IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: 6091/2015
Date heard: 13 June 2018
Date delivered: 31 July 2018
Reportable

In the matter between:

ROLAND ATHOL PRICE TROLLIP Applicant

and

THE TAXING MISTRESS OF THE HIGH COURT Respondent

LAWRENCE TROON Defendant

EASTERN CAPE SOCIETY OF ADVOCATES First *Amicus Curiae*

CIRCLE 9 ATTORNEYS ASSOCIATION Second *Amicus Curiae*

JUDGMENT

PLASKET, SMITH AND LOWE JJ:

BACKGROUND

[1] This is a review of a taxation by the taxing mistress of this court (the respondent) in terms of rule 48 of the Uniform Rules. It was referred for hearing by a full court because it raises issues of importance about the taxation of counsel's fees.

[2] The issue before us concerns the regularity of the respondent's decision to tax off half of the fee charged by Mr I Smuts SC in respect of 13 February 2017, a day on which he was briefed on trial. The defendant in the trial did not oppose the taxation and has taken no part in these proceedings.

[3] The action between the plaintiff and the defendant, a damages claim for defamation, was set down for trial on 13 February 2017. One court day before, the defendant filed an application for a postponement. On the day of trial, the matter was postponed by agreement. The defendant tendered the costs of his application for the postponement and the plaintiff's wasted costs. An order was granted at approximately 10h45. Mr Smuts subsequently charged a full first day trial fee.

[4] Before we turn to the central issue, we shall place it in its context by first discussing the purpose of taxation; the discretion of the taxing master; and the proper approach to the taxation of counsel's fees on taxation, with reference in particular to the first day of trial. But first it is necessary to deal with the applications for admission as *amici curiae*.

ADMISSION OF *AMICI CURIAE*

[5] At the hearing of the matter the Eastern Cape Society of Advocates and the Circle 9 Attorneys Association successfully applied to be admitted as *amici curiae*. The applicant consented to their admission and we, being satisfied that they had an interest in the matter and would be of assistance to the court, granted them leave to join the proceedings as *amici curiae.*

[6] On the same day, Mr Ralph Human, a cost consultant carrying on business in Grahamstown, also applied to be admitted as an *amicus curiae.* After hearing submissions by Mr Human, who acted in person, as well as Mr Dugmore who appeared for the applicant, we dismissed Mr Human's application and indicated that the reasons for our ruling would be provided when we give our judgment in respect of the review application. These are the reasons for our ruling.

[7] Mr Human had given notice on 12 June 2018 that he would apply at the hearing of the matter for an order: admitting him as an *amicus curiae,* postponing the matter to a date to be arranged with the Registrar; and directing the Registrar to comply with the provisions of rule 16A of the Uniform Rules. The applicant opposed his application.

[8] Mr Human's application was based on the following averments. He had been a costs consultant in the Eastern Cape since 1985 after having been employed by the Department of Justice as Assistant Registrar and Taxing Master from 1972 to 1985. He asserted that he has represented thousands of litigants over the years and still represents litigants in the preparation of bills of costs, taxation thereof and opposing of taxations. These litigants include disadvantaged members of the community, municipalities, corporations, and government departments. He contended that he is accordingly able to assist the court in the adjudication of the principles involved in this matter.

[9] He said that he only found out about the matter on 6 June 2018 before departing to Cape Town on business. Upon his return from Cape Town on 12 June 2018, he heard that no attorneys association had applied to be admitted as an *amicus curiae* and that only the Eastern Cape Society of Advocates had sought admission as an *amicus curiae.* (By the time the matter was heard, however, that was no longer the case as Circle 9 had applied.

[10] He asserted furthermore that the issue which falls for adjudication in this matter is of substantial interest to various parties who are not before court. These parties are, *inter alia,* government departments, parastatals, the Road Accident Fund and the defendant. He did not represent any of these parties, and not being an admitted attorney or advocate, could not have done so. Despite this, he pleaded for a postponement of the matter so that these bodies could have time to consider whether to intervene in the matter.

[11] Mr Human's submission that the application raised a constitutional issue as contemplated by rule 16A is based on his assertion that the relief sought by the applicant raised an issue of public interest. That this matter may be of public interest

does not mean that it raises a constitutional issue. It does not. We are simply called upon to decide if the respondent applied her mind properly to the quantum of Mr Smuts' fee. Mr Human appears to have confused acting in the public interest as a basis for standing in terms of s 38(*d*) of the Constitution when a right in the bill of rights is infringed or threatened, with the incorrect assumption that the public interest in a matter infuses it with a constitutional dimension. Rule 16A consequently has no application in this matter.

