IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.17/2013
CCA/27/2011

In the matter between:

'MATLHONG MERIAM MOSHEBI & 1381 OTHERS **Appellants**

And

SELECT MANAGEMENT SERVICES **Respondent**

CORAM: SCOTT AP
THRING JA
CLEAVER AJA

HEARD: 7APRIL 2014
DELIVERED: 17 APRIL 2014

SUMMARY

Appeal against a judgment of the High Court which had on review reduced the amount allowed by the Taxing Master for an item in a bill of costs – Reduction challenged on appeal as an interference with Taxing Master's discretion and that reduced amount was an arbitrary amount – principle to be applied when fees claimed for work done for more than one client – amount allowed by High Court reduced further.

JUDGMENT

CLEAVER AJA

[1] This is an appeal against a judgment of the High Court which had on review to it reduced the fee allowed to appellants' attorney by the Taxing Master for taking instructions to defend an application, in a bill of costs presented to him for taxation.

[2] The events which preceded the proceedings which formed the subject matter of the bill of costs are relevant to an understanding of the item in the bill which gave rise to the appeal.

[3] During 2009 the parties were engaged in litigation with each other in which the appellants were successful, with the respondent being

ordered to pay the costs, which were thereafter taxed. The respondent's attorney wished to pay the costs into the trust account of the appellants' attorney and not directly to the appellants' counsel and accordingly wrote to the attorney on 29 July 2011 asking for the banking details of his trust account. It would appear that this letter was ignored in that a writ of execution was issued immediately thereafter for recovery of the costs. This led to an abortive application by the respondent in the High Court to stay execution of the writ, resulting in it being ordered to pay the costs of the application on the scale as between attorney and client. It is in the bill presented to the Taxing Master for the taxation of those costs that the disputed item appears.

[4] The item in question reads:-

> "4/08/11 Taking instructions to oppose the application
> From each client (1st respondents) 414,600.00."

There were 1382 respondents and they were treated as the first respondent in the application to court.

[5] At the taxation of the bill the respondent's attorney's objection to the amount of this item was successful to the extent that the Taxing

Master reduced the amount to M241,850.00. The respondent's attorney was not satisfied with this ruling and in terms of Rule 49 of the Rules of Court required the Taxing Master to state a case in respect of the item for a decision of the court. The case stated by the Taxing Master reads as follows:-

> "Whether it was justifiable in law, for the Taxing Master to allow only M241,859.00 for taking instructions from 1383 respondents on the basis that, the instructions given were similar in respect of each respondent, as opposed to the full sum of M414,600.00, which was based on the ground that, this was the fee actually incurred as an expense in relation to each one of the respondents."

[6] The High Court concluded that only one service had been performed when the attorney took instructions to oppose the application, and that in its view the sum of M241,850.00 was "still excessive for the service." The judge found that an amount not exceeding M30,000.00 should have been allowed and that that figure was to be substituted for the amount allowed by the Taxing Master.

[7] The appeal before us by the appellants is against the finding of the High Court, the submission being that by reducing the amount

allowed by the Taxing Master, the court had interfered with the official's discretion, and also that there was no legal, factual or consensual basis for arriving at the figure of M30,000.00. It was also submitted that the court had erred in not considering the issue of costs.

[8] It is trite that a court may reverse a ruling of a Taxing Master if it is clearly of the view that he was wrong. See *Legal and General Assurance Society Ltd. v Lieberum N.O & Another* 1968(1) SA 473(AD) at 478.

[9] The issue which faced both the Taxing Master and the court *a quo* was what fee was to be allowed for the taking of instructions from multiple clients. This should not have been difficult for both the Taxing Master and the court had been referred to the well known passage in *In re Lubbe 1964*(1) SA 855(T) at 856 C-D which has stood the test for time for nearly 40 years

> "Where an attorney does work in connection with litigation for more than one client the question to be determined is whether one service was performed or more than one service. If separate services are performed for different clients separate fees can be charged, but if one service is performed for more than one client only one fee can be charged. In the case of one service, each client is liable for an *aliquot* share of

> the attorney's fee, and a successful litigant under such circumstance can recover on taxation only an *aliquot* share of the fee against the unsuccessful litigant."

