ZEELIE v GENERAL ACCIDENT INSURANCE CO LTD

EASTERN CAPE DIVISION

VAN RENSBURG J, KROON J and BURGER AJ

1992 August 19; November 26

Costs—Party and party—Two sets of attorneys employed—Rule 70(8) of Uniform Rules of Court—Litigant resident in one town but employed in city of seat of Court—Litigant could with equal facility consult attorney where employed as at town where resident—In such circumstances litigant should instruct attorney at seat of Court—Would not be entitled to recover from opponent costs of attorney at town where he resides—Litigant in casu *instructing two sets of attorneys—Attorneys at seat of Court only instructed some two years after attorneys at town of residence instructed—Ordered that bills of costs be taxed on basis that only costs of one set of attorneys recoverable and to allow only such costs of attorneys at town of residence as would have been allowed had they been included in bill of attorneys at seat of Court—Taxing Master not to permit any duplication of costs.*

Where a litigant, who resides in one town but is employed in another which is the seat of the Court, can with equal facility consult an attorney where he is employed as at the place where he resides, he should instruct an attorney in the town/city where the seat of the Court is and where he is employed and he will not be entitled, in terms of Rule 70(8) of the Uniform Rules of Court, to recover from his opponent the costs of instructing a firm of attorneys at the place where he resides.

In the present case, the Court held that the appellant, who had during 1987 instructed attorneys in Uitenhage (where she resided) and, some two-and-a-half years later, attorneys in Port Elizabeth, where she was employed and which was the seat of the Court, was not entitled to recover the costs of both sets of attorneys from the respondent. It was held that she was only entitled to recover the costs of the attorneys at the seat of the Court. The Court held however that such an order would preclude the appellant from recovering some costs which had been necessarily incurred by her Uitenhage attorneys before the Port Elizabeth attorneys had been instructed and some such costs incurred by her Uitenhage attorneys after the Port Elizabeth attorneys had been instructed. The Court accordingly ordered that the appellant should be permitted to recover such items in the bill of costs of her Uitenhage attorneys as would have been allowed on taxation had they been included in her Port Elizabeth attorneys' bill of costs, whether they were incurred before the attorneys in Port Elizabeth were instructed or thereafter. It was ordered, however, that the Taxing Master should not allow any duplication of costs nor any items which would not have been incurred had the appellant instructed her Port Elizabeth attorneys only.

Appeal from a review of the taxation of bills of costs in the South Eastern Cape Local Division (Rein AJ). The facts and the nature of the issues on appeal appear from the judgment of Van Rensburg J.

H J van der Linde for the appellant.

J T Whitehead for the respondent.

Cur adv vult.

Postea (November 26).

Van Rensburg J: The appellant instituted an action in the South Eastern Cape Local Division against the respondent for damages arising out of a motor collision.

At all relevant times the appellant was resident in Uitenhage and was in full-time employment in Port Elizabeth.

The appellant instructed attorneys in Uitenhage, who in turn instructed attorneys at the seat of the Court in Port Elizabeth.

The matter was ultimately settled by the parties and in terms of the settlement the respondent agreed to pay the appellant's taxed costs as between party and party.

On taxation the Taxing Master allowed the costs of both sets of attorneys.

On review of the Taxing Master's decision, Rein AJ ruled that the Taxing Master had erred in allowing the costs of both sets of attorneys.

The present appeal is directed against this decision.

The question of whether the costs of a second attorney should be allowed on taxation is governed by the provisions of Rule 70(8) of the Uniform Rules of Court, which Rule reads as follows:

'Where, in the opinion of the Taxing Master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be renumerated on the basis set out in the tariff for the work necessarily done by him.'