[12] The high water mark of Mr Human's application is his submission that he is in 'a position to assist this Honourable Court to adjudicate on the principle involved in the present matter'. This falls far short of what is required for admission as an *amicus curiae.* He does not state how he will assist us in this regard, does not set out what submissions he would make if admitted as an *amicus curiae* and their relevance, why they would be useful for the court and how they differ from the submissions of other parties. We would in any event have the benefit of opposing arguments by the other two *amici curiae*. We were not convinced that we would have needed Mr Human's assistance to interpret and apply the well-established legal principles implicated in this case. We were accordingly of the view that it would not be in the interest of justice to admit him as *amicus curiae* and dismissed his application.

THE TEST ON A REVIEW OF TAXATION

[13] A C Cilliers in *Law of Costs*[1] states that taxation of costs 'has always been regarded as an integral part of the judicial process' and that the rights and obligations of parties to litigation 'are not finally determined until the costs ordered by the court have been taxed'. Apart from this, taxation also ensures that 'the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of the litigation which resulted in the order for costs'.[2]

[14] These purposes are captured in rule 70(3) which reads as follows:

[1]Para 13.10.
[2]*Mouton & another v Martine* 1968 (4) SA 738 (T) at 742A-B.

'With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[15] The intention of rule 70(3) is to ensure that the ultimate winner of a suit should not have the fruits of victory reduced by having to pay too high a proportion of his or her costs by way of an attorney and client bill. It has also been recognised, on the other hand, that the interests of the loser must be protected and that party should not be oppressed by having to pay an excessive amount of costs. In *Thusi v Minister of Home Affairs & another and 71 other cases*[3] Wallis J held that the indemnity principle is of general application in the field of costs, and that it has not become outdated.[4] We agree. The touchstone is for expenditure to be allowed which has been reasonably and properly incurred.[5]

[16] In *Ocean Commodities Inc & others v Standard Bank of SA Ltd & others*[6] the court restated the test applicable when dealing with a review of taxation as follows:
'This case indicates, I think, that the Court was of the view that the test as formulated by Potgieter JA in the *Legal and General Assurance Society* case *supra* and the statement that the Court will interfere with a ruling of a Taxing Master only if it is satisfied that he was clearly wrong, are merely two ways of saying the same thing. I think, with respect, that it is better to state the test to be that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him, since it indicates somewhat more clearly than does the formulation of the test by Potgieter JA what the test actually involves, *viz* that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is

[3] *Thusi v Minister of Home Affairs & another and 71 other cases* 2011 (2) SA 561 (KZP).
[4] Para 99. See too *Rocky & Witherow (Pty) Ltd v Taxing Master & another* 1970 (1) SA 702 (N) at 704A.
[5] *Nus South Africa (Pty) Ltd v R & E Holdings (Pty) Ltd* 2000 (3) SA 522 (E) at 526G-H.
[6] *Ocean Commodities Inc & others v Standard Bank of SA Ltd & others* 1984 (3) SA 15 (A) at 18E-G. See too *President of the Republic of South Africa & others v Gauteng Lions Rugby Union & another* 2002 (2) SA 64 (CC) para 13.

satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling.'

THE DISCRETION OF THE TAXING MASTER

[17] Cilliers in *Law of Cost*[7] said the following of the discretion vested in a taxing master:

'The discretion vested in the taxing master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words "reasonable" and "in the opinion of the taxing master" that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. The discretion to decide what costs have been necessarily or properly incurred is given to the taxing master and not to the court. It is now a well-established rule that in regard to *quantum*, both as to the qualifying fees for medical expert witnesses, other expert witnesses, and counsel's fees, the decision of the taxing master is a discretionary one.

The taxing master has a discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that he or she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, the decision will be subject to review. (*City of Cape Town v Arun Property Development (Pty) Ltd* 2009 (5) SA 226 (C) 232.) In addition, even where the discretion has been exercised properly, a court on review will be entitled to interfere where the decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances, or as to the practice of the court.

