IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: **3088/2021**

In the matter between:

OSHO AGRI INVESTMENTS (PTY) LTD Applicant

and

HONEY ATTORNEYS 1st Respondent

TAXING MASTER OF THE HIGH COURT 2nd Respondent

CORAM: JP DAFFUE J

DELIVERED ON: 06 JUNE 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 06 JUNE 2022.

I INTRODUCTION

[1] The ways of a client and its attorney parted acrimoniously. The former client was so dissatisfied with the services rendered to it that it even lodged a claim with the Legal Practice Council. It also refused to pay the invoice initially rendered to it whereupon a bill of costs was drawn which was eventually taxed by the taxing master. Being dissatisfied with the rulings of the taxing master, the former client filed a notice of review of taxation in terms of rule 48. This application was filed outside the time limit prescribed in rule 48. An application for condonation was brought, but aborted. A second application for condonation was brought and on 31 March 2022 I granted condonation, but ordered the former client to pay the firm of attorneys' taxed or agreed

party and party costs consequent upon the unopposed application for condonation.

II THE PARTIES

[2] The applicant in the application for review is Osho Agri Investments (Pty) Ltd. It was represented during taxation by Ms Joshna Govender, who refers to herself as a project professional of the applicant. She also deposed to the founding affidavit in the application for condonation. Ms Koller of Webbers Attorneys Inc is the applicant's attorney of record in the review application. I doubt whether Ms Govender could act for the applicant in opposing the taxation. *Ex facie* the papers she is not an admitted legal practitioner or a director of the applicant. However, this is not the issue before me as there was no objection to her appearance. The applicant filed a written response in respect of sub-rule 48(5)(a).[1]

[3] Mr Buchner acted for Honey Attorneys, cited as the first respondent, on instructions of the applicant until the parties parted ways. Ms Hanlie van Zyl received instructions to draw the bill of costs and she appeared before the taxing master during the taxation thereof. She provided the written response to the taxing master's stated case in terms of rule 48(5)(a).[2]

[4] The taxing master is cited as the second respondent. He prepared a stated case in terms rule 48(3)(a)[3] and also filed a report on receipt of the parties submissions.[4]

III BRIEF HISTORY OF THE FACTS LEADING TO THE INSTRUCTIONS TO HONEY ATTORNEYS

[5] The applicant purchased a farm in the Bethlehem district which was registered in its name on 9 June 2020. On the farm was a non-operational, but well-established existing apple orchard as well as a large and complete

[1] Record: pp 75 – 79
[2] Record: pp 82 - 86
[3] Record: pp 69 - 74
[4] Record: pp 108/9

infrastructure. Seven days after registration of transfer of the farm in the applicant's name the orchard and improvements on the farm were gutted by fire, apparently emanating from a controlled fire by the fire department of the Dihlabeng Municipality, which spread to the applicant's farm. When the farm was purchased, its directors and stakeholders believed that they would be able to export the fruit to various markets in Brittain. By then the orchard had received numerous awards for the quality of the fruit produced.[5] This background is important in considering the review of the taxing master's taxation.

[6] Mr Buchner was instructed to assess the matter and file a claim in relation to the damage sustained due to fire to the orchard. It is apparent from the record that experts were appointed and that numerous pre-litigation steps had been taken by the first respondent.

[7] On 10 June 2020 - *ex facie* items 104 - 111 of the bill of costs - the peremptory statutory notices were drafted and sent to Dihlabeng Local Municipality and Thabo Mofutsanyana District Municipality. These notice had to be sent and delivered to the particular organs of state within a period of six months. It appears from the bill of costs that by the time that the parties parted ways, summons had not been issued. This is not surprising, bearing in mind the nature of the claim and the apparent extent of the damages which would surely include an enormous claim for loss of income. This case is not the run-of-the-mill case, but surely extremely intricate. Experience has taught us that it is not so easy to detect the origin of a fire and even if that is detected, to prove who or what caused the fire, why did it spread and what possible grounds of negligence might be applicable. In order to prove liability and damages *in casu* many and detailed investigations are required and the exercise cannot be equated with the claim of a motor vehicle owner whose stationary vehicle has been damaged in a collision by another person.