From the provisions of Rule 70(8) it is clear that the necessity, in the opinion of the Taxing Master, of engaging the services of more than one attorney is the criterion which must be satisfied before the costs of more than one attorney will be allowed on taxation. Our Courts have consistently held that this criterion is satisfied where a litigant does not reside or carry on business at the seat of the Court out of which the action is instituted and he engages an attorney who practises at his place of residence or business in addition to an attorney at the seat of the Court. *Human v Van Wijk* 1906 TS 8 at 10; *Policansky Bros v Hermann & Canard* 1911 TPD 319 at 332–3; *Fanels (Pty) Ltd v Simmons NO and Another* 1957 (4) SA 591 (T) at 593A–B; *The Master v Gerber and Another; Thomas v Minister of Law and Order and Others* 1989 (2) SA 659 (E) at 661I–664A; *Schoeman v Schoeman* 1990 (2) SA 37 (E) at 39G–41I; *Sonnenburg v Moima* 1987 (1) SA 571 (T) at 574I–575C.

The reasoning behind permitting a litigant to engage the services of an attorney at his place of residence or business in addition to an attorney at the seat of the Court is explained by Kroon J in *Schoeman's* case *supra* at 42F–H in the following terms:

'As appears from the cases cited above the basis for permitting a litigant to incur, as against the other party, the costs of engaging an additional attorney at the place where he resides or works is that for reasons of pressing convenience it is considered reasonably necessary that he do so. By the same token he is disallowed the costs of engaging an attorney who practises far afield, the basis being that it is considered that in such circumstances he could as well give instructions direct to the attorney at the seat of the Court the corollary of which is that it is not necessary that he engage the other attorney.

On the other hand, it is, in my judgment, not correct to say that in the choice

town where he lives or carries on business. Much would depend on the circumstances of the case and a realistic and common sense approach should be adopted.'

In the present matter we have the situation that the appellant was resident in Uitenhage and was in full-time employment in Port Elizabeth, Port Elizabeth also being the seat of the Court out of which the action was instituted. While it would usually be acceptable for a litigant to instruct an additional attorney at the place where he resides, as the appellant has done in the present matter, this is not an immutable rule. Each case must be decided on its own facts and a common sense approach must be adopted in arriving at a decision. The distinguishing feature between the situation with which we are faced in the present matter and the situation in cases where the authorities have held that a litigant was entitled to instruct an additional attorney at the place where he resides is that in the present matter, although the appellant was not resident at the seat of the Court, she was in full-time employment at the seat of the Court in Port Elizabeth. Had it not been for this fact the situation would have been entirely different.

Counsel for the respondent submitted that where a litigant can with *equal facility* consult an attorney where he is employed as at the place where he resides, then, if he is employed at the seat of the Court, he must instruct an attorney there and would not be entitled to recover from his opponent the costs incurred in instructing a firm of attorneys at the place where he resides. I consider there to be substance in this submission, the emphasis being on whether the litigant can with equal facility consult an attorney at the one place as at the other.

The problem with which the appellant is faced in the present matter is that she erroneously assumed that she was as of right entitled to instruct a firm of attorneys at her place of residence and because of this assumption no attempt was made to show that for reasons of pressing convenience it was reasonably necessary to instruct an attorney at her place of residence, when on the face of it she could with equal facility have instructed an attorney at her place of employment. In the absence of any attempt to show that it was more convenient and reasonably necessary to instruct an attorney at the place where she resides, it cannot be said that she could not with equal facility have consulted an attorney at the seat of the Court. This being so it cannot, in my view, be said that the appellant was entitled to engage the services of a firm of attorneys in Uitenhage in addition to a firm of attorneys in Port Elizabeth. It follows that Rein AJ was correct in holding that the Taxing Master erred in allowing the costs of two firms of attorneys on taxation. The result of this conclusion is that the arguments advanced by counsel for the appellant in support of his contention that the Taxing Master was correct in allowing the costs of both the Port Elizabeth and Uitenhage firms of attorneys on taxation cannot be upheld. The fact that the appellant had been consulting a firm of attorneys in Uitenhage for
tantial period of time before instructing attorneys in Port Elizabeth
ot, in my view, entitle her for that reason to recover the costs of two
of attorneys to the detriment of the respondent. The question is
r she was entitled to instruct a firm of attorneys in Uitenhage and
ver the costs

attorneys in addition to the costs incurred by the employment of a firm of attorneys in Port Elizabeth. I have already expressed the view that she has not made out a case entitling her to the costs of a second firm of attorneys on taxation.

