

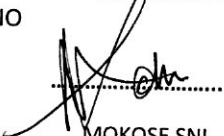
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2016/77102

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
3/8/2022	
DATE	MOKOSE SNI

In the matter between:

MARTHA KENOSI POLORI

Plaintiff

and

BENJAMIN MOODIE

Defendant

REVIEW IN TERMS OF RULE 48 OF THE UNIFORM RULES OF COURT

MOKOSE J

[1] The plaintiff seeks a review in terms of Section 48 of the Uniform Rules of Court regarding the rulings made by the Taxing Master on 29 July 2020 in respect of a bill of costs of Adams and Adams. The bill was taxed in respect of a trial in which the court disallowed certain amounts which the plaintiff contends were reasonable, proper and necessary.

Background

[2] The plaintiff was involved in a motor vehicle accident on 7 November 2014. She sustained orthopaedic and soft tissue injuries. An offer was accepted by the defendant on behalf of the plaintiff for the sum of R120 000,00 which was duly paid by the RAF. The defendant failed to convey the offer to the plaintiff the offer and also failed to discuss the nature of the damages, the sequelae of the injuries and the ability to appoint experts before accepting the offer. The defendant also failed to pay the said amount over to the plaintiff. The plaintiff then claimed damages from the defendant for his failures as outlined above on the basis that there had been a breach of the defendant's contractual duty of care to the plaintiff.

[3] The issues in dispute between the parties included, but were not limited to, prescription of the matter, injuries sustained by the plaintiff in the accident, referral to expert witnesses, the plaintiff's employment at the time of the accident, the completion of the RAF 1 form and the accuracy of the actuarial calculations. The matter was set down for trial on 20 May 2019 but was settled on the said day by the parties in the sum of R1 000 000,00.

[4] The order granted by the court by agreement between the parties dealt with costs as follows:

"3. *The defendant shall make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall also include but not be limited to the costs pertaining to the hearing dates of 21 February 2018, 15 October 2018 and 20 May 2019 and the following:-*

3.1 *The fees Senior Counsel on the High Court scale, inclusive of, but not limited to, Counsel's full days fees, as well as the costs of preparation of the Heads of Argument, if any;*

- 3.2 *The reasonable, taxable costs of obtaining all expert, medico-legal, actuarial; and addendum reports from the Plaintiff's experts which were furnished to the defendant and/or included in the trial bundles;*
- 3.3 *The reasonable, taxable preparation, qualification, travelling and reservation fees, if any, of the following experts whom notice have been given, being:*
- 3.3.1 *Dr Birrel (Orthopaedic Surgeon);*
- 3.3.2 *Dr Truter (Clinical Psychologist);*
- 3.3.3 *Ms Holshausen (Occupational Therapist);*
- 3.3.4 *Dr D Shevel (Psychiatrist);*
- 3.3.5 *Dr Mazabow (Clinical Psychologist);*
- 3.3.6 *Ms Noble (Industrial Psychologist);*
- 3.3.7 *Mr Hayes (Expert Attorney);*
- 3.3.8 *Mr G Whittaker (Actuary).*
- 3.4 *The reasonable costs of all consultations between the plaintiff's attorneys, and/or Counsel and/or witnesses, and/or the experts and/or the Plaintiff in preparation for the hearing and to discuss the terms of this order;*
- 3.5 *The reasonable, taxable accommodation and transportation costs (including Toll and E-toll charges) incurred by or on behalf of the plaintiff in attending all medico-legal consultations with her legal representatives, and the court proceedings, subject to the discretion of the Taxing Master."*

[5] I shall deal with the specific items to be reviewed by the court and give a ruling thereafter.

Items 184 and 185

[6] These items deal with the taxed costs in respect of expert witness meetings. The Taxing Master taxed off an amount of R13 364,00 from the plaintiff's bill of costs having ruled that the experts do not qualify themselves when attending expert meetings but assist in preparing counsel for trial. Accordingly, the said amounts are not recoverable under the umbrella of qualifying fees and constitute attorney and client fees and disbursements.

