

KATRINA GOMASES vs JAN HENDRIK DUVENHAGE

O'LINN, J

1995/02/03

CIVIL PROCEDURE

Review of Taxing Master's taxation of costs in civil action in Magistrate's Court.

HELD 1: A litigant cannot attack the magistrate's order as to costs in the course of a review of the Taxing Master's taxation.

HELD 2: Where a lawyer of the Legal Assistance Centre at Windhoek appears for a litigant at a centre outside Windhoek and only charges his client disbursements in regard to travelling to and accommodation at such place outside Windhoek where the trial takes place, such disbursement should be regarded as "necessary expenses".

HELD 2.1: The phrase in Rule 33(a) - "where in any proceedings it is impossible to obtain the services of a local attorney, he may employ the nearest available or some other attorney..." should be interpreted to mean "a local attorney", "providing the type of services rendered by the attorney appointed". An attorney such as those of the Legal Assistance Centre, who as a matter of course, because of the special nature of such an institution, provides their services to their clients without the usual charges for their professional services and therefore provides services which are not provided by the local attorney in private practice. In such a case, there is no local attorney available providing such services and consequently the rule to employ the local attorney is not applicable.

IN THE HIGH COURT OF NAMIBIA

In the matter between

KATRINA GOMASES

APPLICANT

versus

JAN HENDRIK DUVENHAGE

DEFENDANT

CORAM: O'LINN, J.

Heard on: 1994/10/12

Delivered on: 1995/02/03

JUDGMENT

O'LINN, J: This matter was placed before me at the instance of the applicant/defendant for the purposes of review of the decision of the Keetmanshoop Clerk of the Court acting as Taxing Master as well as the subsequent decision on the review by the Magistrate Mr Christiaans who confirmed the decision of the said Taxing Master.

On 15/3/1994 in the Magistrate's Court at Keetmanshoop, judgment was granted against the applicant/defendant in favour of the respondent/plaintiff. The relevant part of the final paragraph of the judgment read as follows:

"The action based on the actio de pauperie was well-founded. The plaintiff also made out her case that the defendant had been negligent on a

balance of probabilities , the action succeeded and damages as claimed, awarded. Accordingly judgment for 5 000 N\$ plus interest and costs is granted."

(The emphasis is mine.)

In plaintiff's Particulars of Claim the prayer for costs read as follows:

"Costs of suit limited to costs of disbursements."

(The emphasis is mine).

This special order of costs was prayed for because the Legal Assistance Centre, with address 4 Korner Street, Windhoek, sued out the summons as attorney for plaintiff/respondent, and remained the attorney for plaintiff-respondent from the beginning of the action up to the present moment.

It is a notorious fact obviously known to the magistrate presiding at the trial as well as the attorneys Lentin, Botma & van den Heever of Keetmanshoop, acting throughout for the applicant/defendant, that the institution known as the Legal Assistance Centre does not charge their clients the normal legal fees for their professional services to which other legal practitioners are entitled and as a consequence these fees cannot be claimed or recovered from the opposing litigant against whom judgment is granted.

For this reason only "costs of disbursements" were payable by respondent/plaintiff in this case and only "costs of disbursement" were claimed from applicant/defendant.

No appeal was lodged against the trial magistrate's order and that order, including the order as to costs therefore still stands.

The present review is also not a review of the order of the trial magistrate, but only a review of the Taxing Masters taxation and the subsequent confirmation by the magistrate Christiaans on review by him of the Taxing Master's taxation.

The only costs claimed on taxation on behalf of plaintiff was for costs of service of the summons amounting to N\$15, travel to Keetmanshoop and back on 23/11/93 amounting to N\$1 010; travel from Windhoek to Keetmanshoop and back on 15/3/94 amounting to N\$2 340; accommodation at the Canyon Hotel Keetmanshoop amounting to N\$224.

This claim was taxed off by the Taxing Master by N\$1 040 in regard to the second claim for travel between Windhoek and Keetmanshoop.