This is, however, not the end of the matter. The effect of the judgment of Rein AJ is that the appellant is precluded from recovering any of the costs whatsoever incurred by employing a firm of attorneys in Uitenhage. To permit the judgment to stand in its present form would, with respect, cause substantial injustice to the appellant. It will be noted from the bill of costs lodged by the appellant's Uitenhage attorneys that the first entry therein is dated 24 August 1987. The first entry in the bill of costs lodged by the appellant's Port Elizabeth attorneys is dated 18 January 1990. It is thus apparent that from 24 August 1987 to 18 January 1990, a period of just short of two-and-a-half years, the appellant was only represented by her Uitenhage attorneys, who during that period did whatever was necessary in connection with her claim against the respondent. It was only from 18 January 1990 that she engaged the services of a second firm of attorneys in Port Elizabeth.

The object of an order for costs, which applies equally to an agreement to pay the costs of an opponent, is stated by Innes CJ in *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488 as follows:

'Costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. 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.'

If the costs of the appellant's Uitenhage attorneys are disallowed entirely, the appellant will be precluded from recovering certain costs which were necessarily incurred by her Uitenhage attorneys in connection with her claim over a period before any instructions had been given to her Port Elizabeth attorneys. She will furthermore be precluded from recovering any costs which might have been necessarily incurred by her Uitenhage attorneys after she had instructed attorneys in Port Elizabeth, which would have been allowed by the Taxing Master on taxation had they been included in the bill of costs of her Port Elizabeth attorneys. The result would be that the respondent's agreement to pay the appellant's taxed party and party costs would not indemnify her in respect of certain costs which were necessarily incurred.

Counsel for the respondent, realising the difficulties which would result were the order of Rein AJ to be permitted to stand in its present form, submitted that the matter should be referred back to the Taxing Master with the instruction that the two bills of costs be taxed as if they were one bill. I consider there to be substance in this submission. The appellant should, in my view, be entitled to recover all such costs as were necessarily incurred by her in instructing attorneys in Uitenhage. To permit her to recover such costs would result in a situation which would be no different from the situation where, for example, a litigant instructs a firm of attorneys at the seat of the Court and later changes to another firm of

for costs would clearly be entitled to recover the costs nece: ily incurred in the employment of both firms of attorneys on a party and party basis.

On this basis the appellant should, in my view, be permitted to recover such items in the bill of costs of her Uitenhage attorneys as she would have been allowed on taxation had they been included in the bill of costs of her Port Elizabeth attorneys, whether they were incurred before attorneys in Port Elizabeth were instructed or thereafter. At the same time, because I have decided that the appellant is not entitled to claim the costs occasioned by the employment of a second firm of attorneys, the Taxing Master, in taxing the two bills of costs on the basis set out by me, should not allow any duplication of costs, nor should he allow any items which would not have been incurred had the appellant instructed her Port Elizabeth attorneys only.

The order which I propose making will have the effect that the appellant has achieved substantial success on appeal. It follows, in my view, that the respondent should be ordered to pay the costs of the appeal.

The appeal is accordingly allowed with costs and the following order is substituted for the order of the Court *a quo*:

(a) The Taxing Master erred in allowing the costs occasioned by the plaintiff employing a second firm of attorneys.

(b) The matter is referred back to the Taxing Master to enable him to tax the two bills of costs on the basis that the plaintiff is only entitled to recover the costs of one firm of attorneys.

(c) In so taxing, the Taxing Master is instructed to allow such items in the bill of costs of the plaintiff's Uitenhage attorneys as she would have been allowed on taxation had they been included in the bill of costs of her Port Elizabeth attorneys, whether they were incurred before attorneys in Port Elizabeth were instructed, or thereafter, subject to the proviso that the Taxing Master is not to permit any duplication of costs, nor is he to permit the plaintiff to recover any items which would not have been incurred had the plaintiff instructed her Port Elizabeth attorneys only.