[7] The plaintiff contends that the Taxing Master erred in her decision to disallow the amounts as the consultations with the experts served to inform the experts of the issues on which they would be required to testify and to limit the issues to a minimum. The consultations fall within the ambit of the qualifying process. The whole purpose of the meeting was to ensure that all the experts knew where they differed with each other and the basis of their differences. Accordingly, the expert meeting fell within the ambit of qualifying fees and should be allowed by the Taxing Master.

[8] In the stated case of the Taxing Master, the question is asked why the experts would have a meeting to qualify themselves as no appearance was made by them in court, the matter having been settled by agreement between the parties. Such attendances cannot be put to party and party costs. The Taxing Master was of the view that experts do not qualify themselves when they attend expert meetings and that same is not recoverable. The court's attention was brought to the case of *City Deep v Johannesburg City Council*¹ where the court held that it had always been accepted that in reviewing

¹ 1973 (2) SA 109 (W) at paras D - E

the ruling of a Taxing Master the courts will not lightly disturb the discretion which he has. It would only be interfered with if he had exercised it improperly or has not brought his mind to bear on the question in issue or has acted on a wrong principle.

[9] The scope of qualifying fees was discussed in the case of *Kohne and Another v Union and National Insurance Co Ltd*² in which the following principles were enunciated:

- (i) that an expert is a “master of his trade” who is able by comparison and experience to place his opinion before the Court. It is his special skill, knowledge and experience which makes his evidence of value to the Court. He comes to Court as the master and not to learn;
- (ii) in order to enable him to enlighten and assist the Court, he must qualify himself by ascertaining the facts upon which he has to bring his opinion to bear. This usually involves inspection of persons or places or things;
- (iii) it is also expected of experts to read relevant authorities and scientific journals to enable them to assist the Court in the light of their own experience and knowledge compared or contrasted with what is said in the authoritative writings. It must be obvious that it is only those portions of the authoritative writing which are strictly relevant which he as a master should read. As a master the judge was of the view that he should know where to find the relevant portions. It may sometimes be necessary for experts to carry out investigations and do experiments;
- (iv) qualifying fees are regarded as part of the costs of the production of reasonably required evidence. The indemnity which is afforded by the Rule to a successful party in respect of qualifying fees is for all costs reasonably incurred.

² 1968 (2) SA 499 (N)

[10] It is common cause that the experts did not testify in court, the matter having been settled by the parties. In determining whether the experts' fees are qualifying fees, regard must be had to whether the costs were expended for the purpose of the meeting which was to assist in preparing Counsel for court or to inform the experts of the issues on which they would be required to testify, thereby limiting the issues in the matter.

[11] Applying the principles set out in the cases noted above, I am of the view that from the notes taken in the experts meeting the costs do not fall within the ambit of qualifying fees. However, the plaintiff is of the view that in the event that the court is of the view that the expert meeting does not fall within the ambit of qualifying fees, the fees should be allowed as was it was agreed between the parties that the defendant would pay the costs occasioned by the expert meeting as per paragraph 3.4 of the Court Order.

[12] I have looked at paragraph 3.4 of the court order and am in agreement with the plaintiff that the costs would fall within the ambit of the said paragraph. Accordingly, the fees in respect of Items 184 and 185 are allowed.

Item 352

[13] The Taxing Master taxed off the sum of R58 362,50 being a portion of the amount charged by de Waal SC, counsel for the plaintiff. The Taxing Master was of the view that the work charged by Counsel was unnecessary and could have been done by an attorney. Of the total amount of 54.75 hours that was spent by counsel on this matter, she disallowed fees for 17.75 hours and only allowed fees for the time she perceived as reasonable in the circumstances.

[14] It is difficult to lay down a scale of fees for counsel. Each case must be treated on its own merits.³ A Taxing Master has the discretion which will not be interfered with lightly by a reviewing court. It will only be interfered with where the discretion of the Taxing Master has been exercised improperly or has not brought his mind to bear on the question in issue or has acted on a wrong principle.