The taxing Master's discretion is wide, but not unfettered. In exercising it the taxing master must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned. The discretion is not properly exercised if such facts or circumstances are ignored or misconstrued.'

[18] A taxing master is required to approach the task of taxing a bill of costs with an open mind. In *Botha v Themistocleous*[8] the court held that a taxing master's function is not limited to merely fixing fees on the assumption that work that has been charged for has in fact been done: he or she should not close his or her eyes

[7]Para 13.03.
[8]*Botha v Themistocleous* 1966 (1) SA 107 (T) at 110C-D.

and ears to evidence that may show that work alleged to have been done had not been done. We would add, however, that this would normally only arise if a dispute is squarely raised in a taxation or where good reason exists to suspect that the services claimed for have not been performed. In circumstances such as these, the taxing master is under a duty to afford the affected party an opportunity to deal with any disputed questions of fact.[9]

[19] As a taxing master must have a full picture before him or her, in order to determine just remuneration for work done, he or she may have to determine disputes of fact.[10] In *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd)*[11] the following was said of this function:

'In the light of this discussion of the authorities, I am of the opinion that the taxing master has the power, and in some instances (rare though they may be) the duty, to hear oral evidence on disputed questions of fact arising out of the taxation before him. It follows, in my view, that in the occasional instance in which the taxing master hears oral evidence, it must be taken to be his duty to keep a record of that evidence, and of his findings of fact based upon the evidence. Therefore, when the taxing master is required in terms of Rule 48(1) to state a case in respect of a matter in which he has heard evidence, he will not be expected to rely entirely on his memory, and the record kept by him will assist him in drawing up the stated case.'

[20] While a taxing master may not ignore evidence that may show that work that has been charged for has, in fact, not been done, this does not mean that there is a duty upon practitioners to 'prove their claims', as it were. The legal profession is a 'distinguished and venerable profession' and its members are officers of the court. As a result, 'absolute personal integrity and scrupulous honesty' are expected of them.[12] It follows that a taxing officer is entitled to take counsel's fee list at face value as constituting a record of the work that has been done. The honesty and professional ethics of counsel ought not to be lightly questioned.

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[9] *Maasdorp and Smit v Sullivan* 1964 (4) SA 2 (E) at 2H-3E.
[10] Cilliers *Law of Costs* para 13-09.
[11] *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd* [1998] 3 All SA 489 (W) at 497e-f. See too *Road Accident Fund v Registrar, Transvaal Provincial Division & another* 2003 (5) SA 268 (T) at 271E-F.
[12] *General Council of the Bar of South Africa v Geach & others* 2013 (2) SA 52 (SCA) para 87.

[21] It is the duty of the taxing master to ensure that the expenditure claimed was reasonably incurred and is a reasonable fee. It is in this context that his or her discretion is to be exercised with due regard to the purpose for which taxation is intended.

COUNSEL'S FEES ON TAXATION

[22] While the taxing master's discretion must be informed by the considerations set out in rule 70(3), the reasonableness of the fees charged is always the fundamental consideration. The taxing master must 'determine not only the quantum of counsel's fees but whether in the particular circumstances of the case counsel's fee should be allowed at all'.[13]

[23] In *City of Cape Town v Arun Property Development (Pty) Ltd & another*[14] Sholto-Douglas AJ detailed what had to be taken into account when assessing counsel's fees on taxation. Relevant considerations include the nature and complexity of the matter; the work done by counsel; the fee charged; its reasonableness in the context of the underlying principle that a successful litigant should not be out of pocket; and the 'totality of the fee for the matter'.

[24] While the fee allowed by the taxing master must be reasonable in the circumstances, counsel is also entitled to 'be fairly compensated as a professional man for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter'.[15] If a matter is settled, withdrawn or postponed, the function of the taxing master is to determine a reasonable fee for counsel, taking into account the date when the case was settled or withdrawn or postponed. Quite apart from considering the complexity of the matter, the amount of work that was required to be done and how long before the date of trial the matter was settled, the principles applicable to compensation for counsel in the context of that profession must be considered[16].

