NHLAPO v TAXING OFFICER, MAGISTRATE'S COURT, JOHANNESBURG, AND ANOTHER

WITWATERSRAND LOCAL DIVISION

ZULMAN J

1992 May 21, 22

Magistrate's court—Civil proceedings—Costs—Taxation of—Party and party costs—No summons issued—Such bill may be taxed in magistrate's court—Rule 33(22) of Magistrates' Courts Rules providing machinery for such taxation— Magistrates' Courts Act 32 of 1944, s 80(4).

Costs—Taxation of—Pre-litigation expenses in action for damages for bodily injuries under provisions of Multilateral Motor Vehicle Accidents Fund Act 93 of 1989—Item 1 of Part III of Table A of Annexure 2 to Magistrates' Courts Rules—Such expenses allowable.

The applicant's attorney had attended to a third party claim on behalf of the applicant. After taking instructions and obtaining the necessary authorisation and documentation, the attorney prepared a party and party bill of costs, which was lodged with the insurance company concerned as part of a claim in accordance with the provisions of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. The insurance company made an offer of settlement to the applicant and also agreed to pay costs either as agreed or taxed. The applicant accepted the offer and signed the discharge form, which provided for costs 'to be taxed or agreed on a magistrate's court defended actions scale . . .'. The duly prepared bill of costs was thereafter presented to the insurance company who responded with the request that the bill of costs be taxed. A notice of taxation was prepared by the applicant's attorney but when applicant's attorney attended on the taxation he was advised by the taxing mistress that she would not allow anything more on the bill other than the sum of R160 as provided for in item 1 of Magistrates' Courts tariff for defended actions, ie an all-inclusive fee for taking instructions with no allowance to be made for 'pre-litigation' costs. The applicant accordingly brought the instant application in which the fundamental issues were, firstly, whether a bill of costs as between party and party can be taxed in the magistrate's court where a matter is settled without a summons being issued and, secondly, whether 'pre-litigation expenses' can be allowed in view of the provisions of item 1 of Part III of Table A to Annexure 2 to the Magistrates' Courts Rules, which provided for fees on two scales for 'instructions to sue or defend . . . perusal of all documentation and consideration of merits and all necessary consultations to issue summons'.

Held, as regards the first question, that upon a proper interpretation of Rule 33(22) of the Magistrates' Courts Rules, as well as a consideration of s 80(4) of the Magistrates' Courts Act 32 of 1944, that such costs could be taxed in the magistrate's court and that Rule 33(22) provided the machinery for the taxation of such costs; and s 80(4) of the Magistrates' Courts Act 32 of 1944 was further support for such a conclusion.

Held, further, as regards the second question, that if regard was had to the underlying intention of the Legislature in regard to third party claims and in particular in regard to the taxation of costs in relation thereto, viz to encourage early settlement of disputes, that it would frustrate such object to deprive parties of the ability to have costs taxed in the magistrate's court.

Held, further, that the items listed in the draft bill in the instant case were clearly items which fell within the compass of pre-litigation expenses and were therefore items which were properly taxable by the taxing master/mistress.

Held, accordingly, that the application should be granted.

Application for a declaratory order and an order directing the taxing mistress/master of a magistrate's court to tax a bill of costs. The facts appear from the reasons for judgment.

M Nowitz for the applicant.

No appearance for the respondents.

Cur adv vult.

Postea (22 May 1992).

Zulman J: The applicant seeks an order in the following terms:

'1. Declaring that the taxing mistress/master, magistrate's court, Johannesburg (hereinafter referred to as the first respondent) is authorised to tax the bill of costs constituting annexure "D" to the founding affidavit.
2. Directing the first respondent to tax the bill of costs constituting annexure "D" to the founding affidavit.
3. Directing that items 2–24 of annexure "D" to the founding affidavit be taxed as pre-litigation expenses on the appropriate magistrate's court scale and as per the relevant magistrates' courts tariff as separate items to item 1 of annexure "D".'

The application is not opposed by the two respondents, who are respectively the taxing master/mistress of the magistrate's court, Johannesburg and the chief civil magistrate, Johannesburg, who abide the decision of the Court.