[5] Record: p 47

IV LEGAL PRINCIPLES PERTAINING TO COSTS AND TAXATION

[8] There is a distinction between party and party costs and attorney and client costs. *In casu* the first respondent was entitled to prepare an attorney and client bill of costs as it was entitled to claim costs from its former client. These include fees in respect of professional services rendered by it as well as disbursements made by it on behalf of the client. Such costs are payable by the client whatever the outcome of the matter in which the attorney's services had been engaged and are not dependent upon any award of costs by the court. It includes all the costs that the attorney is entitled to recover against the client on taxation of his bill of costs.[6]

[9] Attorney and client costs differ from party and party costs in that the former costs may include items for charges made by the attorney, but which the client cannot recover from the other party, as well as the difference between certain amounts debited by the attorney and the amounts allowed for those items by the taxing master as being an expenditure recoverable from the other party.[7]

[10] In *Magwill Carriers (Pty) Ltd v National Transport Commission*[8] it was confirmed that the test to be applied in respect of attorney and client costs is that all work done and disbursements made which are usual in the conduct of the client's affairs dealt with by the attorney may be debited against the client unless the content of the attorney's mandate indicates the contrary. Having said this, an attorney is not entitled to recover from his client fees or disbursements in respect of unnecessary work done by him.

[11] There are different principles of taxation applicable between various attorney and client bills of costs, but it is clear that where the costs are payable by the client to his attorney, a more generous approach is followed.[9]

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[6] See Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed by Cilliers *et al*, vol 2 at pp 953 - 954
[7] *Hawkins v Gelb* 1959 (1) SA 703 (W) at 705
[8] 1982 (1) SA 166 (T) at 169
[9] See Cilliers, Law of Costs: loose-leave ed, para 4.07

[12] It is not necessary to provide particular examples of attorney and client costs, but to name one example applicable and queried *in casu,* an attorney is entitled to charge for copies of letters to be kept as well as for the costs of copies of documents not necessary for the conduct of the case or which were made at the client's request for his own use.

[13] The taxing master has specialised knowledge of the technical details of taxation and a court should be reluctant to interfere with his/her discretion. This will only be done when compelling grounds have been proven. A full bench of the Cape Provincial Division consisting of eminent judges, such as, Herbstein, Van Winsen and Beyers, stated that a court cannot substitute its opinion for that of the taxing master and that it "will not interfere merely where it concludes that had it been seized of the enquiry to determine the amount to be allowed it would have been allowed more or less than that did the Taxing Officer."[10]

[14] According to Kruger and Mostert[11] courts defer to specialised officials like taxing masters, but they are able to consider the reasons for decisions. The authors continued as follows: "Judges can assess whether the bill and supporting documents and the facts were properly weighed by the taxing master. They can also check the process of justification. In doing so judges do not reconsider the substantive question but assess the decision-making process. They will ask whether the taxing master's decision is reasonably supportable on the facts." In the same vein, the *quantum* of fees is a matter primarily for the discretion of the taxing master and a judge will interfere only in extreme cases and then reluctantly too. The experience of the co–author, Justice Kruger, a former judge and before that an advocate at the bar for many years, cannot be doubted. With reference to *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd and another*[12] the authors proceeded: "However, a judge who worked as counsel for many years may be in a better position than the taxing master to assess the need for and reasonableness of counsel's consultations and drafting or settling of affidavits. Similarly, a judge who worked as an attorney for many years may be in a better position than the taxing master to assess the reasonableness or necessity of work done."

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[10] *Bertish v Standard Bank of SA Ltd* 1956 (4) SA 9 (C) 13 D - E
[11] *Taxation of Costs in the Higher and Lower Courts: A Practical Guide* at pp 109 & 110
[12] 1990 (4) SA 587 (T) at p 589B - C

[15] Finally, it is apposite to quote the following *dictum* of the court in *Visser v Gubb*[13] which principles have been stated and restated in numerous judgments, *inter alia President of the Republic of South Africa v Gauteng Lions Rugby Union*[14]:

"The Court will not interfere with the exercise of such discretion (that of the taxing master) unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The Court will also interfere where it is of opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue..... The court must be of the view that the taxing master was clearly wrong, ie its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

V EVALUATION OF THE DIFFERENT VIEW POINTS

[16] In its notice of review of taxation, which was filed late, the applicant requested the second respondent to state a case for rescission by a judge. This notice of the applicant dealt in 29 paragraphs over 10 pages with the reasons why the taxing master's taxation should be reviewed and set aside. Attached to this notice are numerous other documents explaining the history of the matter as well as the complaint of misconduct filed with the Legal Practice Council.

