IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 6686/21

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) NOT REVISED.

23 December 2022 .....
DATE SIGNATURE

In the matter between:

BRENNER MILLS (PTY) LTD Applicant

And

THE TAXING MASTER, HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA First Respondent

KWENA MAHLAKOANA ATTORNEYS Second Respondent

And

Case No: 43767/2020

Ex parte matter of:

TARRYN VOLLMER & OTHERS

JUDGEMENT – REVIEW OF TAXATION

FRANCIS-SUBBIAH, J:

[1] This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court (Uniform Rules).[1] The applications are brought to review and to set aside the decision taken by the taxing masters. These matters were allocated to me for a decision in chambers. There is a common thread between these matters, concerning the jurisdiction of the taxing master of the High Court Gauteng Division, Pretoria to tax and determine reasonable costs payable by the client for professional services rendered by the attorney.

[2] In the *Brenner Mills* matter the applicant (the client) entered into a contingency fee agreement (agreement) with the second respondent (the attorney), to render professional services relating to the reduction of an imposed, penalty in particular for an application to vary a consent order between the applicant and the

[1] Promulgated under the Supreme Court Act 59 of 1959

Competition Commission. It's common cause that shortly before the matter could be heard by the Competition Tribunal, the client instructed the attorney to withdraw the matter and submit a bill of costs that was taxed by the taxing master of the Pretoria High Court.

[3] In the *Vollmer* matter, the applicant (the attorney) seeks a review of the taxing master's decision not to tax a bill of costs in an *ex parte* surrogacy application where no notice of motion and founding papers were issued at the court. It is observed that this matter is enrolled on caselines using a case number already allocated to a different matter. The taxing master considered the costs claimed in the bill of costs as pre-litigation or non-litigious costs because the attorney's mandate was terminated before any litigation commenced. It was contended (as per the Judge President's directive) that where an attorney and client's relationship has ceased to exist it may not be enrolled before a taxing master unless the bill of costs is the subject of litigation in the High Court. An additional provision found in Rule 70(5) of the Uniform Rules provides that the *'taxing master shall not tax costs in instances where some other officer is empowered to do so'*. For these reasons the taxing master refused to tax the bill of costs and advised it should be referred to the Legal Practice Council.

[4] The service rendered by the attorney was for the drafting of a surrogacy contract. There is the contention that the attorney had invoiced the client with a final

account when the mandate was terminated for the amount of R13 713,00. When the client complained because the legal brief had not been done, the attorney then drafted a bill of costs and set it down for taxation before the taxing master of the High Court in the amount claiming R51 363, 50. The client also submits that this matter is not appropriate for determination by the taxing master of the High Court and should be referred to the Legal Practice Council for assessment.

[5] It is trite that the taxing master of the High Court in which litigation took place has jurisdiction to tax a bill of costs in respect of services rendered in connection with such litigation. The relevant portion of Rule 70(1)(a) of the Uniform Rules sets out the following:

> *'The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work…Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do*.'

[6] In both of these matters litigation did not proceed in the courts.

[7] I had the occasion to deal with this aspect in *Taxation of Legal Costs in South Africa,*[2] where it was expressed that law societies are reluctant to assess the attorney and client fees because the matter is of a litigious nature and it can be taxed and quantified by the taxing master of the appropriate court. In particular, the Law Society of the Northern Provinces required that it may only be approached if the attorney consents to the fee assessment committee reviewing his or her fees. It is however evident that clients of legal practitioners having an issue with fees charged may currently lodge a complaint to the Legal Practice Counsel established under the Legal Practice Act 28 of 2014 (LPA).[3]

[8] Such matters are referred to the newly established Legal Practice Council, being the regulatory body for the legal profession in the Republic.[4] The Attorney's Act 53 of 1979 (Attorney's Act) and the rules set out by the former Law Societies was repealed by section 119 of the LPA, with effect from 1 November 2018.