The second respondent has, however, placed before the Court a useful affidavit wherein he sets out the essence of the problem in the matter and the possible difficulties in the way of granting the relief sought by the applicant. As is pointed out by the second respondent in his affidavit, the aspects raised in the application are of considerable importance to his office and it would appear that the problem which is raised in the application arises on a fairly regular basis. The second respondent therefore suggests that a judgment of the Supreme Court would assist in resolving the present uncertainty which apparently pertains in the magistrate's court. I have been assisted in my task by useful heads of argument prepared by Mr *Nowitz* who appears for the applicant before me, and the Court is indebted to him for his assistance.

The facts giving rise to this application are briefly as follows:

On 24 November 1989 the applicant's attorney was instructed by the applicant to attend to a third party claim arising out of an accident which had occurred on that day in Katlehong involving the applicant's grandchild. After taking instructions and obtaining the necessary authorisations and documentation, the attorney prepared a party and party bill of costs. (This bill is annexure D to the papers before me and is the document which is referred to in the applicant's notice of motion.) This bill of costs was lodged with Fedgen Insurance Ltd ('Fedgen') as a part of a claim in accordance with the provisions of the Multi-lateral Motor Vehicle Accidents Fund Act 93 of 1989. The insurance company made an offer to the applicant on 5 March 1991 to settle her claim in a sum of some R8 000 and also agreed to pay costs either as agreed or taxed. (The precise terms of the

offer made by the insurance company are set out in a letter which is annexure B to the founding affidavit.) On 17 September 1991 the applicant accepted the offer set forth in the letter and signed a discharge form drawn by the insurance company in the customary form. The discharge form provided for costs 'to be taxed or agreed on a magistrate's court defended actions scale A/B/C bill'. The duly prepared bill of costs which, as I previously mentioned, is annexure D to the founding affidavit, was then presented to Fedgen on 31 October 1991 for its consideration. Fedgen responded with the request that the bill of costs be taxed. Accordingly a notice of taxation was prepared by the applicant's attorney and the notice of taxation together with the bill of costs constituting annexure D were served on Fedgen on 9 January 1992.

A case number was allocated by the clerk of the court in the magistrate's court to the matter and the bill of costs was set down for taxation on 20 January 1992. When the attorney attended on the taxation he was advised by the taxing mistress (the first respondent) that she would not allow anything more on the bill other than the sum of R160 as provided for in item 1 of the magistrates' courts tariff III for defended actions, ie an all-inclusive fee for taking instructions with no allowance to be made for 'pre-litigation' costs. The attorney then pointed out to the first respondent that in fact no summons had been issued in the matter, that costs were settled by consent and were to be paid as taxed or agreed and that both she and her predecessor had previously taxed similar bills of costs where an insurance company had agreed to pay taxed costs on the appropriate defended scale, without limiting the 'pre-litigation' costs contained in such bill of costs to the sum of R160 as provided for in item 1 of the magistrates' courts tariff III for defended actions.

The first respondent, after listening to the attorney's representations, advised that as far as she was concerned the magistrates' courts tariff made no provision for 'pre-litigation' costs. She requested the attorney to return to her office later in the day when she undertook to hand down a further ruling.

An articled clerk in the employ of the attorney then attended on the first respondent, who advised the articled clerk that she had no authority to tax the bill. She made the following endorsement in manuscript on the bill which was presented:

'Op die 20/1/92 is taksasie bygewoon deur mnr Montso. Ek het hom meegedeel dat ek nie "pre-litigation" koste kan takseer nie op 'n party en party skaal nie, daar is geen voorsiening in die reëls nie.
R Koen'

When the clerk advised the applicant's attorney of the refusal to tax the bill in question, he telephoned the second respondent who, as I have previously mentioned, is the chief civil magistrate, and made an appointment to discuss the matter with him. After making representations at such meeting, the attorney was asked to put the representations in writing, which he duly did.

On 30 January 1992 a reply was received by the attorney from the chief civil magistrate in which he, in effect, supported the refusal of the taxing mistress to tax the bill of costs in question. In his reply he also set out

certain reasons as to why he had taken that view. He also referred to an unreported decision by the name of *Mhlatuza Mashinini* which he contended did not support a submission that the clerk of the court may tax a bill such as that under consideration and also referred to the fact that he had discussed the matter with a Mr Honey, who is the author of a book entitled *MVA Practice* and that Mr Honey expressed the opinion that whether bills of the kind in question could be taxed or not was not a new problem but whether there was authority to do so was problematical.