[17] On 13 December 2021 the taxing master filed his stated case in terms of rule 48(3). The taxing master referred to the numerous items queried by the applicant and although he did not set out any finding of fact in the stated case as provided for in sub-rule 48(3)(b), he mentioned the following:[15]

"I took it upon myself to explain the taxation process to Mrs Govender as a lay person and this may be evidence by the fact that the taxation of a bill consisting of 141 items took longer than 2 hours to finalise as I had to consider objections raised in respect of each item."

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[13] 1981 (3) SA 753 (C) at 754 H – 755
[14] 2002 (2) SA 64 (CC) at 73 C - D
[15] Record: p 70

Ms Govender's allegations against the taxing master and Ms Van Zyl were denied. The application for review of taxation was filed late, a point raised by the taxing master. Consequently, the applicant was obliged to apply to the court for condonation for the late filing of the application. After the granting of condonation, no further submissions were made by the applicant and second respondent. The taxing master served his report in accordance with the provisions of sub-rule 48(5)(b).[16] No further written submissions were made by the parties in terms of sub-rule 48(5)(c).

[18] The applicant raised objections to about all the fees and disbursements claimed for work done and expenses incurred over a period of about a year. The taxing master taxed off R3 095.50 from the total fees claimed by the first respondent, being R53 434.01. The expenses amounted to R67 101.15. These included the costs of SANSA (the South African National Space Agency), the South African Weather Service, Mr David White, a chartered valuation surveyor and Mr Danckwerts, a well-known expert in these kind of cases. The last two experts physically inspected the applicant's property, conducted interviews, wrote reports and also claimed for their travelling and accommodation expenses as they were obviously from out of town.[17] I will return to this later.

[19] The taxing master did not strictly in terms of sub-rule 48(3)(b) set out any finding of fact. I do not intend to deal with each and every complaint pertaining to the various items on the bill of costs as this will unnecessarily increase the length of this judgment.

[20] The conduct of Ms Govender and her attitude as a lay person to the taxation of the bill of costs is significant. She complained about the way she was treated, responded to and disrespected by both the taxing master as well as Ms Van Zyl and made the following observation:[18]

"6 General complaint:

[16] Record: pp 108/9
[17] Record: pp 19 - 22
[18] Record: p 3

> Ms Government (on behalf of the plaintiff/applicant) requested the taxing master that they go through bill item by item and as per the notice to oppose, this was not done. The taxing master deprived a lay person from the opportunity to raise objections in respect of each and every issue that they had with the bill. Objections were raised on 131 items of the 141 items as per the notice to oppose. The taxing master did not investigate most of the objections as raised by the plaintiff."

Never in my life, during my experience at the side bar and the bar over a period of more than 30 years, did I come across a party that objected to almost all the items of the opposition's bill of costs. This is unheard of. In this case, we are not even dealing with a party and party bill of costs, but with an attorney and client bill of costs; in fact, the most generous of the different attorney and client bills of costs.

[21] On the applicant's version the first respondent should basically have worked for free and as I have explained, this case is not the normal run-of-the-mill case. Although summons was not issued yet, it is important for an attorney to properly evaluate a client's case before summons is issued. The particulars of claim must comply with rule 18 and if not, a defendant may utilise rule 30 procedure, or even file an exception in accordance with the provisions of rule 32.

[22] Ms Govender's version that she was not treated with respect and that her objections were not properly considered, is contradicted if the time spent on the taxation of the account is considered.[19] The taxation started at 11h30 and continued until 13h30 or 13h40. Very seldom, speaking from experience, does the taxation of a bill of costs, especially based on an attorney and client scale, take in excess of 2 hours. Although Ms Govender mentioned that she had to take a flight back home which would be departing at 14h00, it appeared that after the short luncheon adjournment, she was still sitting outside the taxing master's office at about 14h00. I know there is a dispute in this regard, but fact of the matter is that a similar taxation conducted by objective and reasonable legal practitioners on both sides would have been finalised in a much shorter time.