[9] Therefore it follows those matters of such nature relating to service based legal fees between an attorney and his or her client with or without a contingency fee agreement generally does not proceed before the taxing master of the court,

[2] Francis-Subbiah, R. "Taxation of Legal Costs in South Africa" First Edition, Juta (2013) at p25 para 3.3
[3] A charge of 5% of the total bill is levied for the service, although a waiver of the fee can be considered in deserving circumstances.
[4] Section 4 of Act 28 of 2014

instead it will come before the committees establishment under the Legal Practice Council.

[10] The LPA provides for a legislative framework for the transformation and restructuring of the legal profession under a single regulatory body, to ensure the values underpinning the Constitution are embraced and that the rule of law is upheld, that legal services are accessible, that the independence of the legal profession is strengthened and to ensure the accountability of the legal profession to the public.[5] In terms of section 4 of the LPA, the Legal Practice Council regulates and exercises its jurisdiction over legal practitioners who are attorneys and advocates. Following the recommendation from the South African Law Reform Commission report,[6] the Legal Practice Council should establish a committee that will be responsible for determining service-based attorney and client fee guidelines in all branches of the law.[7] In particular, section 5(b) of the LPA sets out the objectives of the Legal Practice Council who are to:

> '*ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services thereby enhancing access to justice.'*

[5] Preamble to Legal Practice Act 28 of 2014; S4 – Purpose of the LPA
[6] On Project 142 released in April 2022, after it was approved by the Minister of Justice and Correctional Services
[7] Section 18(1)(ii) of Act 28 of 2014

[11] These provisions mandate the implementation of and empowers the Legal Practice Council under a 'Fees Assessment Committee' to set up services for the assessment of legal practitioner fees and costs by its own experts. Legal fees payable by clients to attorneys have been determined by market forces and not by legislation. Whereas a taxing master of the court is empowered to tax bills in terms of Rules and Tariffs governed by legislation.[8] The fee assessment committees will therefore contribute to an in-house capacity building for the Legal Practice Council in each of its provincial seats. This will further contribute to strengthening the independence of the legal profession, addressing the problem of exorbitant legal fees and promote accountability to the public.

[12] In the *Vollmer* matter, a surrogate motherhood agreement had to be concluded and confirmed by the High Court in accordance with the Children's Act.[9] The application proceeds before the Judge and is conducted in chambers as per statutory requirement. However, *in casu* the *ex parte* application to the High Court did not materialize and proceed before the court.

[13] It is the client's submissions that the nature of surrogacy matters is not litigious since the application is an *ex parte* matter and an administrative process. The client argued that the taxation of the bill of costs is the incorrect procedure

[8] Rule 70 of the Uniform Rules of Court, Tariffs promulagated by the Rules Board
[9] Chapter 19 of the Children's Act 38 of 2005

because no fee mandate was signed between the client and attorney. Further, no judgment was secured against the client to warrant a taxation of a bill of costs. The client took the view that the attorney should issue summons in order to recover the costs claimed for professional services rendered. Even when summons is issued, a quantification of the fees claimed is required. Hence, from the preceding discussion, it is appropriate that such assessment of fees and costs incurred by the attorney for services rendered to her client be assessed by the relevant controlling body of the attorney, the Legal Practice Council. It follows that the taxing master's lack of jurisdiction to tax the bill of costs is confirmed and the review is therefore dismissed.

[14] The position however, in *Brenner Mills* differs since a bill of costs was taxed on an attorney and client basis on 28 September 2021 and 13 January 2022. The parties had agreed in terms of their Contingency Fee Agreement at paragraph 7, that in the event of a premature termination of the agreement by the client, *'the client shall owe the Attorneys an amount as agreed upon or taxed by the Taxing Master of the High Court, Pretoria on the applicable scale.'*