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[13] *Rosenberg v Prima Toy Holders (Pty) Ltd* 1972 (3) SA 791 (C) at 794B.
[14] *City of Cape Town v Arun Property Development (Pty) Ltd & another* 2009 (5) SA 227 (C) para 30.
[15] *Kromoscope (Pty) Ltd & another v Rinoth* 1991 (2) SA 250 (W) at 256E-F.
[16] *Ndlovu v Santam Insurance Co Ltd* 1982 (2) SA 199 (T) at 201H-202A. See also *Naicker v Commercial Properties (Pty) Ltd* 1978 (3) SA 992 (D).

[25] Van Dijkhorst J, in *Pretorius v Santam Bpk*[17] explained the unique position of the advocate when a trial for which he had been briefed did not proceed:

*'*My bevinding [in *I D Myburgh en M J Fourie NO v Guardian Nasionale Versekerings Maatskappy Bpk* (TPA saak 23858/95 van 25 September 1998] was dat die ou gebruik dat advokate 'n eerste dag fooi of deel daarvan betaal word waar 'n verhoor betreklik kort voor die verhoordag deur die mat val, sy grondslag het in die feit dat advokate se beroep hoofsaaklik sentreer om verskynings in die Hof. Die etiese kode van advokate verbied dubbel brevettering en dit kan gevolglik in die algemeen gesproke aanvaar word dat indien 'n saak kort voor verhoor deur die mat val, die advokaat waarskynlik geen ander brevet vir verskyning op die betrokke dag sal ontvang nie. Op 'n meevaller kan nie gereken word nie. Uiteraard het hy soms (en party advokate dikwels) pleitstukke en opiniewerk wat sy aandag verg, maar dit sou hy waarskynlik tog na-ure of oor naweke gedoen het. Die glyskaal het dus ten grondslag gehad die gedagte dat hoe nader aan die verhoordatum 'n saak deur die mat val hoe onwaarskynliker dit is dat 'n plaavervangende brevet ontvang sal word. Die situasie het nie verander nie en daar is gevolglik geen rede om te bevind dat die praktyk wat voortgeduur het sedert 1990 onredelik is nie. Na my mening was dit billik. Gevolglik het ek beslis dat die toelating van 'n eerste dag verhoorfooi redelik was.'

[26] There is a difference between the nature, structure and functioning of the advocates' profession and the attorneys' profession. As a result, a distinction is drawn between a trial fee which an advocate may charge when a trial is settled or postponed on or shortly before the trial date, and that which an attorney may charge.[18] The settlement or postponement of a trial prejudices counsel if he or she is not properly compensated for having reserved that day for trial (not to mention the reservation of sufficient days to allow for the completion of the trial and potential delay on the running trial roll). An attorney however is able to do other work in the

[17]*Pretorius v Santam Bpk* 2000 (2) SA 858 (T) at 867G-868A. ('My finding [in *I D Myburgh & M J Fourie NO v Guardian Nasionale Versekerings Maatskappy Bpk*. . .] was that the old practice that advocates are paid a first day fee or part thereof where a trial, reasonably shortly before the trial date, falls through has its origin in the fact that the advocates' profession revolves principally around appearing in court. The ethical code of advocates prohibits double-briefing, and it can as a result be accepted that in general if shortly before trial a case falls through, the advocate is likely to get no other brief to appear on the particular day. One cannot bank on a windfall. In the nature of things, he will sometimes (and some advocates often) have pleadings and opinion work that can engage his attention but he would most likely have done that after hours or over weekends. The sliding scale thus has as its basis the idea that the closer one is to the trial date when a case falls through, the more unlikely it is that a replacement brief will be received. The situation has not changed and there is as a result no reason to find that the practice that prevailed since 1990 is unreasonable. In my view, it was fair. As a result, I have decided that allowing a first day fee was reasonable.' (Our translation.))

[18]*Motor Finance Corporation (Pty) Ltd v Prinsloo & another* [2016] ZAECGHC 105 paras 8-10.

same circumstances. The difference between the two branches of the profession were explained by Blieden J in *Road Accident Fund v Le Roux*:[19]

'The structure of the advocate's profession is such that the settlement of a trial and the loss of a first-day trial fee prejudices counsel, who runs a real risk of not being compensated for reserving a day for trial. An attorney, on the other hand, in the time set aside for the first day of the hearing, can do other lucrative work. . .'