As taxed off the amounts for travel and accommodation are prima facie reasonable and necessary disbursements, if it can be assumed that it was reasonable and necessary to obtain the services of the Windhoek-based attorneys of the Legal Assistance Centre, rather than local attorneys.

Attorneys for the applicant/defendant however submits as their main point that -

"the Court should have made an order in terms of Rule 33(9) which the Court blatantly failed to do, there was no request made or proof given by the plaintiff's attorney for the appropriate order and in consequence the Court cannot at time of hearing or thereafter, mero motu make such order, and most certainly not the Clerk of the Court at taxation."

The first part of this argument is an attack on the trial magistrate's order and the non-compliance with the rule 33(a) by the trial Court. This argument fails altogether to recognize that no appeal has been lodged against the trial magistrate's order and that order therefore stands for present purposes. Whether or not the trial magistrate's order encompasses costs such as travelling and accommodation, is a different matter altogether.

It is necessary first to analyze the trial magistrate's order. Obviously, the trial magistrate could not have granted more than what was asked by plaintiff/respondent and I am sure that he must have been aware of this fact. Although the words used by him are somewhat ambiguous in the light of the order sought by plaintiff/respondent, it is reasonable in the circumstances to assume that he intended to grant a cost order, limited to "costs of disbursements", as requested by plaintiff. Furthermore, that such "costs of disbursements" by necessary implication, meant reasonable and necessary disbursements including travelling and accommodation expenses, necessitated by the fact that the plaintiff in the interests of both plaintiff and defendant, was entitled to make use of the services of the attorneys of the Legal Assistance Centre based in Windhoek, because they

are the only attorneys who appear for clients who are relatively indigent and for whom they do not charge the normal fees to which other attorneys, such as the so-called "local attorneys" in Keetmanshoop, would normally charge for their professional services.

The reliance placed by the applicants' attorneys on Rule 33(a) appears to be somewhat misplaced and I say so inter alia for the following reasons:

1. The rules of the Magistrate's Court constitute delegated legislation with the same status as regulations.

As such, to be valid, they must inter alia comply with the letter and spirit of the enabling legislation in this case, the Magistrate's Courts Act. Such rules must be reasonable and clear, i.e. not ambiguous. Furthermore, perhaps most important, it must be consistent with the letter and spirit of the supreme law of Namibia, namely the Constitution of Namibia.

It should further be borne in mind that when the aforesaid rules were enacted, the Namibian Constitution and constitutional dispensation did not exist, and neither did institutions such as the Legal Assistance Centre which are aimed at giving effect to the letter and spirit of the Namibian Constitution, particularly those relating to fundamental rights such as article 12, by making legal representation available also to those who cannot afford it.

2. An approach and a rule or the interpretation

of a rule which would penalize an indigent litigant if he or she makes use of the relatively free services of attorneys from the Legal Assistance Centre instead of "local" attorneys charging their normal fees, or which would force such a litigant to abandon his or her cause and to seek no determination of their civil rights in a Court of Law, will infringe particularly article 12(1) (a) and (e) of the Namibian Constitution and the other articles setting out the fundamental human rights of persons.

3. Rule 33(a) as well as 33(5) (a) (i) are at least ambiguous. When interpreting an ambiguous rule, the meaning should be preferred which will sustain its validity rather than the one which will make it ultra vires or unconstitutional or invalid on other grounds.
4. Rule 33(9) must be read in conjunction with the primary or basic rule stated at the very beginning of rule 33 without qualification and without making it subject to any of the subrules. This primary or basic rule reads as follows:

"The Court in giving judgment or making any order, including any adjournment or amendment, may award such costs as may be just ..."

I agree that the general approach should be as stated in the decision of "Die Voorsitter van die Dorpsraad van Schweizer-Reineke v van Zyl, 1968(1) SA 344 (T) at 345, followed in many decisions thereafter, where it was stated:

"As uitgangspunt is dit nodig om in gedagte te hou dat ons te doen het met 'n kosterekening tussen party en party en dat in die algemeen gesproke die bree opset van so 'n kosterekening is om die party aan wie koste toegestaan is ten voile te vergoed vir kostes en uitgawes redelikerwys deur horn aangegaan en volgens die oordeel van die takseermeester nodig is en gepas om reg te laat geskied of om die reg van die partye te beskerm."

