REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, DURBAN

CASE NO: 5602/2009

In the matter between:

P A LANDER **APPLICANT**

and

L O'MEARA **1ST RESPONDENT**
KWAZULU-NATAL LAW SOCIETY **2ND RESPONDENT**

JUDGMENT

GORVEN J

JURISDICTION

[1] This is an application arising from non-litigious work done by the applicant, who is an attorney. The applicant charged R45 000.00 for this work. The client regarded this fee as excessive. As a result the second respondent, pursuant to its rules, appointed the first respondent as a committee to tax the fee in question. The first respondent assessed the fee at R9 000.00. The applicant was dissatisfied with the assessment and applies to have it reviewed.

[2] Section 69 (h) of the Attorneys Act, No. 53 of 1979 grants to the Council of the second respondent the power to prescribe the manner of assessment of the fees payable by any person to a practitioner in respect of the performance of any work other than litigious work and, *mero motu* or at

the request of such person or practitioner, to assess such fees in the prescribed manner.

[3] Section 74 (5) of the Act provides that any assessment of fees in terms of a rule contemplated in section 69 (h) shall be subject to review in all respects as if it were a determination by such officer of a provincial division or high court as is charged with the taxation of fees and charges.

[4] Pursuant to section 69 (h), the Council of the second respondent promulgated certain rules ("the Society rules"), one of which is rule 16.

[5] Rule 16 (b) of the Society rules provides as follows:

> With a view to affording the member reasonable and adequate remuneration for the services rendered by him, the Council or the committee as the case may be, shall, on every assessment, allow all such fees and disbursements as appear to it to have been reasonable for the performance of the work concerned, and in so doing shall take cognisance of the following-
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> (i) the amount and importance of the work done;
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> (ii) the complexity of the matter or the difficulty or novelty of the work or the questions raised;
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> (iii) the skill, labour, specialised knowledge and responsibility involved on the part of the member;
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> (iv) the number and importance of the documents prepared or perused without necessarily having regard to length;
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> (v) the place where and circumstances in which the services or any part thereof were rendered;
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> (vi) the time expended by the member;
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> (vii) when money or property is involved, it's amount or value;

(viii) the importance of the matter to the client;

(ix) the quality of the work done;

(x) the experience or seniority of the member;

whether the fees and disbursements have been incurred or increased through overcaution, negligence or mistake on the part of the member.[1]

[6] Rule 16 (e) of the Society rules provides that the Council or the committee, as the case may be, shall be entitled in its discretion at any time, to depart from any of the provisions of rule 16 (b), in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

[7] It can therefore be seen that the second respondent acted correctly in appointing a committee to assess the fee in question. It can also be seen that this court has jurisdiction to review that assessment at the instance of the applicant.

HISTORY

[8] The history of the matter is undisputed. It is largely set out in the letter of the applicant dated 12 October 2007 to attorneys who were then representing the client in querying his fee and the submissions of the applicant to this court. The applicant was approached by his client on 3 September 2007 to prepare a deed of sale to give effect to an agreement to sell his shares numbered 269 and 318 respectively held in Mziki Share Block Limited (the company). The company was the lessee of what is commonly

[1] The Government Gazette promulgating the rules, No. 6316 dated 2 March 1977, does not allocate a sub-paragraph number to the last-mentioned criterion. This appears to have been an oversight and has not been subsequently rectified.

known as a game farm situated between Phinda Lodge and Mkuze Game Reserve. The shares had been given to an estate agent to sell on behalf of the client without success. The manager of the game farm had introduced the present purchaser to the client. The client was unsure of the legal owner of the shares and referred the applicant to his accountant. The applicant contacted the accountant and became aware, as a result, that:

(1) The client held a 100% member's interest in Idleways CC ("the CC"), which in turn owned shares 269 and 318;

(2) The original purchase price of the shares by the CC was R1 000 000.00;

(3) A sale by the client of the two shares out of the CC to the purchaser would have resulted in a tax liability to the CC of R750 000.00 in respect of Capital Gains Tax.

Arising from this information the applicant drew the sale agreement on the basis that the client sold his member's interest and loan account in the CC to the purchaser. This relieved the CC of liability for Capital Gains Tax.

[9] The letter of 12 October 2007 purports to deal with the client's query under the various sub-headings of Rule 16 (b) of the Society rules which I have set out above although sub-paragraph (xi) does not deal with a sub-rule[2]. The letter set out the following:

> (i) The amount involved was R6 million, being the purchase price of the member's interest in Idleways cc, the corporation which held two shareblocks in Mziki Share Block Limited. Derrick had had the shareblocks on sale for some months and it was of importance to him,

[2] Sub-rules (xi) and (xii) were deleted by Government Gazette No. 27370 dated 18 March 2005. The item which the applicant numbered (xii) deals with the unnumbered sub-rule mentioned in footnote 1.

inasmuch as the amount offered was very acceptable and the matter had to be finalised with some urgency whilst the offer remained open.

