



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: 2671/2016P
DATE: 7 OCTOBER 2016**

In the matter between:

CANNON SOUTH AFRICA

APPLICANT

and

**THE COMMISSIONER: SOUTH AFRICA
REVENUE CUSTOM AND EXCISE**

RESPONDENT

REVIEW OF TAXATION

MBATHA J:

A. INTRODUCTION

[1] This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court (the Rules).

[2] The applicant in this review was the respondent in the main application whereby the applicant sought out the following order:

- (a) that the applicant's appeal against the respondent's determination of 22 January 2013 (as amended on 20 February 2013) that the applicant's printer cartridge KP 36iP be classified under the tariff code 96.12.10 is upheld and accordingly, the respondent's determination is set aside;
- (b) that appropriate classification for the aforesaid cartridge is 8843.99;
- (c) that the respondent is to pay costs of the application, inclusive of the costs of two counsel; and
- (d) further, and/or alternative relief.

[3] The respondent subsequently filed its answering affidavit to oppose the relief sought by the applicant.

[4] The respondent is dissatisfied with various rulings of the Taxing Master in respect of the Bill of Costs presented on behalf of the State Attorney, Pretoria, which was faxed on 22 February 2016. The Taxing Master was invited to state a case for the decision of the Judge of this court. The respondent (applicant in the main application) also made submissions in terms of Rule 48 (5) (a) of the Rules.

B. PLAINTIFF'S SUBMISSIONS

- [5] 1. That the Taxing Master in respect of Item 42, being disbursement costs for counsel's fees for perusing and considering the application papers and consultation with attorney and legal representative of South African Revenue Services, misdirected herself in disallowing such fees and treated them as attorney and client fees and ruling that counsel would be entitled to an hourly rate of R1 800 per hour;
2. that in respect of Item 31, being a disbursement cost for preparing answering affidavits, settling affidavits, considering/perusing various

documentation received from the South African Revenue Services in order to prepare and preparing the application to strike out, that she misdirected herself by ruling that:

- (a) counsel would be entitled to draft the Answering Affidavit at R450.00 per page;
 - (b) settling affidavits and considering various documentation from representative and legal representative of South African Revenue Services are attorney and client costs; and
 - (c) that for preparing and drafting the application to strike out counsel would be entitled to a drafting rate of R450 per page.
3. In this regard it is submitted that her decision is incorrect, it disregarded factors or principles which were proper for her to consider and that she failed to exercise her discretion properly or at all.

C. STATED CASES BY THE TAXING MASTER

- [6] 1.(a) In respect of Item 42, in brief, she states that counsel should not claim a fee for perusal on an party and party Bill of Costs, counsel is not allowed to claim a separate fee for perusal and reading papers, as such fees form part of his fee on brief on application.
- (b) On the consultation with attorney and legal representative form the South African Revenue Services, she states that the fee was excessive for an hours' consultation. She considered that counsel was Senior Counsel and ruled that a fee for R1 800 for an hour's consultation was excessive as the initial amount of R3 100 was excessive.
- 2.(a) On Item 31 she states that on 13 May 2014 counsel prepared answering affidavits for six hours and charged R18 600. On 14 May 2014 he prepared answering affidavits again for five hours and charged R15 500. The answering affidavit word count came to 1½ page with annexures thereto, which were not drafted by counsel. Counsel was

therefore allowed R3 600 which fee was inclusive of settling papers and disallowed R15 500 which she found to be unreasonable and highly excessive.

- (b) Counsel also prepared an application to strike out, whereby she allowed a page at R450 as the page must consist of a 250 word count. The application to strike out word count amounted to one page. Therefore the amount for drafting was unreasonable and excessive. She ruled that though the application was drafted by counsel instead of the attorney, the word count of 250 words per page should apply.
3. She cited various authorities in support of her rulings and attached the relevant parts of the Bill of Costs that she referred to.

D. THE LAW

- [7] 1. The High Court Rule 70 (3) provides as follows:

‘With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him 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 the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.’

Rule 70 (3) clearly expresses the intention of the Legislature by protecting the interests of the successful litigant in that expenditure reasonably incurred should be reimbursed to him, without overburdening the unsuccessful litigant with unreasonably incurred expenditure.