[15] Where a client feels aggrieved by any portion of an attorney- client mandate or any fees chargeable in terms of the agreement, the agreement shall be referred for review to the relevant professional controlling body of the practitioner, the Legal Practice Council, which may set aside any provision of the agreement if

in its view such provision of fees is unreasonable or unjust.[10] I take into account that as the matter *in casu* was taxed by the taxing master of the High Court, the discretion exercised by the taxingmaster becomes reviewable by the Court.[11]

[16] The authorities are clear, a taxing master's decision will be interfered with only when the court is clearly satisfied that the taxing master's ruling was clearly wrong.[12] The taxing master is tasked on every taxation to allow such costs, charges and expenses as appear to him or her to be necessary or proper for the attainment of justice or for defending the rights of any party.[13] A taxing master exercising a discretion in determining what costs are reasonable must adopt a flexible and sensible approach, taking into account particular features of the case, relevant principles and authoritive judicial decisions and legislation.

[17] The Constitutional Court further held in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*[14] that a balance must be struck to afford the party adequate indemnification but within reasonable bounds. The High Court tariff strictly determines the taxation of party and party costs that are recoverable from the opposing party and there is no tariff

[10] As contemplated by section 35 of LPA
[11] Rule 48 of the Uniform Rules
[12] Francis-Subbiah, R *Taxation of Legal Costs in South Africa* at pages 67-70;*Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A); *Roux v Road Accident Fund* (unreported, ECJ case no 650/04, 19 May 2005)
[13] Rule 70 of the Uniform Rules
[14]2002 (2) SA 64 (CC)

prescribed for fees that are paid by a client to his or her attorney. However, a taxing master under the provisions of Rule 70(5)(a) of the Uniform Rules is entitled in exercising a discretion, when taxing a bill of costs, to depart from the provisions of the tariff, in extraordinary or exceptional cases where strict adherence to such provisions would be inequitable.

[18] There are 16 items appearing on the bill of costs that are disputed. These are items 5,10,13,19,20,25,26,28,29,30,32,33, 36,37,40 and 42.

[19] In considering the hourly rate applied, the acceptable starting point is the mandated agreement between the attorney and client. The agreement refers to an amount of R 3 500, 00 per hour. The parties had agreed that in the event of a premature termination of the agreement by the client, the client would be liable for all the work done by the attorney at the rate of R3 500.00 per hour.

[20] The prime indicator for taxation remains the agreement and not the tariff.[15] In this regard, the taxing master exercised a discretion to determine the reasonableness of the agreed fee. The taxing master confirmed the hourly rate based on the agreement between the parties, ruling that the fee per hour was reasonable and fair for the type of matter and service rendered. Using the tariff

[15] *Cambridge Plan AG V Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (t) at 602F-H

strictly in taxing a bill of costs as between attorney and client will be unreasonable in the current circumstances where there is an undisputed hourly fee agreement. No circumstances are presented as to why the taxing master should be bound to apply the tariff under Rule 70 of the Uniform Rules or double the tariff. I cannot faulter the taxing master in confirming the rate per hour as agreed between the parties. The discretion is correctly applied.

[21] The applicant complains that Item 5 pertains exclusively to time spent in researching legislation and case law in preparation for consultation with counsel. Even though it is the role of counsel to conduct research when employed and not the attorney. Counsel did in fact do research and invoiced a charge for it. Furthermore, the applicant contends that the attorney was briefed because of his competence and expertise in the field of Competition Law and is now charging to qualify himself as an expert at the expense of the client.

[22] The taxing master took into account that it was common cause between the parties that the matter was novel and the nature of the relief sought was unique. Even though the attorney is an expert in the field, the taxing master accepted that the novelty of the matter required an *'inevitable over-caution and thorough research.'*

[23] It is evident from the bill of costs that both the attorney and the counsel conducted research. The taxing master allowed research to be done by the attorney at half the hours spent by counsel. However, the taxing master has not adduced facts upon which I could find that he properly exercised his discretion on these items allowing for additional research by the attorney.

