

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1227/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE	20/05/2024
SIGNATURE	[REDACTED]

In the matter between:

DHR Consulting (Pty) Ltd

Applicant

And

Bonita Rodrigues Gomes

1st Respondent

Erasmus Group Holdings(Pty) Ltd

2nd Respondent

Paledi Super Spar & Tops

3rd Respondent

Thornhill Super Spar & Tops

4th Respondent

Istores Messina (Pty) Ltd

5th Respondent

Cross Spar & Tops

6th Respondent

Messina Super Spar Nasionale Weg

7th Respondent

Taximark (Pty) Ltd t/a Kathu Super Spar & Tops

8th Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be the 20th May 2024

JUDGEMENT

1. This is what I refer to as the costs scale dispute. While the parties are in agreement that the applicant is to be ordered to pay the costs, they are in dispute as to whether this must be based on party and party scale or on attorney and client scale.¹ In the heads of argument, the respondents states that should the court not be willing to grant a costs order as between attorney and own client , the respondents should be

¹ The heads of argument served on behalf of the respondents states the only real issues are costs and scale and that only wasted costs on party and party scale was tendered by the applicant - paragraph 86

granted attorney and client's scale to compensate for the costs they were put through without any good reason.²

2. On urgent basis, the applicant issued the application to interdict and restrain the first respondent from what the applicant regarded as breaching the confidentiality and restrained of trade agreement for the remainder of the restraint period. It also sought to interdict the second to the eighth respondents from engaging the first respondent as employee or consultant for the balance of the restrained period. The first respondent, employed in 2014, resigned from her employment with the applicant on the 25th October 2022. The last working day was the 25th November 2022
3. On the 20th October 2023 the applicant served the withdrawal notice for the application set down for the following day of the 21st October 2023. In its heads of argument, the applicant states that it served two withdrawal notices. One withdrawal notice tendered the costs on party and party scale. Another one tendered the costs in the application. In relevant part, the costs in the application withdrawal notice reads: *"the Applicant hereby withdraws its application, against the Respondents, which application is enrolled for 21 February 2023, cost in this Application."*
4. On the 21st October 2023 the parties' legal representatives appeared in court when the urgent application was withdrawn by way of the court. By agreement between the parties, the applicant's application was withdrawn with the costs reserved for later argument on the normal motion court roll. The court appearance was at the parties' costs and having received two conflicting notices, one states that the costs will be in the application, the respondents' legal represented cannot be faulted for

² Paragraph 92

having attended the hearing on the 21st February 2023 to protect their clients' interest. The incurred costs need to be recovered and it is unfair for these costs to be recovered from the respondents' pockets.

5. Apart from differing on the scale of costs the applicant is supposed to use to pay the respondents' costs, the parties also differ as to whether the costs should be beyond the 20th February 2023. The applicant argues for the party and party scale up the 20th February 2023 and that the respondent should be ordered to pay the applicant's costs on party and party scale after the 20th February 2023 to the 26th February 2024. The respondents argue for attorney and own client's scale, alternatively attorney and client's scale beyond the 20th February 2023 up to the 26th February 2024.
6. In applicant's heads of arguments, it is stated that it must be assumed that the reason it withdrew the application and tendered the costs was its acceptance that it would not be successful on the merits. This acceptance must have come after the service of the respondents' opposing papers, which the applicant does not say contained anything new it did not know.
7. The application having been withdrawn, I do not intend to deal with the merits of this application. Whether the application was urgent or not cannot be decided after it was withdrawn. The court order only reserved the question of costs.

8. The awarding of the costs is within the discretion of the court and they generally follow the results. The principle that generally, the costs follow the results does not apply to frivolous and vexatious litigation.³
9. The primary purpose of a costs order is to minimize the extent to which a successful litigant will be out of pocket as a result of litigation such party should not have to endure.⁴
10. The costs are awarded to a successful party in order to indemnify that party for the expense to which it has been put through having been unjustly compelled either to initiate or defend a litigation. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity but that does not affect the principle on which it is based. Speaking generally, only amounts which the suitor has paid, or become liable to pay in connection with the due presentment of the case are recoverable as costs.⁵ This dictum reflects the normality that even a successful party will find that some expenses remains to rest where they fall.⁶
11. The costs may be based on party and party or attorney and client scale.

3 Mkhathswa & Others v Mkhathswa & 6 Others (2021) ZACC 15- paragraphs 17 and 18

⁴ Mkhathswa & Others v Mkhathswa & 6 Others (2021) ZACC 15 – paragraph 20.

⁵ Texas Co(SA) Ltd v Cape Town Municipality 1926 AD 467 at 488.