(ii) The initial instruction was to prepare a Deed of Sale for the sale of the shareblocks. This however, had serious tax implications, as there would have been Capital Gains Tax payable of R750 000.00. This was on the basis that the base cost of the shareblocks was R1 million and the capital gain of R5 million would have attracted Capital Gains Tax accordingly. I therefore drew documentation for the purchase and sale of the member's interest in Idleways cc.

(iii) I have been in practice for an uninterrupted period of thirty years. During this time I have built up extensive experience in commercial work generally and commercial contracts in particular. The drafting of the sale agreement and related documentation, although not unduly lengthy, reflects my experience in that field. I consider myself to be a senior practitioner who is entitled to a fee in accordance with my experience. The amount of the selling price as well as the amount of potential Capital Gains Tax involved, reflect on the responsibility of the task undertaken.

(iv) To advise Derrick fully and to prepare the necessary documentation, it was necessary to obtain and peruse the Articles and Memorandum of Agreement (sic) of Mziki Share Block Limited. These amounted to eighty pages. In addition, documents received and perused included the shareblock certificates, company search in Idleways cc, balance sheet of Idleways cc, Resolution of Mziki Share Block (Pty) Limited relating to property sales levies and Special Resolution of Mziki Share Block relating to pre-emptive rights.

(v) The services were rendered from my business premises.

(vi) I received the instruction to attend to this particular matter on the 3rd September 2007. Due to its urgency and importance to Derrick, it was given priority. The matter was effectively finalised when payment was

received on the 11th September 2007, i.e. some six working days after having received the original instruction. Subsequent to this, there were various other queries of Derrick raised by him and which I dealt with.

(vii) As advised above, the selling price of the interest was R6 million.

(viii) The importance of the matter appears from my comments above.

(ix) The work done was of a professional standard and in keeping with a practitioner of my experience.

(x) My experience as a practitioner is dealt with in paragraph (iii).

(xi) The KwaZulu-Natal Law Society does not set tariffs, only guidelines, and I would suggest that the fee charged is not unreasonable in all the circumstances as set out above. One should also be mindful of the fact that if the sale were negotiated through an estate agent, the commission charged would be ten times that of the fee raised.

(xii) There was no "over caution, negligence or mistake" as referred to in this sub-paragraph.

[10] As mentioned above, the first respondent reduced the fee on assessment. He states:

I ascertained the following:

- that Mr Lander received telephonic instructions from Wiggill on the 3 September 2007 and by the 11 September 2007 the matter was finalized.
- that Mr Lander's file contained an adequate record of the work done by him.
- that if the matter was urgent, Mr Lander had met this requirement admirably.
- that as already stated no agreement had been reached on the fees to be charged by Mr Lander.

- that Mr Lander had calculated his fees based on a percentage of the purchase price namely .75% of R6 000 000.00.
- that Mr Lander justified his fees by drawing a comparison to what he claimed an estate agent would have charged ie. 7.5% of R6 000 000.00.

I have some difficulty understanding the rationale behind such a comparison being made. After all, an estate agent would be entitled to a fee as suggested by Mr Lander only if he was successful in introducing a prospective purchaser to a seller. Here Wiggle (sic) had himself found the purchaser.

An attorney is entitled to a reasonable and adequate remuneration for services rendered by him.

In the absence of an agreement on the fees to be charged, Mr Lander ought to have determined his fees based on the criteria set out in the Rules.

Mr Lander, it would appear, based his fees on an incorrect principle. There is nothing before me that would justify a departure from the criteria set out in the Rules.

The matter, although of great commercial value, was not a complicated one and Mr Lander would have not spent (sic) more than 5 to 6 hours on the matter. Given Mr Lander's seniority and experience, I am of the view that Mr Lander would be entitled to charge up to R1 500.00 per hour.

After carefully examining all work done by Mr Lander and after taking cognisance of the considerations set out in Rules, I would allow a fee of R9 000.00 excluding VAT.

[11] After the applicant indicated that he intended to review the assessment, a copy of his submissions was sent to the first respondent. The first respondent indicated that he had no comments to make on the submissions in question.