Kroon J and Burger AJ concurred.

Appellant's Attorneys: *Neville Borman & Botha*. Respondent's Attorneys: *Nettletons*.

VAN DYK v DU TOIT EN 'N ANDER

ORANJE-VRYSTAATSE PROVINSIALE AFDELING

CILLIÉ R

1992 Desember 10

Minderjarige—Onderhoud—Onderhoudsplig van vader—Verval van—Verval van onderhoudsplig op grond van minderjarige se self-onderhoudendheid geskied ipso iure*—Geen hofbevel tot sodanige effek nodig nie—Vader in egskeidingsbevel beveel om onderhoud vir minderjarige kind te betaal—Latere geskil ten aansien van vraag of onderhoudsplig op grond van kind se selfonderhoudendheid verval het of nie—Lasbrief tot uitwinning ten aansien van onderhoud ongeldig.*

Uitwinning—Lasbrief tot uitwinning—Geldigheid van—Afdwingbaarheid van vonnis afhanklik van beslissing van verdere regsprobleem—So 'n vonnis kan nie as basis dien vir lasbrief nie—Lasbrief uitgereik ter afdwinging van vonnis ter betaling van onderhoud vir minderjarige—Geskil tussen partye of minderjarige selfonderhoudend is—Lasbrief ongeldig en tersyde gestel.

Die verval van 'n onderhoudsplig ten aansien van 'n minderjarige kind op grond van die intrede van selfonderhoudendheid geskied *ipso iure* oftewel vanweë regswerking. Geen hofbevel tot sodanige effek is nodig voordat die onderhoudsplig verval nie. Die blote intrede van selfonderhoudendheid bring dit mee.

'n Uitwinningslasbrief kan tersyde gestel word as dit nie verder ondersteun word deur sy *causa* nie. 'n Vonnis waarvan die afdwingbaarheid afhanklik is van die beslissing van 'n verdere regsprobleem is sodanig onseker dat dit nie as basis vir 'n uitwinningslasbrief kan dien nie.

Die applikant en die eerste respondent is van mekaar geskei en die applikant is in die egskeidingsbevel beveel om onderhoud vir sy twee minderjarige kinders te betaal. Nadat een van die kinders begin werk het en 'n salaris verdien het, het die applikant onderhoudsbetalings vir daardie kind gestaak op grond daarvan dat die kind selfonderhoudend was. Die eerste respondente het beweer dat die kind nie selfonderhoudend was nie en het 'n lasbrief tot uitwinning teen die applikant uitgeneem. In 'n aansoek om die tersydestelling van die lasbrief,

Beslis, dat die vraag of die lasbrief nog deur sy *causa* ondersteun was slegs beantwoord kon word na beslissing van die regsprobleem, naamlik of regswerking reeds die applikant se onderhoudsplig laat verval het aldan nie.

Beslis, verder, dat aangesien die afdwingbaarheid van die vonnis waarop die lasbrief uitgereik is onderhewig was aan die beslissing van voormelde regsprobleem, dit nie as basis vir die lasbrief kon dien nie en derhalwe moes die uitwinningslasbrief tersyde gestel word.

Minor—Maintenance—Father duty to maintain—Lapsing of—Lapsing of duty to maintain on the grounds of minor becoming self-supporting occurs ipso iure*—No order of court to that effect necessary—Father ordered in divorce order to pay maintenance for minor child—Dispute subsequently arising as to whether or not duty to pay maintenance had lapsed by reason of minor becoming self-supporting—Warrant of execution in respect of maintenance set aside.*

Execution—Warrant of execution—Validity of—Enforceability of judgment dependent upon decision of further legal issue—Such judgment of Court cannot serve as basis for warrant—Warrant issued in enforcement of order for payment of