[15] Oral advices are generally only allowed as between attorney and client and it is customary for counsel to be briefed for written advice. However, the court in the matter of *Stuart-Lamb v Stuart-Lamb*⁴ held that obtaining of advice plays an integral part of any trial and the Judge could see no reason why counsel's fees for furnishing written advice in evidence should be regarded as a party and party charge whereas fees for consultations held for the purpose of furnishing oral advice on evidence should not likewise be treated as a party and party charge.

[16] The plaintiff deals with the impugned items on counsel's account in detail. They include advice on evidence in which she disallowed 5.75 hours and found that 'piecemeal advices' cannot be allowed on party and party bill of costs. The court is informed that although the advice on evidence by counsel is privileged information, it was advice pertaining, *inter alia*, to aspects of a reasonable settlement amount, the complex legal and factual issues pertaining to the under settlement of the plaintiff's claim, whether the experts should have been briefed and the allegations made in the pleadings, approach to claims of this nature, actuarial calculations and the reasonableness of the tender. The court is also informed that some of the advice on evidence pertained to the ensuring that the matter is ripe for hearing. I am satisfied that the time spent by counsel on the aspect of advice on evidence

³ Roos: Taxation of Bills of Costs p20

⁴

was necessary, proper and reasonable in the circumstances and accordingly reverse the amounts disallowed by the Taxing Master in this regard.

[17] The Taxing Master further disallowed the settling and amending of Mr Hayes' expert report on the basis that it constituted an amendment of the report. She further ruled that Mr Hayes was an attorney and was therefore not necessary for counsel to settle this report. However, one hour under this item was allowed.

[18] The plaintiff submits that Mr Hayes had been briefed as an expert in the matter, was instructed to express an opinion on the obligation of an attorney in the position of the defendant towards his client. An expert summary was filed in terms of Rule 36(9) of the Uniform Rules consisting of 8 pages. We are further informed that counsel spent an hour consulting with junior counsel and Mr Hayes then finalised and settled the expert summary.

[19] I am of the view that the Taxing Master misunderstood counsel's function in settling the expert witness' summary. It was not being amended. Accordingly, the time spent was necessary, proper and reasonable in the circumstances.

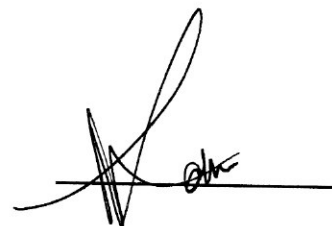
[20] The next item under the disallowed amounts by the Taxing Master is that of the telephone calls and correspondences. The Taxing Master disallowed a total of 3.25 hours spent by Adv de Waal SC on telephone calls and correspondences. In her stated case the Taxing Master states that it has been disallowed as these administrative functions are those of an attorney and not an advocate. The plaintiff denies that they are merely administrative functions and included the time spent considering

aspects pertaining to the joint minutes between experts which forms part of counsel's fees for preparation for trial.

[21] I have considered the explanation by the plaintiff as to counsel's fees in respect of telephone calls and correspondences and am of the view that the Taxing Master was correct in taxing off these amounts under this charge. Accordingly, the Taxing Master's decisions pertaining to the fees taxed off in respect of telephone calls and correspondences is upheld.

[22] In conclusion, the following order is granted:

- (i) Items 184 and 185 fall within the ambit of qualifying fees and should not be taxed off;
- (ii) Item 352 falls within the ambit of counsel's advice on evidence and should not be taxed off;
- (iii) Expert witness summary fees should not be taxed off; and
- (iv) Telephone calls and correspondences – the Taxing Master did not err and that the amounts should be taxed off.

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MOKOSE J

Judge of the High Court
of South Africa Gauteng
Division, Pretoria

For the Plaintiff:

Adams & Adams Attorneys

For the Defendant:

Gildenhuis Malatji Inc