COMPLAINT

[12] The essence of the applicant's complaint is contained in his submissions to the following effect:

A. The committee erred in failing to apply all of the various criteria in Rule 16(b) to the assessment.
B. The committee erred in applying only one of such criteria, viz Rule 16(b)(vi) "the time expended by the member".
C. The committee ought to have applied the balance of the criteria, but failed to do so.
D. The committee erred in finding that the fee raised was based on a comparison with fees charged by an estate agent, whereas any such comparison was made to compare the fee raised to that which Wiggill would have paid had an estate agent negotiated the sale (i.e. R450 000.00 as against R45 000.00)
E. The fee raised was based on the factors set out in Rule 16(b) and it was felt that a figure between .05% and 1% of the value of the deal was appropriate, viz. .075%.
F. The committee, had it correctly applied the provisions of Rule 16(b), should have found that the fee raised was fair and reasonable.
G. In any event, the fee is not disproportionate to a fee chargeable by a senior legal practitioner of more that thirty years' experience.

LEGAL PRINCIPLES

[13] As indicated above, a review of this assessment is dealt with as if it were a determination by the taxing master in the high court. Rule 48 of the Uniform Rules of Court governs the procedure. The principles relating to these reviews are clear and definitive. A court is very reluctant to interfere

with the exercise of a taxing master's discretion.[3] The review is in the nature of the third species of review referred to by Innes CJ in the *JCI* case.[4] The approach has more recently been stated as being "That the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him … 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 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".[5] The usual basis for interference with a discretionary decision, set out in *Shidiack vs Union Government (Minister of the Interior)*[6]*,* therefore applies as well as the general approach set out in the *Ocean Commodities* case. If, accordingly, the taxing master did not exercise his or her discretion properly, did not apply his or her mind to the matter, disregarded factors or principles which were proper for him or her to consider or considered others which it was improper to consider, has acted upon wrong principles or wrongly interpreted rules of law, or has given a ruling which no reasonable person would have given or is clearly wrong, interference on review is justified.

[14] In particular, it has been held that fees allowed to counsel are pre-eminently left to the discretion of the taxing master and the court will not interfere with the exercise of this discretion unless the taxing master has

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[3] *Bedford Pharmaceuticals Ltd v S A Pharmacy Board and the Taxing Master* 1947 (1) (SA) 291 (T) 292-293

[4] *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111

[5] *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) (SA) 15 (A) 18 F – G. See also *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) (SA) 64 (CC) at para [13]

[6] 1912 AD 642

acted upon a wrong principle or exercised his or her discretion in a wrong manner.[7] This is so because there is only a limited tariff for counsel's fees in specified cases and the taxing master is enjoined "to allow such fees as he considers reasonable".[8]

[15] I consider that the present matter is akin to that relating to fees allowed to counsel. Like fees allowed to counsel, there is no specified tariff but only general principles. These are reflected in Rule 16 (b) and (e) of the Society rules. These do no more than provide factors to consider for the purpose of the general exercise of arriving at a fee which is "reasonable for the performance of the work concerned."[9] Certain of the items in Rule 16 (b) of the Society rules find echo in Rule 70 of the Uniform Rules of Court.[10]

[16] In such a matter, where reasonableness is the criterion, the general reluctance to interfere on review with a determination arrived at by the exercise of a discretion is even more pronounced. It goes without saying that this never reaches the point where the right of review is rendered nugatory.

[17] There is a so-called graft on the main principle relating to judicial interference with the decision of the taxing master. The court will substitute its own opinion for that of the taxing master when the matter is one in which the court is as well able to judge as the taxing master is.[11] This is not such a

[7] *Duvos (Pty) Ltd v Newcastle Town Council and Others* 1965 (4) SA 553 (N) 558 A – B. See also *van Harte v Rabinowitz and Minde and Another* 1947 (4) SA 366 (C) 368
[8] *Duvos (Pty) Ltd* (supra) at 558 C.
Rule 69 (5) of the Uniform Rules of Court.
[9] Preamble to Rule 16 (b) of the Society's rules.
[10] eg Rule 70(3), (5) (a) (b) and (5) (b).
[11] *Wellworths Bazaars Ltd v Chandlers Ltd and Others* 1947 (4) SA 453 (T) 457 – 8
Scott & Another v Poupard & Another 1972 (1) SA 686 (A) 689 F – G.

matter. The first respondent, as an attorney, is in a better position to assess the reasonableness of the fee charged for drafting an agreement than is the court.

THE PRESENT APPLICATION

[18] Applying the general principles to the present matter, accordingly, I am only entitled to interfere with the first respondent's assessment on limited grounds. I shall evaluate the submissions made by the applicant which, in essence, amount to a claim that the first respondent, in the respects specified, disregarded factors or principles which he should have considered. I shall thereafter evaluate whether or not, on an overall conspectus of the matter, I am of the view that the first respondent was clearly wrong.

