THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 400/2019 & 782/2019

In the Rule 17 Review of Taxation between:

TADVEST INDUSTRIAL (PTY) LTD	
Formerly known as OLD ABLAND (PTY) LTD	**APPLICANT**

and

ANTHEA HANEKOM	**FIRST RESPONDENT**
STUURMAN HANEKOM	**SECOND RESPONDENT**
THOSE OCCUPYING COTTAGE NO 3,	
TOPSHELL PARK, BADEN POWELL ROAD,	
LYNEDOCH, STELLENBOSCH WITH OR UNDER	
FIRST AND SECOND RESPONDENTS' CONSENT	**THIRD RESPONDENT**
STELLENBOSCH MUNICIPALITY	**FOURTH RESPONDENT**
DEPARTMENT OF RURAL DEVELOPMENT	
AND LAND REFORM	**FIFTH RESPONDENT**

Neutral citation: *Tadvest Industrial (Pty) Ltd and Another v A Hanekom & Others* (400/2019 & 782/2019) [2021] ZASCA 153 (27 October 2021)

Coram: NAVSA ADP

ORDER

The review of taxation is dismissed with costs.

JUDGMENT

NAVSA ADP

[1] Purportedly, this is a review of taxation referred for decision in terms of Rules of this Court. As will soon become apparent it is less about taxation than about extraneous matters.

[2] Two bills of costs were presented to the taxing master for taxation by the attorneys acting for first to third respondents, based on a costs order in their favor by this Court in relation to the dismissal of an application for leave to appeal and a subsequent dismissal of an application for a reconsideration application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013. At the commencement of the taxation process the applicant objected to it on the basis that the aforesaid respondents had, subsequent to the costs orders, concluded an agreement in terms of which they had waived their claims to costs. The respondents objected to the introduction of a written settlement agreement. They also disputed the applicability of the agreement and asserted that the applicant had not complied with its obligations in terms thereof.

[3] It is for present purposes not necessary to have regard to all the details of the extensive provisions of the agreement on which the applicant relied. I record only as much as is necessary to facilitate an understanding of the parties' respective positions. It appears that the litigation leading up to the application for leave to appeal involved the occupation of land. The agreement, in terms of which the respondents allegedly waived their rights, appears to have provided for the applicant to make a substantial

financial contribution to relocating the respondents to alternative accommodation and to pay transfer costs in respect of the land to which they would be relocated. It also allowed for an *ex gratia* payment to the respondents. The agreement recorded that the 'settlement agreement will be in full and final settlement of all the disputes between the parties, and of all causes of action between the parties including any cost orders or accrued costs in proceedings between the parties.' It goes on to record that notwithstanding that clause, the respondents 'do not waive their right to claim costs of the matter in the Land Claims Court under case number 189/20'.

[4] The applicant alleged, before the taxing master, that it had complied with all its obligations and that the respondents were bound by the waiver reflected in the settlement agreement. The applicant also alluded to an agreement for the respondents to set-off their costs order against the amount the applicant would pay in relation to the purchase of the alternative accommodation but that this then gave way to the agreement, in final form, to waive the costs order. Reference was also made by the applicant to correspondence between the parties in relation to negotiations leading up to the settlement agreement.

[5] The applicant, in addition, had raised a further objection, namely, that the respondents' legal representation had been State funded and that the purpose of a costs order is to indemnify a party against litigation expenses, which in the present case had not been incurred, and that only the Department of Land Reform was out of pocket but that costs had not been awarded to it. The applicant submitted that neither the respondents nor their legal representatives were out of pocket. This was not an instance where the legal representatives rendered services for free entitling them to recover costs in terms of the provisions of the Legal Practice Act 28 of 2014, and that in any event they had not complied with the statutory procedure. The applicant also denied that there had been a cession of rights to claim costs. Finally, the applicant submitted that the respondents' legal representatives could not claim costs since costs were not awarded to them. On the strength of all these grounds, the applicants required the taxing master to prepare a stated case.

[6] The first and second respondents insisted, before the taxing master: that they had not waived their rights to claim costs; that the settlement agreement was not

retrospective; and that in any event, it was not a matter for the taxing master to decide. They were adamant that the applicant should take legal measures available to it, beyond the taxation process, if it intended to dispute the validity or enforceability of this Court's costs order. Put differently, the applicant was free to take such legal measures, as advised, to enforce the settlement agreement and the disputes in relation thereto could then be ventilated.

[7] The taxing master considered that the issues raised by the applicant were beyond his remit and proceeded to finalise the taxation of the bill against the applicant's objections.

[8] In its contentions in response to the taxing master's stated case, the applicant denied that it had failed to comply with its obligation in terms of the settlement agreement. The applicant submitted, once again, that it was within the taxing master's 'jurisdiction' to determine whether the legal representatives who sought costs were entitled thereto. He was clothed with the power, so they submitted, to consider the legitimacy of the costs order, viewed against the settlement agreement. The applicant sought an order that the review be upheld and that the taxation be dismissed.