⁶ Bowman NO v Avraamides & Another 1991(1) SA 92(W) –paragraph 94

The tariff in Rule 70 is designed for and intended for the taxation of party and party costs.⁷ When function as a court, a court must operate on the assumption that Rule 70(3) does achieve what it sets out to achieve, being that a party to whom costs are awarded is afforded "full indemnity" for every expenditure reasonably incurred by such a party in relation its claim or defence.⁸

12. Rule 70(3) prescribes that the objective of the defeated adversary paying the successful litigant's costs is to provide a "full indemnity" to the successful litigant. The tariff is deemed to do so even if common sense reveals the contrary. The payment by a client to the client's own attorney is not aimed at a "full indemnity", but rather is aimed at payment of a reasonable recompense for services rendered.⁹

13. Attorney and client costs are those costs which an attorney will recover from his or her client in respect of professional services rendered and disbursements made on behalf of his or her client in the conduct of litigation.¹⁰ A client is liable to his or her attorney to pay these costs and such liability is not dependent upon the award of costs by court.¹¹ The award of attorney and own client costs had to be seen as an attempt by a court to go one step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation. Taxation would in such cases be liberal

⁷ Coetzee v Taxing Master, South Gauteng High Court & Another (2017) ZAGPJHC 175; 2013 (1) SA 74(GSJ- paragraphs 17, 18 and 25

⁸ Bowman NO v Avraamides & Another 1991(1) SA 92(W)-paragraph 95

⁹ Coetzee v Taxing Master, South Gauteng High Court & Another (2017) ZAGPJHC 175; 2013 (1) SA 74(GSJ- par 10

¹⁰ Bowman v Avraamides 1991(1) SA 92(W).

¹¹ Erasmus Superior Court Practice : Service 27, 2007- page B1-428.

but would not sanction excessive or unreasonable costs. It is an extraordinary order which would not be made without good reason.¹²

14. The scale of attorney and client is extra ordinary and penal in nature. It should be awarded where there is blameworthy conduct worthy of censure on the part of the guilty party such as fraudulent, dishonest, vexation conduct that amount to an abuse of court processes.¹³ The costs on attorney and client scale may also be awarded to ensure more effectively than it can do by means of a judgement for party and party costs that the successful party will not be out of pocket in respect of the expense caused by the litigation . They may also be used by the courts to mark its disapproval of the conduct which should be frowned upon and where such cost order is justified having regard to the particular circumstances of the matter.¹⁴ They may not only be meant to punish a losing party, but may be justified where, in the view of the court, there are circumstances which gave rise to the litigation, or arising out of the conduct of a losing party, which would render it just, equitable and necessary to ensure that a successful party is not out of pocket.¹⁵

¹² Sentrachim Ltd v Prinsloo (1996) ZASCA 133; 1997(2) SA 1(SCA)

¹³ Plastic Converters of SA on behalf of members v National Union of Metal Workers of SA (2016) ZALAC 39, (2016) 37 ILJ 2815(LAC); Public Protector v SA Reserve Bank (2019) ZACC 29[2019(6)SA 253(CC)- par 8

¹⁴ Erasmus Superior Court Practice: Service 27, 2007- page B1-428A

¹⁵ The Law Society of the Cape of Good Hope v Sizwe : Eastern Cape, Grahamstown Case 994/2012(16/06/2013)- par 4; Nel v Waterberg Landbouers Koperatiewe 1946 AD 597 at 607; Fidelity Bank Ltd v Three Women (Pty) Ltd & Others (1996) 4 All SA 368(W)

15. At times it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist a successful litigant in recouping often substantial expenses.¹⁶
16. The tariff party and party is used as a guide and not binding on the taxing master on the taxation of attorney and own client costs, with the result that that tariff cannot be a default fee rate in respect of attorney and own client costs.¹⁷
17. The applicant submits that the respondents will be “fully indemnified” if the costs are awarded on party and party scale up until the 20th February 2023. .
18. Relying on Texas case¹⁸, the applicant submits that the respondents will be “fully indemnified” if the costs are awarded on party and party scale up until the 20th February 2023. It submits that the aim of the party and party scale costs is to indemnify the successful party against cost incurred in the litigation. This submission is made in the face of the applicant’s concession that the withdrawal of the urgent application was on the acceptance that it could not sustain the merits of the application.
19. Although the awarding of party and party costs is aimed at giving “full indemnity” to the successful party, the taxation in terms of Rule 70(3) does not necessarily

¹⁶ Mkhathswa & Others v Mkhathswa & 6 Others (2021) ZACC 15- par 20

¹⁷ Coetzee v Taxing Master, South Gauteng High Court & Another (2017) ZAGPJHC 175; 2013 (1) SA 74(GSJ- par 20

¹⁸ Texas Co(SA) Ltd v Cape Town Municipality 1926 AD 467 par 488

achieve that.¹⁹ The function of a taxed bill to be paid by a defeated adversary and the taxed bill to be paid by a client for services rendered is not identical. Rule 70(3) prescribes that the objective of the defeated adversary paying the successful litigant's costs is to provide a "full indemnity" to the successful litigant. The tariff is deemed to do so even if common sense reveals the contrary. The payment by a client to the client's own attorney is not aimed at a "full indemnity", but rather is aimed at payment of a reasonable recompense for services rendered.²⁰