In the face of all of this the applicant then decided to bring the application which is before this Court. It would appear that when the matter first came before this Court the learned presiding Judge considered that it was necessary to give notice of the application to the insurance company in question. This was duly done. On 12 May 1992 the insurance company wrote a letter to the applicant's attorneys, the effect of which was that it had no desire to be joined as a party in the application and that they would abide the decision of the Court.

The application raises two fundamental issues, namely:

1. Whether a bill of costs as between party and party can be taxed in the magistrate's court where a matter is settled without a summons being issued.
2. Whether 'pre-litigation expenses' can be allowed in view of the provisions of item 1 Part III of Table A to the Magistrates' Courts Rules.

Rule 33(22) seems to me to be of direct relevance to the problem raised in this application. This Rule was added to the rules by Government Notice R1139 of 1982. It provides as follows:

'If a party consents to pay the costs of another party, the clerk of the court shall, in the absence of an order of the court, tax such costs, as if they had been awarded by the court.'

It is significant, in my view, that the Rule makes provision for a situation which is to obtain 'in the absence of an order of court'. The absence of an order of court to my mind suggests the absence, in most cases, of any litigation, although it is possible for there to have been litigation which terminated without an order of court requiring taxation, but that would not be the normal case. The normal case where there is no order of court is one where there is no litigation in the sense of a summons being issued.

Secondly, the Rule, as was pointed out by counsel, uses the word 'shall' as opposed to the word 'may' and this indicates, in the context of the Rule, the fact that the provision is a peremptory one and not a discretionary one. In this regard reference may be made to the discussion of the use of the word 'may' as opposed to the word 'shall' in Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 6th ed at 836–7, as also in Steyn *Die Uitleg van Wette* 5th ed at 57–63.

Furthermore, it seems to me that subrule (22) of Rule 33, unlike the 21 subrules which precede it, is one which deals with the situation where no summons has been issued and/or where there has been no order of court. This is so since if one looks at the other subrules of Rule 33, one observes, for example, that in Rule 33(1) provision is made for a court giving judgment or making an order, including an adjournment or amendment,

also supports this principle. It was held in that case documents perused at the stage of taking instructions to sue are not necessarily incorporated in the instructions to sue and that it is a misdirection for the clerk of the court simply to disallow such perusal charge. The approach of the court should be to consider and allow the appropriate charge for instructions to sue and summons and then to consider whether, at that stage in the action, the documents in question were necessarily perused and an opinion and a conclusion reached to allow the associated charge. Similarly, the case of *Granite Investments (Pty) Ltd v Boshoff* 1978 (2) SA 340 (T), particularly at 346H, is supportive of the proposition previously advanced in that the learned Judge there (Van Reenen J) held that:

'The taking of instructions for which a fee is allowed under item 1 cannot in all cases include a perusal of all necessary documents.'

The unreported decision in the *Mashinini* case, to which I have previously referred, is further support for the proposition that the type of costs to which reference is made in this matter are indeed taxable and allowable even if they are pre-litigation costs, since in that case it was held that the drawing of a preliminary statement on the same day as an affidavit was prepared was allowable. In all of these circumstances I have come to the conclusion that the applicant is entitled to the relief sought by her. An order is accordingly made in terms of paras 1, 2 and 3 of the notice of motion.

Applicant's Attorneys: *Raphael Kurganoff.*

LEVY v FIRST NATIONAL BANK LTD

WITWATERSRAND LOCAL DIVISION

BLIEDEN J

1992 September 2, 23

Mortgage—Mortgage bond—Interest on debt—When claimable—Covering surety bond—Bond of R400 000 in respect of all claims which bank had against mortgagor from time to time—Distinction drawn between amount due and interest thereon, such interest accruing on 'such sum as may be due', which is limited to R400 000—Purpose of bond clearly to enable bank to acquire security for moneys owed to it or to be owed to it and bond reflecting accessory contingent obligation on part of mortgagor —Debt only payable upon bank making demand on mortgagor —Mortgagor liability accordingly conditional—Debt due sum owing when demand made and interest only chargeable when amount claimed and not before.