[24] A significant duplication of work cannot be justified under any circumstances. Unjustified circumspect or over-caution cannot be condoned. Where thorough research is necessary it may not be duplicated and the actual function of each legal representative in the team to produce the necessary work must be justified. Accepting that an attorney upon being briefed with the matter understands the issues concisely and employs counsel to conduct research, settle the pleadings and argue the matter in court and therefore will not himself spend hours in research. The attorney fee for research in the circumstances is not justified and must be taxed off completely at item 5.

[25] Items 13, 28 and 37 further include time spent on research. Although the precise times spent on research at these items are not specified, the work done should be considered contextually with a reasonable time allowed. At item 13, an hour was taxed off and two hours was allowed for researching, preparing and drafting a contingency fee agreement of 5 pages. The applicant submits that drafting 4 pages an hour and perusing 40 pages an hour by an attorney is deemed a

reasonable practice in the division of the High Court on a party and party basis. It was similarly allowed in an unreported decision where medical accounts where allowed on a time- spent basis of 40 pages per hour.[16] Taking into account that this bill is taxed as between attorney and (own) client the allowance of 2 hours is reasonable and the taxing masters discretion is confirmed. In applying the similar principle to item 28, an allocation of 12 hours is appropriate and reasonable for the work done in preparation, drafting of the notice of motion, founding affidavits and compiling and preparation of annexures for the application consisting of 24 (A4) pages and 179 annexures. The taxingmaster had allowed 16 hours and therefore a further 4 hours be taxed off.

[26] The taxing master allowed 5 hours for the work done at item 37. The applicant initially submits that the pleadings were already lodged and nothing further needed to be done regarding research, however fails to comment on the consideration of the default judgment application. Taking into account that the taxing master has taxed off 3 hours, which would be adequate to address the duplication pertaining to research work. 5 hours for the perusal, drafting of leter to the commission, consultation with client and making of copies for the default judgment is adequate and generous. The ruling of the taxing master is not interfered with.

[16] Van Rooyen v Road Accident Fund (Unreported, TPD case no 7364/1998, 21 June 2004)

[27] It is the respondent's contention that since a contingency fee agreement was entered in on the basis that 'no win, no fee' applied to the arrangement between the parties, it was necessary to invest the time expended on the work done and be overcautious to ensure success. In consideration of the legal service rendered and hours claimed, although irrelevant for success on a contingency basis, becomes significantly relevant when assessing the reasonableness of the time expended on the service rendered. In *Protea Life Co Ltd v Mich Quenet Financial Brokers en Andere*,[17] it was observed that all reasonable costs should be allowed as between attorney and client although they are not strictly necessary. In a similar vein in the matter of *Ben McDonald Inc and Another v Rudolph and Another*[18] the court held that costs that should be allowed are those that are not strictly necessary or 'proper' but yet are reasonable.

[28] Having perused the pleadings, although claimed to be drafted in a sound and clear manner to effectively tackle the novel issues of law, it did not require exceptional skill or intensive intellectual effort in drafting the pleadings. The subjective need for circumspect does not justify additional time spent. The ultimate test is whether the time spent on the work done is reasonable. It was however cautioned in *Van Niekerk*[19] that a time based rate can be *'putting a*

[17] 2001 (2) SA 636 (o) at 644
[18] 1997 (4)SA 252 (T) at 256 C
[19] *J D van Niekerk en Genote Ing v Administrateur, Transvaal* [1994] 2 All SA 26 (A);1994 (1) SA 595 (A)

premium on slow and inefficient work and conducing to the charging of fees that are wholly out of proportion to the value of the services rendered.'[20]

[29] From the parties' submissions, concessions made by the respondent and an assessment of the bill of costs it can be gauged that the time expended to render the service to the client is excessive. Although the service was rendered at a time when the contingency fee arrangement was relevant, where a client agrees to pay a legal practitioner a percentage of the claim awarded in litigation, it is however no longer the decisive factor in this case. The application was withdrawn ostensibly for the reason that the Tribunal lacked jurisdiction in the matter. The answering affidavit of the Competition Commission indicate at paragraph 27 and 29, that the commission advised the applicant on 10 March 2020 and again on 1 Septembmer 2020 that it would oppose the application for the variation order sought on the basis that that '*the Tribunal lacks juridsdiciton to reduce the quantum of an administrative penality*'*.* Prior to the hearing of the application, it was withdrawn.