[27] Counsel, when accepting a trial brief must make a number of decisions. He or she is obliged to consider the number of days which must be kept available for a particular trial. If a particular court has a running roll (as this court has) counsel is required to factor in that a trial may not commence on the day of set down. He or she also has to take into account that the trial may run for longer than expected. No other brief may properly be accepted for the days so reserved as this would constitute double-briefing. This all constitutes a loss of opportunity to earn fees from other work in consequence of the acceptance of the trial brief.[20]

[28] Counsel's chamber work would have been performed at one time or another in any event, often after hours. If counsel performed chamber work on the day of a settled or postponed trial this does not compensate for, and should not be taken into account, in respect of the entitlement to a full day trial fee. The only possible compensation for loss of opportunity in respect of the first day of trial would be the fortunate retention of another brief for court work accepted subsequent to it becoming apparent that the trial would not proceed. In these circumstances, the fee charged for the first day of trial in the matter not proceeding would obviously have to be determined with reference to the fees earned from the subsequent brief for court work on that same day – and of course be commensurate with the service rendered.

[29] That said, the suggestion that an advocate, when rendering a fee for a full first day trial fee in respect of a matter which has settled or postponed, must necessarily demonstrate that he or she has turned away work and has no other work is erroneous. A taxing master's starting point should be that, in the absence of

[19] *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W) at 756E-F.
[20] *Motor Finance Corporation (Pty) Ltd v Prinsloo & another* (note 18) para 10.

evidence to the contrary, advocates as members of an honourable profession, render fees honestly and behave ethically.

THE DECISION UNDER REVIEW

[30] In her stated case in terms of rule 48, the respondent said that in assessing Mr Smuts' fee, she had regard to the order, and particularly paragraphs 1 and 2 thereof. She noted that in paragraph 1, the defendant withdrew his application for a postponement and tendered the plaintiff's costs 'on the usual scale', while in paragraph 2, he agreed to a postponement and tendered 'the wasted costs of the postponement'.

[31] The respondent noted that while Mr Smuts had charged a fee of R27 000 for a day fee on trial, she had only allowed half of that. She took into account that the matter had been finalised by 10h45 and that 'at most, counsel was before court for one hour and engaged in the matter from 08h00 to 10h45'. She stated that she had 'listened to the recording of the hearing and it was apparent that Advocate Smuts SC was not at court when the matter was postponed'. From this she drew what she described as 'the only inference that she could on the facts before her', namely that 'counsel's attendance was required elsewhere and he then returned to his chambers to do other work'. She reasoned that if he had not been required elsewhere, 'he would surely have been at court when an Order was taken by agreement'.

[32] The stated case continued to say that the plaintiff's attorney could have requested counsel to 'furnish written confirmation that he in fact did not attend to any other fee generating work on the day in question, in order to persuade the Taxing Mistress to allow the full day fee' but he did not do so.

[33] The applicant's submissions in answer to the stated case took issue with the respondent's factual assumptions and reasoning. First, it was stated that the matter was postponed in chambers at 10h45, and not in court, with the result that there was no recording of the proceedings; secondly, the applicant disputed that the inference drawn by the respondent was correct; thirdly, it was submitted that the applicant's attorney was never requested by the respondent to make any representations about

counsel's fees before her decision was taken; and fourthly it was argued that the two cases relied upon by the respondent were not relevant, one being distinguishable and the other being a minority judgment. The applicant concluded by saying that there was no basis in law for the respondent's decision.

[34] Much of the debate between the parties concerns the nature of the fee an advocate is entitled to charge when a trial for which he or she has been briefed does not proceed. Although the *Geach* matter,[21] to which reference has been made above, is not on all fours with this case, it considered the issue with which we are here concerned within the context of the unethical conduct of double-briefing and overreaching: the advocates concerned had all accepted a number of briefs to conduct trials on the same day, knowing they would all settle, and had charged a full trial fee in each. The case concerned disciplinary action against the advocates rather than the reasonableness of their fees.

[35] The Supreme Court of Appeal was divided as to whether all should be struck from the roll of advocates, or whether suspension would suffice for some. Both the majority judgment of Nugent JA and the minority judgment of Wallis JA dealt in passing with the approach to a first day trial fee that an advocate is entitled to charge.

[36] Nugent JA held as follows[22]:

'An advocate who accepts a brief to conduct a trial must hold himself or herself available to do so. Because the advocate has held himself or herself available he or she is generally entitled to a full day's fee if the case settles on the day or even shortly before that and the advocate has been left with no other income for the day. But if his or her instructions are to postpone a case when the roll is called, or to note that the case has been settled, or to negotiate a settlement of the claim, then the fee must be commensurate with that service. To charge a trial fee where the instructions are not to conduct a trial but instead to do something else is overreaching.'

