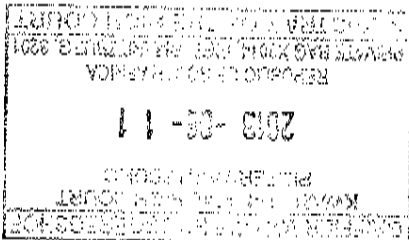


(a) disallowing various items in the bill of costs relating to the travelling, accommodation and related fees of the Respondent's instructing attorney from Cape Town, and as a consequence taxing off the items relating inter-alia to travelling to and from court, travelling to and from

[1] This is a review of a taxation of a party and party bill of costs in the above application. The Respondent seeks a review of the taxing master's decisions:

INTRODUCTION:

KOEN J:



J U D G M E N T

R T WIMBUSH
HARVEST CHEMICALS (PTY) LTD
First Applicant
and
ERINTRADE (PTY) LTD Va R T CHEMICALS
Respondent
Second Applicant

In the matter between:

IN RE CASE NO: 2151/12
(reportable)

CASE NO: 548/13

PIETERMARITZBURG

IN THE KWAZULU-NATAL HIGH COURT,

R J JOOSTE
REGISTRAR

¹ In addition to dismissing the application with costs, Ploos van Amstel J also granted an order interdicting and restraining the Applicants from using, disclosing or publishing the Respondent's confidential information and trade secrets, and pending the final determination of an action to be instituted by the Respondent against the Applicants within 60 days for an interdict, rectification of the share sale agreement and ancillary relief, the Applicants' were interdicted and restrained from developing or registering any product if they have, in doing so, used any confidential information or know how which the first Applicant obtained during his employment with the Respondent or which confidential information or know how was used to effect the Respondent's registrations with the Registrar of Fertilizers, Farm feeds, Agricultural Remedies and Stock Remedies in terms of Act 36 of 1947. This additional relief arose from the counter application.

These two categories will be considered *serialim* below. But first something has to be said of the background to the litigation resulting in the application which was launched against the Respondent and dismissed with costs by Ploos van Amstel J on 8 June 2012¹, which give rise to the bill being taxed.

(b) allowing only 3 hours and 20 minutes in respect of item 54, although this item was not objected to by the Applicants in their Notice of Objection to the Taxation, in respect of attendance at a consultation with senior and junior counsel on 22 March 2012, as well as directors of respondent and noting detailed particulars in order to draft and finalize opposing affidavits and attending court when return date postponed to 30/05/2012² for which a fee of R8 520,00 was claimed for 10 hours attendance.

by the Respondent;
junior counsel's chambers in Cape Town, parking at the airport and car rental expenses and accommodation in Pietermaritzburg, as incurred

RELEVANT BACKGROUND:

[2] The relevant background facts include the following:

- (a) The Applicants claimed that they were entitled to the results of a field trial conducted in respect of a sample of 1,3 dichloropropene, an agricultural chemical.²

- (b) The First Applicant is a former share holder and managing director of the Respondent;

- (c) In the founding affidavit the Respondent was cited as a private company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa carrying on business as a manufacturer and trader in agricultural chemicals from its principal place of business at 22 Old Field Road, Mkonjeni, Pietermaritzburg, KwaZulu-Natal;

- (d) Although the founding affidavit referred to and annexed copies of clauses from:

- (i) a agreement in terms whereof shares belonging to the First Applicant and other minority shareholders were bought out by Ububele Chemicals Group (Pty) Ltd; and

² The Respondent filed a counter application to protect certain alleged confidential information it believed the Applicants became privy to. The items in the bill of costs sought to be reviewed relate to the Applicants' application and not the counter application;

(iii) a further contract concluded between the Respondent and the

First Applicant as employee, entitled 'Employment settlement agreement', in terms whereof the First Applicant would remain an employee of the Respondent on call to assist in the Respondent's management, by assisting one Derek Alexander who was designated to take over the role of managing the Respondent,

these agreements were referred to³ simply to 'set out the nature of the aforementioned transactions in order to obviate any confusion created by my current status as an employee of the Respondent'. Indeed these agreements do not appear to have been of much or any significance to the issues in dispute in the application;

(d) It was common cause that the Respondent for a number of years wanted to register the 1,3 dichloropropene product with the Registrar of Fertilizers, Farm feeds, Agricultural Remedies and Stock Remedies and that the First Applicant also wanted to register this product.⁴ Both the Respondent and the First Applicant needed field trials in respect of the dichloropropene to be conducted, as the results thereof were essential for the registration of the product. The First Applicant had a sample of the product, the Respondent not;

³ Paragraph 11 of the founding affidavit.