See also: "The Civil Practice of the Magistrates Courts in South Africa, " 8th ed., by Erasmus & Loggerenberg, Vol 2, 89.

Again this general approach is even of greater importance today and is supported by the aforesaid provisions of the Namibian Constitution.

In the present case, the plaintiff, probably an indigent person, may not have been in a position to have her civil rights decided in a Court of law, if she could not make use of the services of the Legal Assistance Centre and even if she could not recover travelling and accommodation expenses for her attorneys.

In my view Section 80(1) of the Magistrates Courts Act providing that Taxation of stamps, fees, costs and charges in connection with any civil proceedings in Magistrate's Courts shall, as between party and party, be payable in accordance with the scales prescribed by the rules, is not an obstacle to the implementation of the aforesaid general approach, and the aforesaid basic and primary Rule because Rule 33, subrule 3(a)(1) provides:

"The scale of fees to be taken by attorneys as between party and party shall -

- (i) be that set out in Table A of Annexure 2 in addition to necessary expenses.
(My emphasis).

- 5.1. "Necessary" expenses are nowhere denned in the Act and the rules. In my view, it must be interpreted in the context of the aforesaid basic or primary rule, the aforesaid general approach and the aforesaid provisions of the Namibian Constitution.

On that basis, costs like that allowed by the Taxing Master in his discretion as "necessary" expenses, being in this case travelling and accommodation for the attorney of the Legal Assistance Centre in Windhoek to attend to the trial in Keetmanshoop, were necessary, because without that, the attorney could not have attended Court at Keetmanshoop.

6. If any local attorney or other attorney, not from the Legal Assistance Centre were employed by plaintiff/respondent, the defendant/applicant would have had to pay plaintiff/respondents legal costs, which would probably have amounted to much more than the amount now taxed for travelling and accommodation.
7. The phrase "where in any proceedings it is impossible for a party to obtain the services of a local attorney, he may employ the nearest available or some other attorney ..." should be interpreted to mean "a local attorney" "providing the type of services rendered by the attorney appointed" e.g. an

attorney such as those of the Legal Assistance Centre, who as a matter of course, because of the special nature of such an institution provide their services to their clients without the usual charges for their professional services. Surely, it must have been a notorious and obvious fact to all the interested parties that such "local attorneys" were not available. Furthermore, if proof of such fact was required in terms of Rule 33(a), such proof was provided by the notorious aforesaid facts which must have been common cause at all relevant stages.

8. The available Court record does not show whether the attorneys addressed the Court on the precise form of the cost order. However it can be assumed that the plaintiff would have persisted in judgment for costs limited to costs and disbursements, and that the defendant/respondent would not have objected to the order as prayed because it was more favourable to it than an unlimited order of costs.

It also follows that the trial magistrate must have been aware of this position and must have intended to grant the costs as prayed, being limited to "costs and disbursements" and that these costs by necessary implication, would have included reasonable and necessary travelling and accommodation costs.

If the trial magistrate erred, it was therefore not a matter of substance but of form, in so far as he had failed to express himself clearly in regard to the contents of his order and particularly whether or not travelling expenses were to be allowed as required by rule 33(a).

The attorneys for plaintiff/respondent were also negligent in not ensuring that the correct formulation of the cost order is made in terms of the rules.

The Taxing Master however has a discretion in regard to Rule 33 subrule 5(a) (i) which in my view, he duly exercised.

I agree in substance with the reasons given by the Judicial Officer, Mr Christiaans on review to him.

In the result, the application for review is dismissed and the taxation by the Taxing Master in Keetmanshoop is confirmed.

A handwritten signature in black ink, appearing to read 'B. O'Linn', written over a horizontal line.

O'LINN, JUDGE