2. The Taxing Master is vested with a discretion to allow costs necessarily incurred in the litigation. However, a court of law can still interfere with the exercise of the Master's discretion even where exercised properly, where a misrepresentation of the law or a misconception as to the facts and circumstances or as to the practice of the court. See *Wholesalers Limited v Natal Pharmaceutical Society and The Taxing Master*.¹
3. In a party and party Bill of Costs the Taxing Master should apply the tariff. However, Rule 70 (5) provides for a departure from the tariff in the exercise of his discretion in extraordinary or exceptional circumstances where adherence to the tariff would be inequitable. This discretion is not only limited to items on the tariff, but also where there is a *lacuna* in the tariff.
4. In general, fees allowed to counsel are often left at the discretion of the Master. It is trite that the court will not interfere with such exercise of discretion, unless the Taxing Master has acted upon a wrong principle or exercised his discretion in a wrong manner.

E. APPLICATION OF THE LAW TO THE FACTS

- [8] 1. The applicant's submission is that the applicant in the main application set out its case in a founding affidavit with annexures consisting of 4 104 words or 16 statutory pages of 250 words each, plus 36 pages of annexures, totalling 76 A4 pages.

The application was brought to uphold the appeal against the respondent's determination that the applicant's printer cartridge KP 361 iP be classified under Tariff Code 96.12.10 and that the respondent's determination be set aside. It also prayed for an order for the costs of two counsel.

¹ 1937 NPD 418 at page 425

The application was opposed by the respondent. The answering affidavit was drafted by Senior Counsel, consisting of 2 441 words or 9 statutory pages with 8 pages of annexures, in total 27 A4 pages.

The applicant did not file any replying affidavit, it indicated that it wished to withdraw its application. The parties subsequently agreed that the applicant would be liable for counsel's fees only.

2. It is clear from the submissions made by the applicant herein that the litigation involved customs and excise matters and that it dealt with international trade agreements and the determination of duties. This kind of litigation according to the applicant requires expert evidence and is of a technical nature. A Customs Tariff Classification Specialist had to set out how the applicant failed to introduce expert evidence of an extreme technical nature. In light of these submissions this court accepts that the matter was complex to warrant the employment of Senior Counsel.
3. It is trite that in general the discretion of the Taxing Master will not be disturbed unless it is found that he or she did not exercise a proper discretion, for example, by disregarding factors which were proper for him or her to consider or by considering matters which it was improper for him or her to consider, or if he or she has disregarded relevant factors or has had regard to improper factors or by giving a ruling which the court can see no reasonable person would have given. (*Wellworths Bazaars Ltd v Chandler's LTD*²). The courts have also recognised the principle that the court may interfere in those classes of cases where the court is able to form as good an opinion as the Taxing Master and perhaps even a better opinion. (See *Wellworths* above)
4. Having carefully considered all the relevant facts in this review, I have come to the conclusion that, though I have been furnished with the reasons for the exercise of her discretion, it is evident that this was an exceptional case.

² 1947 (4) SA 453 (T) 457 to 458

5. In the light thereof, I find that an exception should be made in respect of this matter for a reconsideration by the Taxing Master due to its complexity, the nature of the litigation and that it was necessary to engage Senior Counsel at an early stage for the attainment of justice. Without usurping the discretion of the Taxing Master I am of the view that the disbursements and the fees were reasonably incurred and she can still exercise the Master's discretion in that regard when she re-taxes the Bill of Costs.

[9] Accordingly, I make the following order:

- (a) The taxation of a Bill of Costs on 22 February 2016 under case no 4449/2014 be and is hereby set aside;
- (b) The Bill of Costs is referred back to the Taxing Master who must tax the Bill of Costs *de novo* on the basis that I have alluded to in the review judgment; and
- (c) Each party to pay its own costs.

MBATHA J

Applicant's Attorneys:

NAIDOO MAHARAJ INC.

141 Problem Mkhize (Cowey) Road

Morningside

Durban

C/O SIVA CHETTY AND COMPANY

378 Langalibalele Street

Pietermaritzburg

Respondent's Attorneys:

STATE ATTORNEY – PRETORIA

391 Anton Lembede Steet

6th Floor

Metropolitan Building

Durban