[9] The second and third respondents in their response, raised a primary point *in limine*. They contended that the taxing master has no jurisdiction to entertain a review or appeal against an order of costs by a court and that his authority in relation to costs orders are to be found within the four corners of the applicable rules of court. The function of a taxing master, so the respondents submitted, was to give effect to a costs order not to question it. A taxing master addresses the reasonableness of charges and disbursements. Rule 17(3) entitles a party aggrieved with the ruling of a taxing master to seek a review. A taxing master on the other hand has no power to ignore or amend a costs order. In the present case, the taxing master fulfilled his purpose by taxing the bill.

[10] The respondents raised further '*points in limine'*. First, the same issue was pending in the Constitutional Court. Second, evidence regarding an alleged waiver cannot be introduced by way of a notice of taxation and it cannot be adjudicated by

the taxing master. Last, the applicant failed to adopt an appropriate remedy in relation to its assertions concerning the agreement on which it relied.

[11] The taxing master's report noted that the applicants opposed taxation on the basis referred to above but did not dispute the taxation in relation to any item. The taxing master pointed out that the applicant's insistence that the costs order was in favour of the successful party and not in favour of the attorneys represented by them is without foundation, as in the normal course of events, it is the attorneys for successful parties who submit their bills of costs to be taxed.

[12] The taxing master adopted the position that it was not for him to decide the rights of the parties in relation to pre or post hearing developments. He was adamant that his task was limited to giving effect to this Court's orders in relation to costs. As to the basis on which legal services were rendered to the respondents, that would fall within the jurisdiction of a court to consider, and the same applied to questions concerning settlement agreements and their enforceability. It was not for him to decide whether there had been a waiver of the costs order. The taxing master agreed with the contention of the respondents that it was open to the applicants to have approached a court, assuming there to be sustainable grounds therefor, to preclude the taxation. That was not done.

[13] As far as the taxing master was concerned there were existing court orders which, in his taxation, he gave effect to. He took the view that the application should be dismissed with costs.

[14] It is necessary to record that it appears from enquiries made of the parties by this Court's Registrar, that the questions raised in para 6 above, in relation to respondents' attorneys' entitlement to claim costs, is presently an issue before the taxing master in the Constitutional Court, but not the question of waiver.

[15] I turn to consider whether the taxing master was correct in proceeding to finalise the taxation of the bill of costs. A taxing master does not have jurisdiction in relation to the issues raised by the applicant. It is not for a taxing master to review, reconsider or

amend a costs order. Those are matter beyond his remit. He has no jurisdiction to decide disputed claims of payment or the like.[1]

[16] Rule 17(3) of this Court's rules circumscribes the issue that may be raised on review in the taxation process. A party dissatisfied with a ruling by the taxing master, in relation to an item in a bill of costs that had been objected to or disallowed *mero motu* by a taxing master, is provided an opportunity to seek redress by way of review. It does not provide an opportunity to contest the costs order itself or its enforceability.

[17] The taxing master and the respondents are correct in their view that the taxing master's function is limited to giving effect to the court order. In *President of the Republic of South Africa and Other v Gauteng Lions Rugby Union,* the Constitutional Court put it thus:

'. . . [T]he ultimate object of the exercise of taxation – and hence of a review of taxation – is to determine a reasonable fee to be recovered as between party and party for the work done…'[2]

[18] In *Berman & Fialkov v Lumb* the court held:

'Whilst it may be the duty of a Taxing Master to interpret the effect of an agreement recording an undertaking to pay taxed costs…a decision regarding the validity or otherwise of the agreement in which the obligation to pay the costs that are to be taxed is sourced, in my view, falls outside the ambit of a Taxing Master's powers and functions: it is an aspect that should be decided by the court.'[3]

And further:

'If the Taxing Master in arriving at the conclusion to apply the non-litigious scale of the law society did in fact make a decision on the legality of the agreement . . . he or she clearly acted beyond his competence.'[4]

[19] The respondents also correctly point out that the applicant was free to resort to legal process in relation to the alleged waiver and thus in relation to the enforceability of the costs order. Whether that be by approaching this Court on the strength of *Estate*

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[1] *Lubbe v Borman* 1938 CPD 211.
[2] *President of the Republic of South Africa and Other v Gauteng Lions Rugby Union* and Another [2001] ZACC 5; 2002 (1) BCLR 1 (CC); 2002 (2) SA 64 (CC) para 32. In the present case the applications to which the orders relate were decided without oral argument.
[3] *Berman & Fialkov v Lumb* [2002] ZAWCHC 48; [2002] 4 All SA 432 (C) para 23.
[4] Ibid para 24.

Garlick v Commissioner for Inland Revenue,[5] as suggested by the respondent, or by way of other process. It is not for the taxing master of this Court to advise. The same applies in relation to the questions raised by the applicants set out in paragraph 6 above. The aforesaid conclusions are dispositive and there is no need for exploration of the other point raised by the respondents. The taxing master was correct tto proceed with taxation.

[20] The review of taxation is dismissed with costs.

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M S NAVSA

Acting Deputy President

[5] *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499, where it was held that when a court has made an order of costs, without having heard argument on it, the court is not *functus officio*.

APPEARANCES:

For the applicant:	McIntyre & Van der Post Attorneys, Bloemfontein
Instructed by:	Cluver Markotter Inc, Stellenbosch
For 1st, 2nd and 3rd respondents:	Webbers, Bloemfontein
Instructed by:	JD van der Merwe Attorneys, Stellenbosch.