The applicant sought an order directing the respondent bank to pay to her a sum of R376 039,82 plus interest. She claimed that the respondent had been overpaid by the said amount by the transferring attorneys when a property belonging to her, which had been mortgaged to the respondent, was sold. The bond in question was a covering surety bond and the amount secured was a sum of R400 000 'howsoever arising from whatsoever causes'. In the event of any default the respondent was 'entitled forthwith to consider the amount of the mortgagor's indebtedness to be legally claimable and due', to 'forthwith proceed with the recovery thereof and . . . to have the mortgaged property declared executable for the full amount of (the) bond, or for such sum as may be due, and the interest to accrue thereon or act otherwise as minded at any time or times (sic)'. Interest was to be reckoned 'at the bank's rate current from time to time and . . . be chargeable to the mortgagor's current account'. It was the applicant's case that her liability to the bank was fixed in an amount of not more than R400 000 plus interest from the date on which such amount was payable, and that this meant that interest was to be calculated from the date when the amount of R400 000 or any lesser amount became legally claimable. The bank contended that the applicant's liability was for an amount of R400 000 plus interest on the balance outstanding from time to time calculated from the date of registration of the bond.

Held, that inasmuch as there was no provision for making monthly payments or for any method of repayment, it was plain that the purpose of the registration of the bond was to enable the respondent to acquire security for the moneys owed to it or to be owed to it.

Held, further, that the bond accordingly reflected an accessory contingent obligation on the part of the applicant: the debt was only payable to the respondent on it making a demand on the applicant to do so.

Held, further, that, because the amount only became due when the bank called it up, interest, in the sense that it was payable, only became chargeable from the date on which such amount was claimed.

Held, further, that the provisions of the bond made it clear that a distinction was drawn between the amount drawn and the interest thereon, such interest becoming due only when the debt was due.

Held, further, that another way of looking at the bond document was that it provided security to the respondent for a debt of R400 000, but envisaged that the position would change from time to time: accordingly the applicant's liability was at best for the respondent a conditional one — it might become a debt, but it also might not.

Held, further, that the position was thus that the debt due was the sum owing when the bond was called up, interest being claimable only once there was a debt due, and that it was this interest that was secured by the bond, not interest on the amount which could have been claimed from time to time by the respondent, as contended for by it: if the latter position was correct, then the longer the respondent took to make a claim, the worse off the applicant would be, a situation neither party could have contemplated when the bond was registered.

Held, further, that it was this confusion between the debt due and the debt secured which resulted in the inherent fallacy of the bank's argument. Judgment granted in favour of the applicant.

Application for an order directing the respondent to pay the applicant certain moneys. The facts appear from the reasons for judgment.

J G A Kruger for the applicant.

M D Kuper SC (with him *N N Lazarus*) for the respondent.

Cur adv vult.

Postea (September 23).

and for awarding costs; subrule (2) deals with costs of an application or order or issue raised by 'the pleadings'; Rule 33(8) deals with the situation where 'immediately after the giving of judgment in any contested action' costs can be taxed.

In these circumstances I am of the view that, solely on the basis of a proper interpretation of Rule 33(22), which I repeat was a Rule which was added to the previous Rules which might in fact not have made provision for the situation of costs which are incurred by a party before a summons has been issued, provides for such costs to be dealt with.

There are further indications in my view which support the argument of the applicant that the clerk of the court is indeed empowered to tax such bills of costs. These indications are to be derived from a consideration of s 80(4) of the Magistrates' Courts Act 32 of 1944. This section provides as follows:

'Any person who is liable to pay or who is sued for costs in any civil proceedings in a court otherwise than under an award by the court or under a special agreement, may require that those costs shall be taxed by the clerk of the court as between attorney and client. . . .'

Plainly this section envisages an agreement to pay costs and there is nothing inconsistent in Rule 33(22) with this section. Indeed, a reference to the work of Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* vol I 8th ed at 322, and particularly the cases referred to in footnotes 52 and 53, indicates that a court will even sanction an agreement to pay attorney and client costs. Plainly there must be provision for the taxation of such costs. In my view, Rule 33(22) is the machinery for the taxation of such costs.

