 or 50 of the Act. Aligned to the locus standi argument, it was submitted that the applicant was attempting to enforce an agreement concluded with Motlanthe Inc., and that it was actually Motlanthe Inc. which should have brought the application, had they deemed it necessary. Such an application by Motlanthe Inc., it was stated, would be met with the same objection.

[11] It must be borne in mind how the parties find themselves in this situation. I have set out the factual background and the main reason why this application became necessary. When the applicant first presented the bill to the respondents for payment, the respondents insisted that the bill should be taxed. The applicant complied and presented the bill for taxation.

[12] The respondents raised an objection that the applicant did not have the mandate to have acted on behalf of the close corporation, and insisted that the applicant should furnish documents to establish his authority in that regard. It is therefore clear that the only obstacle in the way of taxation of the bill was the applicant establishing his mandate, and nothing else. Paragraph 17 of the objection filed on behalf of the respondents makes this plain:

'Upon receipt of the documentation set out in para 16.1 - 16.4 [the respondents] will reconsider the bill of costs as presented and file their opposition, if any, to the bill of costs.'

[13] From the above, it is clear that the stance taken by the respondents in this application is the third different one. First, it was insistence on taxation (nothing about the authority); and when the taxation requirement was complied with, lack of authority was raised. In this application the respondent have adopted a completely new stance. They have been shifting the goal posts since the impugned bill of costs was presented for taxation.

[14] In my view, the respondents' stance is disingenuous and it is not genuinely raised. It is as untenable and objectionable as their conduct which led to the first application. It is clearly aimed at frustrating the indemnification of the applicant for the costs he incurred in protecting the interests of the close corporation. The

applicant was perfectly entitled to act in terms of section 50 of the Act to interdict the respondents' deplorable and unlawful conduct.

[15] It therefore brooks no debate that he is entitled to be fully indemnified for all the reasonable costs incurred in the first application, which aspect became common cause during the hearing. A party and party bill of costs would obviously not achieve that objective. Only a bill of costs taxed on an attorney and client scale would.

[16] The argument that because there is no costs order sanctioning the taxation of the bill of costs on attorney and client scale is a bar to the taxation of such a bill, is misplaced. Ordinarily, an attorney would submit only a party and party bill to recover costs against the party against whom the court has ordered. An attorney and client bill would ordinarily be agreed upon between the attorney and the client. In the event there is no agreement, the attorney would submit his or her bill for taxation, without any court sanctioning it. In the exceptional circumstances of the case, where the applicant acted on behalf of a legal persona, he is entitled to tax the attorney and client bill of costs to indemnify himself. There is no other mechanism.

[17] During the hearing, I encouraged the parties to adopt a practical approach to the matter. At the risk of repetition, the relief sought by the applicant, and why it became necessary to seek it, must be borne in mind. The taxing master declined to

tax the bill because the respondents objected to the applicant's mandate to bring the application.

[18] The taxing master's decision is the sole reason for the application, and it is that crisp issue I must determine. As stated earlier, it is common cause that the applicant acted in terms of section 50, read with section 42, of the Act to vindicate the interests of the close corporation against the respondents.

[19] A cursory reading of section 50 would reveal that a member of a close corporation acting in terms thereof, does not need minutes and resolutions to do so. Otherwise, the whole purpose of the section would be emasculated and rendered nugatory. But, I do not even have to embark on a detailed analysis of the section in this regard.

[20] The very fact that the application by the applicant brought under that section was successful, in and of itself, places it beyond question that the applicant did have the authority to act on behalf of the close corporation. That the respondents sought to question the applicant's authority after the court had granted the application, is in my view, contrived. It could not have been genuinely raised.

[21] I therefore have no difficulty in granting the declaratory order sought by the applicant, together with the ancillary relief remitting the matter to the taxing master to proceed with the taxation. The respondents would be entitled to there and then raise objection to whatever line items are in the bill. I am however, not inclined to grant the prayer directing the taxing master to tax the bill in accordance with the fee mandate agreement concluded between the applicant and his attorneys. To my mind, I would be unduly encroaching on the discretion of the taxing master.

[22] With regard to costs, the applicant has requested that the respondents should be ordered to pay the costs in their personal capacities. I agree. It would be plainly absurd for the close corporation to pay the costs under the circumstances of the case.

[23] In the result the following order is made:

1. It is declared that the applicant was entitled to instruct Motlanthe Inc. to act on behalf of the first respondent in terms of section 50 of the Close Corporation Act 69 of 1984, in the application under case number 41550/2013;
2. The attorney and client bill of costs between the first respondent and Motlanthe Inc. is remitted to the fourth respondent, the taxing master, for taxation;

3. The second and third respondents are ordered to pay the costs of the application in their personal capacities, jointly and severally, the one paying the other to be absolved.

TM Makgoka
Judge of the High Court

APPEARANCES:

For the Applicant:	AC Botha MV-J Chauke Instructed by: Motlanthe Incorporated, Johannesburg Mushwana Incorporated, Pretoria
For the Second and Third Respondents:	DA Smith SC Instructed by: Waldick Jansen Van Rensburg Inc., Pretoria

No appearance for the First and Fourth Respondents