REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 16/2016
A 17/2016

In the matter between:

NOTTINGHAM INCORPORATED **APPLICANT**

and

VXK INVESTMENTS THIRTY (PTY) LTD **RESPONDENT**

Neutral citation: *Nottingham Incorporated v VXK Investments Thirty (Pty) Ltd* (A 16/2016 and A 17/2016) [2017] NAHCMD 129 (5 May 2017)

Coram: ANGULA DJP
Delivered to the Registrar on: **5 May 2017**

ORDER

The matter is referred back to the Registrar.

RULING

ANGULA DJP:

Introduction

[1] The issue in dispute in this matter concerns the appropriateness or otherwise of the determination by the Registrar of the amount of security of costs to be furnished by the applicant to the respondent.

[2] The matter was placed before me for a ruling, ostensibly in terms of rule 75(10).

Background

[3] The applicant is a company registered in accordance with the laws of the state of Georgia, United States of America. It instituted liquidation proceedings against the respondents, both being Namibian registered companies.

[4] After the pleadings were closed, the respondents, served a notice on the applicant in terms of rule 59(1) demanding that the applicant furnishes security of costs in the sum of N$250 000 in respect of each respondent. The reason being that the applicant is a *peregrinus* of this court and does not own any unmortgaged immovable property in Namibia.

[5] Applicant's legal practitioners filed a notice terms of rule 59(2) to contest the security amount demanded. The applicant's legal practitioners then issued a notice in which he invited the respondents' legal practitioner to meet at the Registrar's office on 11 May 2016 in order for the registrar to determine the amount of security for costs.

[6] The respondents' legal practitioners failed to turn up at the Registrar's office as invited in the notice, as a result, the Registrar determined the amount of security for costs in absence of the respondents' legal practitioners. He determined that the applicant must furnish security for costs in the sum of N$250 000 in respect of each respondent.

[7] On 1 June 2016, the respondents' legal practitioners filed a notice in terms of rule 75(1) of the Court's Rules. In that notice, the respondents' legal practitioners "*required the taxing master in terms of rule 75(1) to furnish, to the parties, with an allocatur setting out the taxation calculations of the security amount determined*". The respondents' legal practitioners also notified the taxing master that they intended to apply for review of 'taxation of the security determined' by the Registrar.

Issue for determination

[8] The issue for determination in this matter is whether the applicant followed the correct procedure in contesting the determination of security by the Registrar.

[9] Rule 59 deals with the issue of determination of security for costs. The question of furnishing security is a question of practice and not substantive law. In the proceedings instituted by a *pregrinus* against an *incola* the court is entitled to protect the *incola* before it will assist the *pregrinus*[1].

[10] Rule 59(4) provides that if a party from whom security for costs has been demanded or fixed by the Registrar fails to pay the amount, the other party, in this case the respondents, may apply to the managing judge on notice to the other party, in this case the applicant, that such security be given and that the proceedings be stayed until the order is complied with. The security amount is determined without a Bill of Costs being drawn. The rule is silent on what the party who is dissatisfied with the registrar's determination should do, but I think that it stands to reason that such

[1] Herbestein and Van Wisen, 3rd edition, page 245.

party is not without remedy. He or she has the right to apply to court to have the decision of the Registrar reviewed and/or set aside[2].

[11] Rule 75(1) is envisaged for review of taxation of costs where any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master. A dissatisfied party may take steps to have the decision of the taxing master reviewed. A review of taxation under rule 75 is limited to those cases where there was an objection and those instances where the taxing master disallowed an item *mero metu*[3]. In other words, this rule can only be invoked if there is a Bill or Costs and a party is dissatisfied with the decision of the taxing master in respect of the *allocatur* ultimately issued.

[12] It is common cause that the dispute in this matter did not originate from a ruling of the taxing officer but from a determination by the Registrar. The whole issue between the parties has nothing to do with taxation of costs. It is further common cause that no Bill of Costs was prepared.

[13] In my view the applicant's legal practitioner clearly adopted the wrong procedure to contest the determination by the Registrar by issuing a notice in terms of rule 75(1), requesting "the taxing master to furnish him, the parties (with) an *allocatur* of the security amount determined by him". The legal practitioner for the applicant ought to have known that there would be no allocatur available.

[14] Similarly, the written submissions purportly made in terms of rule 75(4) are, in my view, misplaced and do not find application in the context of rule 59. It would appear from case law that, rule 75 does not even apply where there is a bill of cost for taxation but one of the parties had not attended the taxation[4]; or if the party opposing a taxation of a Bill of Costs failed to object when the matter was before the taxing master[5].

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[2] *Pharumela and Another v St. John's Apostolic Faith Mission of SA and Another* 1975 SA (1) 311.
[3] *Mcunu v Southern Insurance Association Ltd* 1977 (2) SA 18 (SE) at 19A.
[4] *Gran-Or (EDMS) BPK v Bevan* 1969 (2) SA 87 (T).
[5] *Daywine Properties (Pty) Ltd v Murphy and Another* 1991 (3) SA 216 (D).

[15] In my view the procedure the applicant's legal practitioner ought to have adopted should have been to have the Registrar's determination reviewed by the court.

[16] The conclusion I have arrived, is that there is no proper application by the applicant before me, to review and to correct or set aside the Registrar's determination.

[17] In the result I make the following order:

The matter is referred back to the Registrar.

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H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	P Erasmus Of Erasmus & Associates, Windhoek
RESPONDENT:	A Harmse Of Fisher, Quarmby & Pfeifer, Windhoek