20. In terms of Rule 70(5), the tariff is the default position, which may be departed from under the conditions prescribed, being extraordinary or exceptional cases. The function of a taxed bill to be paid by a defeated adversary and the taxed bill to be paid by a client for services rendered is not identical. Rule 70(3) prescribes that the objective of the defeated adversary paying the successful litigant's costs is to provide a "full indemnity" to the successful litigant. The tariff is deemed to do so even if common sense reveals the contrary. The payment by a client to the client's own attorney is not aimed at a "full indemnity", but rather is aimed at payment of a reasonable recompense for services rendered. In addition, the taxing master must further find that a failure to depart from the tariff would result in an inequity. Fairness is the golden thread, both to the debtor client and the creditor attorney.²¹

¹⁹ Mkhathshwa & Others v Mkhathshwa & 6 Others (2021) ZACC 15- paragraph 20; Bowman NO v Avraamides & Another 1991(1) SA 92(W)

²⁰ Coetzee v Taxing Master, South Gauteng High Court & Another (2017) ZAGPJHC 175; 2013 (1) SA 74(GSJ- par 10

²¹ Coetzee v Taxing Master , South Gauteng High Court & Another (2017) ZAGPJHC 175; 2013 (1) SA 74(GSJ- par 14

21. My view is that while the awarded scale is intended to guide the taxing master with the regard to the items to be allowed on the parties' presented bill, the scale does not take away the taxing master's discretion to allow or disallow any item on the statement of a bill. The court order guides taxing master rather than take away her discretion with the result that the taxing master may disallow an item a party regard as being allowed by the court order. The standard used by the taxing to allow or disallow the fees is whether they are reasonable or not.²²
22. My view is that because party and party scale costs are prescribed, the awarding of costs on party and party scale places an innocent party at the risk of being put out of pocket despite its innocence in the litigation. This is because while the taxing master has greater discretion in allowing claimed items where the costs have been granted on attorney and client's scale, the taxing master's discretion is limited to the set out scale where the order is on party and party scale. The limitation is that the costs must be reasonable.
23. Unless by agreement, the costs tendered a day before the hearing cannot save the party tendering the costs incurred by its innocent opponent. This is because by that time, it is too late for the innocent opponent to save those costs by releasing its legal team.
24. The granting of costs on party and party scale comes with the risk that the respondents may not recover all reasonable costs, although proved to have been

²² Mkuyana v Road Accident Fund (2020) ZAECHC 73 ; 2020(6) SA 405(ECG) (Grahamstown) -paragraph 24.

incurred, but which fall outside the parameters of party and party scale. This is because although party and party scale is intended to indemnify the successful party, it does not always achieve this goal. The respondents do not deserve to be put at that kind of risk because of the applicant's conduct.

25. Other than what appears from the heads of argument filed on its behalf that the withdrawal of the urgent application is on the acceptance that it would not sustain the claim on merits, there is no express explanation either on the withdrawal notices or the pleadings why there was withdrawal on the delivery of the respondents' responding papers. It does not appear that the respondents raised anything new the applicant learnt for first time in the responding papers. The applicant knew or must have known that when it issued the urgent application that it would not be successful on the merits. It is thus difficult to avoid the conclusion that knowing the strength of its case, the applicant abused the court processes to interdict the respondents. Abuse of court process is one of the basis to justify attorney and client cost order.

26. The granting of attorney and client costs does not sanction excessive and unreasonable costs.

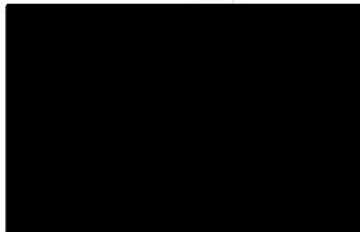
27. The applicant tender of the costs on the 20th February 2023 does not make any difference. The tender was based on party and party scale. I interpret costs in the application to mean costs in the cause, which put the respondents at risk of the costs at the end of the proceedings.

28. The awarding of the costs on the party and party scale puts the respondents in unnecessary cost risk.

29. The applicant is to be directed to pay the respondents' costs on attorney and client scale. This is not a sanction of excessive or unreasonable cost

Order

- (a) The applicant is ordered to pay the respondents costs on attorney and client's scale up to the 26th February 2024, including the costs of the 21st February 2024
- (b) The costs will include the costs of employment of two counsels, where employed.



LEDWABA AJ
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT : Adv M Bresler :
INSTRUCTED BY: Ehlers Law Incorporated

Unit 7 Pro Park
29 Bendor Drive
POLOKWANE

FOR THE RESPONDENTS : Adv M Snyman SC
Adv N Nortje

INSTRUCTED BY : ML Schoeman
C/O Rheeder Attorneys

56A Hoog Street
POLOKWANE

DATE OF HEARING : 26 February 2024

DATE OF JUDGEMENT : 20 May 2024

POLOKWANE HIGH COURT