[37] Wallis JA, in a minority judgment, made the point that overreaching is an abuse of an advocate's position because it involves taking advantage, from a

[21] Note 12.
[22] *Geach* (note 12) para 16.

position of relative strength, of the person who is to pay his or her fee. It is, he said, 'innately dishonest behaviour'.[23] He then proceeded to consider the charging of a first day fee. He stated:[24]

'[134] Traditionally a first day fee on trial compensated the advocate for the work done in preparation for the trial, apart from work, such as drafting pleadings or conferences, that had been the subject of a separate specific brief. It thus covered all work, such as considering the available evidence; reading the documents; deciding which witnesses to call; preparing to lead witnesses; preparing cross-examination of the opponent's witnesses; legal research and the general planning of the conduct of the case. It also compensated the advocate for the appearance on the first day of the case. Fees for the second and further days, known as refreshers, were significantly lower. In current practice, where many advocates charge separately for their preparation, a first day fee on trial should not be markedly different from the refresher because they are compensating for the same work – the day in court.

[135] A misapprehension that infected some of the arguments before us was that, if a trial settles shortly before the date of set down, that entitles the advocate to a fee on brief equivalent to a first day fee on trial, irrespective of whether any work had been done on the brief and irrespective of whether the acceptance of the brief resulted in work being turned away to the advocate's detriment. That approach is incorrect. It would have the result that the mere fact of entering a trial date in the advocate's diary would give rise to an entitlement to charge a fee on brief. But that would breach the basic rule that an advocate is only entitled to charge a reasonable fee. The true position is expressed in rule 8(b)(i) of the rules of the Society of Advocates of KwaZulu-Natal (which has for many years been the ethics committee of the GCB), which reads as follows:

"A fee on brief is chargeable by counsel in order to compensate him for work done in preparation for the trial of a case and for the loss of opportunity to earn fees from other work suffered in consequence of his acceptance of a trial brief. Where neither of these factors is present counsel will not ordinarily be entitled to charge a fee on brief."

For that reason the rule goes on to provide that if a trial settles before the date of set down the advocate's fee should not be settled with the attorney or marked until the date of set down. This enables the advocate to assess the extent of any prejudice arising from the acceptance of the brief. Advocates who wish to claim payment of a fee on the footing that they have been prejudiced by accepting the brief should be able to demonstrate that they have had to turn other work away as a result.'

[38] While the judgment of Wallis JA is the minority judgment, what has been quoted above is, for the most part, not inconsistent with the paragraph referred to in the judgment of Nugent JA. Indeed, it is a more detailed explanation of what Nugent JA had said. Neither judgment changes the position set out in Van Dijkhorst J's

[23] *Geach* (note 12) para 132
[24] *Geach* (note 12) paras 134-135.

judgment in *Pretorius*[25] that an advocate is entitled to be compensated for his or her opportunity cost when a trial settles or is postponed and that, generally speaking, will be on the basis of a full day fee. If, however, he or she is lucky enough to be briefed to appear on that day in another matter, he or she may not charge a full day fee for the matter that did not proceed. This places in proper context Nugent JA's statement to the effect that an advocate may charge a full day fee if he or she 'has been left with no other income for the day'. We understand that by 'no other income' Nugent JA meant income derived from appearance work, and not chamber work, as this is consistent with the case law. We do not understand Nugent JA to place an onus on an advocate to prove that he or she has no other appearance work on the day in question: advocates being officers of the court, that can be assumed, in the absence of evidence pointing to the contrary. To the extent that Wallis JA's minority judgment is inconsistent with this, Nugent JA's majority judgment is to be preferred and followed.

[39] Counsel is entitled to be fairly compensated in accordance with the principles set out above. The taxing master, in his or her discretion, must strive to give the successful party a full indemnity in respect of costs 'reasonably incurred'. If an advocate's fee is a reasonable fee (and this is in the discretion of the taxing master taking into account all relevant circumstances) it ought generally to be allowed in full without deduction.[26]

[40] The decision in *Pro Uhuru Building Contractors v CFM Building Contractors & Ntombi Mfana*[27] was also relied on by the respondent. It takes this matter no further and is irrelevant because it concerned an attorney's first day fee on exception. We also do not understand Dawood J to have held that it is required of a practitioner ordinarily to provide proof that no other fees were earned on the day in question.