When dealing with a fee charged for a service to multiple litigants the Taxing Master should be careful to establish from the attorney claiming to be entitled to the fee that the service was in fact rendered to each of the litigants. This he can do by reference to the attorney's notes or appropriate correspondence.

[10] The time frame relating to the raising of the fee in question is also relevant in assessing whether more than one fee for taking instructions should have been allowed. The bill of costs reflects that the Notice of Motion in respect of the application was received by the appellants' attorney on 4 August 2011 and that on the same day he took instructions from the 1382 respondents. That alone should have been a red flag to the Taxing Master. It hardly needs to be stated that it would have been impossible to take instructions from so many people on one day, the day on which the attorney also spent time consulting with the second and third respondents in the application.

[11] A further consideration is the nature of the matter in which the fee was claimed. It was not an involved or complicated matter but a simple one in which the defence to the application was that the appellants' legal advisers had given the respondent time to pay the costs and that there was no necessity for the application to stay the execution of the writ. The interests of the 1382 respondents in the application were identical, namely to oppose the application. None of them could add an iota to the details of the opposition, since the arrangements to grant the respondent time to pay the amount of the taxed costs had been made by their legal representatives.

[12] In my view there is no basis on which the Taxing Master could have allowed a fee of M241,850.00. There is no indication in the papers as to how the figure was arrived at, but it may be that the Taxing Master allowed a fee of M175 for taking instructions from each of the 1382 clients. Arithmetically, that would explain how the figure was arrived at. However, that would mean that he accepted that the attorney had taken instructions from each one of his clients, something I have already indicated could not have been possible. If the figure was not

arrived at arithmetically, it is one which was arrived at arbitrarily, which would also not be justifiable.

[13] It is clear that the decision of the court *a quo* to allow a fee of M30,000 for the item was not arrived at on any logical or legal ground and cannot be sustained.

[14] In the respondent's set of contentions in terms of Rule 49 put up to the court *a quo*, it was submitted that the amount claimed should be set aside entirely, alternatively that an amount of M10,000.00 should be allowed. That figure is also an arbitrary one and attracts the same criticism as that leveled against the figure of M30,000,00 determined by the court *a quo*.

[15] Since it is clear that the attorney did not take instructions from each one of the 1382 respondents and also that at best for the attorney only one service was provided, only one fee for taking instructions should have been allowed. The court *a quo* was accordingly correct in coming to this conclusion. That being so, there is no justification for allowing a fee any different from the M400 which the Taxing Master

allowed for taking instructions from each of the second and third respondents in the application. The number of persons making up the first respondent should have no bearing on the matter. The difference between both the amounts allowed by the Taxing Master and by the court *a quo* and the amount which should have been allowed is so great that this court clearly is entitled to intervene and to substitute an appropriate amount for the service.

[16] Counsel for the respondent defended the judgment of the court *a quo* and although the result of the appeal is more favourable to the respondent than the judgment *a quo* there is no reason why the respondent should not be entitled to the costs of the appeal. No order will be made in respect of the costs in the court *a quo*.

[17] The appeal is dismissed with costs and the following order is made:-

> The amount of M30,000.00 allowed by the High Court as a fee for the item in the Bill of Costs of Messrs T. Maieane in Case No. CCA/27/2011 reading:
>
> > "4/08/11 Taking instructions to oppose the application from each client (1st respondents)"

is set aside and M400 is substituted it its place.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

D.G. SCOTT
ACTING PRESIDENT

I agree

W.G. THRING
JUSTICE OF APPEAL

Counsel for the appellant: K.E. Mosito KC

Counsel for the respondent: P.J. Loubser