[19] Submissions A, C and F are general ones to similar effect, namely, that the first respondent did not apply all of the criteria set out in rule 16 of the Society rules. The first respondent states that his assessment was made "after taking cognisance of the considerations set out in the Rules". It is clear that this is not simply formulaic on his part. As will be seen from my comments on submission B, it is clear that he had regard to the relevant criteria. In addition, he criticizes the applicant for failing to "have determined his fees based on the criteria set out in the Rules". He further states that there was nothing before him which "would justify a departure from the criteria set out in the Rules". His failure to itemise the various criteria does not mean that he failed to apply them or was not cognisant of them.

[20] Submission B is to the effect that the first respondent applied only one criterion, namely the time expended by the member, which is referred to in Rule 16 (b) (ix). This is clearly incorrect. The report of the first respondent shows that he took into account the amount of the work, the complexity of the matter, the seniority and experience of the applicant, the time taken to deal with the matter and the value and importance to the client of the transaction in question. He also took account of the urgency of the matter and the quality of the work done saying "that if the matter was urgent, Mr Lander had met this requirement admirably".

[21] Submission D claims that the first respondent erred in finding that the fee raised was based on a comparison with fees charged by an estate agent. The first respondent made no such finding. The first respondent indicated that the applicant's justification for charging the fee was based on this comparison. The reference to the estate agent by the applicant in his letter of 12 October 2007 was used to mount an argument that, since commission which would be charged by an estate agent is ten times the amount of the fee, the fee is reasonable. The first respondent is therefore correct in concluding that this is used as a justification. I share the first respondent's perplexity as to why any mention of this kind of fee is made in the context of an instruction to an attorney to draft an agreement since the two bear no relation to each other. I cannot find that the first respondent's reference to this comparison by the applicant amounts to any kind of misdirection or improper application of principle. It is the applicant who, in mentioning this, inappropriately introduces an irrelevant consideration.

[22] Submission E states that based on the factors set out in Rule 16 (b), it was felt that a figure of between .75% and 1% of the value of the deal was appropriate, viz. .075%". It is clear from the letter of 12 October 2007, on which the first respondent was obliged to base the assessment that the applicant focused primarily on the value of the commercial transaction. No reference is made by the applicant to the complexity of the agreement or the actual time expended by the applicant. Reference is made to other factors but the value of the transaction is clearly the overriding consideration in his arriving at the fee. When one looks at the other factors mentioned, none justifies charging a percentage of the value of the transaction as the applicant has done. The value aspect is but one among many relevant criteria. The applicant does not state why the normal approach to charging a fee, ie the time based approach, with the rate modified in the light of other factors such as experience, urgency, complexity, importance and value, was not used. It is as if he adopted an approach as set out in rule 16 (e) of the Council rules but does not say why this is warranted or make out a case that the normal approach would result in an inequity. He certainly does not submit that rule 16 (e) applies in the present matter.

[23] Submission G is to the effect that the fee is not disproportionate to a fee chargeable by a senior legal practitioner with more that thirty years' experience. No factual basis is laid for this submission. No submission is made that the way the applicant arrived at the fee is appropriate or usual

among practitioners in commercial work of this nature or how, for example, such senior legal practitioners would arrive at such a fee.

[24] I am of the view that none of the submissions set out by the applicant demonstrates that the first respondent disregarded factors or principles which he should have considered or approached the matter on a wrong principle. There is therefore no basis for interfering in his assessment along these lines.

[25] I turn to the general approach set out in the *Ocean Commodities* case. It is noteworthy that in his submissions the applicant does not attack the conclusions of the first respondent that:

1. The matter was not a complicated one;
2. The applicant would have spent no more than five to six hours on the matter;
3. In view of the applicant's seniority and experience, the applicant would be able to charge out his time at the rate of R1 500.00 per hour.

In the light of the first respondent having taken into account all the relevant factors and in the light of his reasoning, I am not satisfied on an overall conspectus that he was clearly wrong in arriving at his assessment.

[26] The application for review of the assessment must accordingly fail.

[27] Rule 48 (7) deals with the question of costs of a review of taxation. The convention is to award costs in a fixed, nominal amount. This is the case unless it is necessary to discourage a practitioner or litigant from wasting the

time of the taxing master and judges with reviews that clearly have no prospect of success.[12]

[28] I do not believe that *Madlala's* case applies in the present instance. There is therefore no warrant for ordering anything other than costs in a nominal amount.

[29] In the result the application to review the assessment of the first respondent is dismissed and the applicant is directed to pay costs of the application in a sum of R500.00.

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GORVEN J

(Application in chambers)

Attorney for the Second Respondent	:	Venn, Nemeth & Hart
Attorney for the Applicant	:	Patrick Lander
Date of Judgment	:	13 May 2009

[12] *Madlala v Southern Assurance Association Ltd* 1982 (4) SA 280 (D)