[41] The respondent appears to have applied paragraph 15 of the Guidelines to Taxation of Bills of Costs – Eastern Cape High Courts, in deciding that Mr Smuts was only entitled to half of his fee. This paragraph deals with counsel's fees when a

[25]Note 17.
[26]*Kloot v Interplan Inc* 1994 (3) SA 237 (SE) at 239G-I.
[27]*Pro Uhuru Building Contractors v CFM Building Contractors & another* ECM DATE (Case No.: 1433/2008) unreported.

matter is settled, removed from the roll or postponed. These guidelines are no more than that, and may not be applied rigidly.[28] Furthermore, the guidelines may not be in conflict with the Uniform Rules and the common law. To the extent that they are, they cannot be applied – and if they are, the taxing master commits an irregularity.

[42] Paragraph 15.1 provides that counsel is not entitled to a day fee unless engaged in the matter up to and until 14h00 'at least'. This is in conflict with the case law that we have discussed above – and with the rationale for allowing counsel to charge a full day trial fee.[29]

[43] Paragraph 15.4 provides that if 'counsel have kept themselves available for the day and are unable to proceed with any fee generating work on the day reserved for trial, then they must prove in writing that they turned away work which could have been done on the day the matter was set down for hearing'. This too is in conflict with the case law and the rationale for allowing counsel to charge for a full day fee. To the extent that the respondent sought to apply paragraph 15 of the guidelines, she committed a material error of law.

[44] At the heart of the respondent's reasoning lies a finding that Mr Smuts did other work on the day in question. There is no evidence to suggest that. The respondent inferred this from her belief that he was not at court when the matter was postponed. That was based on her apparently having listened to a recording of proceedings from which it was clear, according to her, that Mr Smuts was not present. Two difficulties arise. First, whatever recording she listened to could not have been relevant because the matter was dealt with in chambers and consequently there was no recording of the proceedings. Secondly, the inference that she drew was based on an incorrect assumption and was, in any event, not the most probable inference to draw. The result is that her decision to halve Mr Smuts' fee is irrational: there is no rational connection between the facts and the decision.

[28] *Britten & others v Pope* 1916 AD 150 at 158-159; *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) para 1.

[29] Paragraph 15.2 provides 'by way of illustration' that if a trial settles by 10h00, counsel may only charge a fee for two hours work – from 08h00 to 10h00.

[45] The respondent erred too in placing an onus on Mr Smuts to establish that he did no other work on the day in question. What she clearly had in mind was chamber work and not appearance work. As we have explained, a taxing master should work from the premise that advocates act honestly and ethically, and do not overreach, rather than from the opposite premise. In other words, in the absence of reason to believe that counsel charged improperly, it was unnecessary for counsel to present evidence to establish the loss of opportunity to justify a full first day fee. By halving Mr Smuts' fee on the assumption that he had 'returned to his chambers to do other work', the respondent applied a wrong principle and committed a material error of law: whether Mr Smuts did chamber work on the day in question was entirely irrelevant to the respondent's decision.

[46] In the result, we are of the view that the respondent erred, and was clearly wrong in respect of her decision to reduce the fee of Mr Smuts by half: her view of the matter differs so materially from our own that this vitiates her decision.

THE ORDER

[47] We make the following order.

(a) The review succeeds.

(b) The respondent's allocator relevant to the first day trial fee of Mr Smuts is set aside and replaced with the following:

'The fee of Mr Smuts SC for 13 February 2017 on trial is allowed in the sum of R27 000.'

(c) There is no order as to costs.

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C. PLASKET

JUDGE OF THE HIGH COURT

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J.E. SMITH

JUDGE OF THE HIGH COURT

_____

M.J. LOWE

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant:	G Dugmore SC Instructed by Wheeldon, Rushmere & Cole Inc, Grahamstown
For the respondent:	No appearance
For the defendant:	No appearance
For the first *amicus curiae*:	T Paterson SC and N Molony Instructed by Whitesides Attorneys, Grahamstown
For the second *amicus curiae*:	Mr A Basson Instructed by Enzo Meyers Attorneys, Grahamstown
For Mr R Human:	In person