[19] Record: pp 70 & 71

[23] In response to the taxing master's stated case, Ms Govender mentioned that she did raise an objection to the manner in which she was treated and ignored, but again, bearing in mind the time taken to tax the account, her version appears to be improbable.

[24] Ms Van Zyl on behalf of first respondent confirmed that the taxing master exercised his discretion properly in considering each item in the bill presented for taxation.[20]

[25] Ms Van Zyl also confirmed that each item in the bill of costs was considered and that the taxing master even requested that certain documents be produced for inspection. She continued to say that the taxing master considered that the work charged for by Honey Attorneys was actually done and that the fees charged were reasonable."[21]

[26] The issue of printing of colour copies may be considered briefly. The taxing master disregarded the applicant's objection. Colour photos were sent by email to first respondent. Surely, and bearing in mind the present manner in which litigation is still conducted in the Free State where case lines are not operative, hard copies had to be made, not only for the applicant's attorney, but eventually for perusal by experts, counsel and service on the opposition. The objection pertaining to the sending of emails and the charging for accompanying letters does not hold water. This form of communication is in line with standard practice.

[27] The objection pertaining to fees and expenses relating to Mr Odendaal is also meaningless. It appears from the papers that he consulted and interviewed neighbours which in my view was necessary in order to obtain statements from possible witnesses.

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[20] Record: p 85, para 7
[21] Record: p 83, para 4 & 5

[28] The complaint about the fee for the perusal of the apple orchard business plan in the amount of R3 990.00 is again baseless. I have indicated above that the claim *in casu* is intricate and it was necessary to establish for example future losses of income. These calculations and cash flow projections are often dealt with in business plans in order to obtain finance from a financial institution. Clearly, the information contained in the business plan was relevant.

[29] The fees and expenses of the experts were objected to. These fees and expenses appear to be more than reasonable and were reasonably required to prepare for institution of an action. There is a dispute as to whether quotations had to be obtained from the experts and pre-approved by the client. The "say-so" of Ms Govender and the terms of the attorney's mandate were not accepted by the taxing master who allowed all the fees and expenses. It also appears as if these issues were raised only after taxation. I refer to the taxing master's stated case where he *inter alia* mentioned the following with which I agree:

> "I must hasten to mention that no fee agreement or mandate was presented to me by either party during taxation. I ruled that it was not my duty (as taxing master) to determine the client's liability to pay the fees to his attorney and that such a question must be determined by the court especially…."[22]

In my view, and unless the taxing master could have been placed in possession of proper proof to confirm Ms Govender's version, he was entitled to allow the fees and disbursements which appeared to be reasonable in the circumstances. I also confirm that, from my experience as legal practitioner in private practice over more than three decades and based on the comments in Kruger and Mostert, the work done by the first respondent was necessary, reasonable and in the applicant's best interest in order to ensure that a proper case is instituted against the correct wrongdoer(s).

[30] I am satisfied that, although the taxing master could have been more careful in providing reasons as required by s 48, there is no reason to interfere with

[22] Record: p 71

the exercise of his discretion. I am satisfied that no case has been made out to show that he was clearly wrong. Consequently, the application stands to be dismissed.

VI CONCLUSION

[31] A judge may also decide to hear the parties or their legal practitioners in chambers or refer the case for decision to the court. In my view this would merely cause further delay and unnecessary extra costs. The applicant explained in detail why it believed the taxing master had exercised his discretion improperly. There is no uncertainty about the applicant's submissions and/or the taxing master's reasons. I considered them and was able to come to an informed decision.

[32] Also, although there was not strict compliance with rule 48 as indicated above, I am satisfied that, instead of referring the matter back in order to comply with the rule, the matter can be adjudicated upon the merits of the case and the submissions made.

[33] In fairness to the parties and although the first respondent as the successful party would in principle be entitled to its costs, I have decided in the exercise of my discretion not to award it its costs. Each party shall be responsible for the payment of its own costs.

VII ORDERS

[34] The following orders are granted:

1. the application for review of the taxing master's taxation of 30 August 2021 is dismissed;
2. each party shall be responsible for its own costs.

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JP DAFFUE J

On behalf of the applicant	Ms Koller mp@webberslaw.com
Instructed by:	Webbers Attorneys Inc BLOEMFONTEIN
On behalf of the first respondent:	Ms H Van Zyl hanli@vzyls.co.za
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