[30] Excessive time spent overcautiously to ensure success is replaced with an assessment of what time expended is reasonable to complete the service rendered. This is where the taxing master acting on a wrong principle,

[20] *Ibid* at pg 29 of [1994] 2 All SA 26 (A) –"Dit stel 'n premie op stadige en ondoeltreffende werk; en dit het tot gevolg dat 'n fooi gevra word wat geheel en al buite verhouding is met die waarde van die dienste wat inderdaad gelewer word."

misdirected[21] himself and allowed excessive time as he stated for '*inevitable over-caution and thorough research*.' A taxing master in his or her discretion should disallow certain costs such as where an attorney has over-reached a client even on an attorney and own client bill.[22]

[31] In ensuring that the client is not over-reached I find the following hours to be adequate and reasonable on an attorney and own client basis in the context of counsel and attorney rendering a service as a team to the client.

a) Item 10 – 30 min is generous and reasonable, tax off a further 30 min

b) Item 19 – 2 hours allowed by the taxing master is confirmed

c) Item 20 – 1 hour allowed by taxing master is confirmed

d) Item 25 – 1 hour is reasonable, as letter is to be settled by counsel and read again at item 26, further 2 hours to be taxed off

e) Item 26 – 2 hours allowed by taxing master is confirmed

f) Item 29 – 2 hours allowed on the basis that it flows from the work done at item 28 where 12 hours was allowed, 6 hours to be taxed off

g) Item 30 – 2. 5 hours allowed – meeting was 2 hours and 30 min for travel, taxing master allowed 5 hours, tax off a further 2.5 hours

h) Item 32 – 4 hours allowed – this item in part appears to be a duplication with item 30, tax off 6 hours

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[21] *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty Ltd)* 1999 (4) SA 503 (W) at 527 set out criteria including whether the taxing master acted upon a wrong principle or was misdirected in deciding to interfere with the taxing master's discretion.

[22] Francis-Subbiah, *supra* at p108

i) Item 33 – 4 hours allowed, include duplications and time spend is excessive, tax off 4 hours

j) Item 36 – 1 hour allowed by taxing master is confirmed.

k) Item 40 – 1 hour allowed by the taxing master is confirmed.

[32] Item 42 deals with counsel fees as a disbursement by the attorney on behalf of the client. Counsel is briefed in the discretion of the attorney. The taxing master considered counsel's invoice and concluded that it was fair and reasonable. The applicant dissatisfied with the taxing master's decision requested the taxing master to refer counsel's invoice for assessment to the Legal Practice Council or the Advocates Bar. Once a taxing master has taxed a bill of costs, it may be taken on review to a Judge in chambers[23] and is not competent for assessment by other regulatory bodies of the legal profession. The applicant however has not raised any objections to Counsel's account in this review proceeding and therefore the Court is not called to review Counsel's account.

Court Order

[33] In the result the following order is made:

33.1 The review under case no 43767/2020 is dismissed with costs. The decision of the taxing master is confirmed and upheld.

[23] In terms of rule 48 of the uniform rules of court

33.2 The review under case no 6686/2021:

a) succeeds on items 5, 10, 25, 28, 29, 30, 32 and 33. The decision of the taxing master is set aside and replaced with the court's decision as set out in the judgment.

b) fails on items 13, 19, 20, 26, 36, 37, 40 and 42 and is dismissed. The decision of the taxing master is confirmed and upheld on these items.

c) There is no order as to costs.

FRANCIS-SUBBIAH, J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION: PRETORIA

The judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to Caselines. The date and time for the hand down is deemed on 23 December 2022 at 16H00.