If further support is needed for the proposition that the taxing master in the magistrate's court is entitled to tax such bills of costs, one may also refer to art 41 of the agreement enacted by the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. This article provides that:

'Upon acceptance of an amount offered as compensation in terms of art 40 the third party shall be entitled to the agreed party and party costs or taxed party and party costs in respect of the claim concerned.'

As regards the case of *Mhlatuza Mashinini* (case No 5690/91) which is referred to by the second respondent in his letter, to which I have made previous reference, a judgment of Margo AJ in this Court, I am in agreement with the second respondent that this case really does not take the matter any further. This is so since the point in issue before me was never raised or debated by that Court and the Court merely assumed that it had a power to make an order dealing with taxation of a bill of costs where there had been a consent to pay such costs.

Counsel has not been able to find any reported decision where Rule 33(22) has been referred to in these Courts and nor have I in my researches been able to find such a decision. I have accordingly approached the matter in the light of the above principles and on the simple construction of the wording of the Act and have come to the conclusion previously mentioned.

As regards the second question posed, namely whether 'pre-litigation expenses can be allowed in view of the provisions of item 1 Part III of

Table A of Annexure 2 to the Magistrates' Courts Rules', it is in my view necessary to look at that item specifically. (A new Table A was introduced pursuant to an amendment to the Magistrates' Courts Rules and was to become operative on 1 July 1991—*vide* Government Notice R1261 promulgated in *Government Gazette* 13283 of 30 May 1991.) The relevant item now reads as follows:

'1. Instructions to sue or defend or to counterclaim or defend a counterclaim, perusal of all documentation and consideration of merits and all necessary consultations to issue summons.'

There is then provision for fees on two scales (Scale A and Scale B.)

The case of *Van Rooyen v Commercial Union Assurance Co of SA Ltd* 1983 (2) SA 465 (O) provides considerable assistance in regard to defining the policy of the Legislature in regard to third party claims in general and in particular in regard to the taxation of costs in relation thereto. The underlying principle to be gathered from the cases and in my view wholly consistent with the intention of the Legislature, particularly as set forth in the new tariff, in these types of matters is to endeavour, firstly, to encourage persons to come to early settlements of disputes of this nature and, secondly, to endeavour to thereby curtail unnecessary costs and expense. It seems to me that it might well frustrate this purpose if one were to put unnecessary obstacles in the way of parties who seek to settle matters early by depriving them of the ability to have costs taxed in the magistrate's court, which undoubtedly must provide a cheaper method of taxation than obliging parties to have such bills of costs taxed in the Supreme Court. This argument is a further fortification for the view which I have expressed in regard to the first issue but which also has relevance to the second issue, namely the issue of determining whether the item in Part III of Table A embraces what is described 'as pre-litigation expenses'. I have perused the draft bill *in casu* and particularly items 2–24, which are contained therein. It seems to me that they are plainly items which fall within the compass of pre-litigation expenses and are items which, to my mind, are properly taxable by the taxing master. In this regard I might usefully refer to the following remarks of Steyn J in the *Van Rooyen* case *supra*, particularly at 477F–478:

'. . . (C)osts incurred before issue of summons in obtaining evidence relating to the "ephemeral element" of "MVA claims" will, in the great majority of cases where there is no prompt admission of liability by the insurer, be party and party costs, clearly falling within the exception to the "general rule" expounded by Innes CJ in *Brits v Engelbrecht*, and within the class of costs reasonably incurred in relation to such claim and to be allowed on taxation as having been "necessary or proper" in terms of Rule 70(3). This is so also because the policy of the statute (Act 56 of 1972) as well as fairness and practicality require that such evidence be gathered as soon as possible so that the parties can effectively come to grips with the facts of the matter and that, where circumstances permit, compensation can be effected with the least possible delay and expense and even without the necessity of having to issue summons. And the present Rule 70(3), otherwise than in the Transvaal prior to 1952, also clearly permits pre-litigation costs being included in party and party costs in proper cases. See *Jacobs and Ehlers* (*supra* at 153–4).'

The case of *Ex parte Beaver Plant Hire (Pty) Ltd: In re Beaver Plant Hire (Pty) Ltd v Pillay* 1986 (4) SA 355 (N), to which Mr *Nowitz* referred me,