⁴ The First Applicant maintained that he was entitled to do so provided he did not use any confidential information or know how which he obtained during his employment with the Respondent, or which confidential information or know how were used to effect the Respondent's registrations with the Registrar.

(e) A discussion took place between the First Applicant and Alexander telephonically on 16 September 2011. The Applicants' claim to the results of the field trial was based on an agreement allegedly concluded during this discussion. There was a factual dispute as to what was allegedly discussed during this discussion;

(f) Ploos van Amstel J found that the application was unaffected by any material dispute of fact as there was no evidence, and accordingly that the Applicants failed to establish that Alexander had the necessary authority to conclude the alleged agreement contended for by the Applicants. An alternative basis, claiming that the Respondent was estopped from denying Alexander's authority was also rejected.⁵

THE TAXING MASTER'S DECISION:

[3] The taxing master disallowed the first category of items and disallowed the bill in respect of the Pietermaritzburg correspondent'. The reason advanced was that:

'... the Respondent was cited in Pietermaritzburg as per the Notice of Motion. I

was convinced by the argument of Mrs Leppan that jurisdiction was never raised in the application. She relied upon the principles as set out in *Naval Services*, where the Applicant/Plaintiff does not have to cite the other party at the

⁵ An appeal against the decision of Ploos van Amstel J was noted, but subsequently withdrawn.

head office of its holding company. The Cape Town attorneys were allowed as if they were based in Pietermaritzburg.

As part of settlement negotiations, the costs of a Pietermaritzburg agent (as a post box only) was agreed upon. It is therefore not correct to say that two sets of attorneys should be allowed, as I did not allow this in principal (sic). It was agreed to between the parties for settlement.⁶

In respect of item 54, the taxing master stated that 'my discretion as a taxing master was judicially exercised by taking due notice of the machine operator's timesheet'.⁷

[4] It seems to me that what the taxing master purports to convey in respect of the first category is that the fees of the Pietermaritzburg correspondent were allowed, by virtue of the agreement between the parties, and not as part of her accepting that the Cape Town attorney's fees should be allowed as instructing 'out of town' attorneys. But for that agreement, it seems that she would not have allowed the fees of the Pietermaritzburg attorneys. This might appear somewhat inconsistent or incongruous but was probably caused by the taxing master being faced, as a *facti* *accompli* with an agreement between the parties that the fees of the Pietermaritzburg attorneys should be allowed. As these fees were allowed on that basis I do not intend saying anything further about them. The issue remaining and to be addressed is whether the fees of the Cape Town attorney should have been

⁶ The reference to 'Naval Services' is to *Naval Services A Vanegcau Limitada v Strang Rennies Metal Terminals (Pty) Ltd*, Case No 11918/07 NPD, a judgment of Skinner A J with which I concurred.

⁷ This was with reference to the decisions in *Ocean Commodities Inc and Others v Standard Bank* 1984 (3) SA 15 (AD) and *Government Gazette* 2835 of 12 December of 1952. The taxing master always retains the discretion to disallow fees even in the absence of objection by the other side.

⁸ As claimed by the Respondent.
⁹ As the Taxing Master allowed.

and other information relevant to the application? Cape Town attorneys thus had first-hand knowledge of the business structure commercial agreements which was (sic) relevant to this application. The responsible for drafting the Respondent's shareholders agreement and other attorneys for the Respondent, De Klerk & Van Gend, was (sic) also Respondent over the last couple of years preceding this application. The Respondent have handled substantial amounts of legal work for the attorneys for the Respondent, as well as the junior counsel for the jurisdiction of the Cape High Court, being De Klerk & Van Gend. The reside. The Respondent's attorneys of record are also situated within the also the place where some of the Respondent's directors/or employees has its registered address in the jurisdiction of the Cape High Court. This is Respondent points out that it:

[5] In its 'Contentions in respect of the taxing master's stated case', the

THE RESPONDENT'S CONTENTIONS:

allowed as out of town instructing attorneys⁸, or simply 'as if they were based in Pietermaritzburg'⁹.

'Consultations with deponents to affidavits resisting the above application was also taken in Cape Town as the deponents to some of the affidavits reside there'.

The Respondent further conceded that jurisdiction was not challenged by the Respondent as the KwaZulu-Natal High Court, Pietermaritzburg does indeed have jurisdiction over the Respondent 'as the Respondent has a Head Office in the jurisdiction of the above Honourable Court.'

[6] The Respondent contends that the current matter is distinguishable from the decision in *Naval Services* in one or more of the following respects:

(a) The *Naval Services* matter was an action whereas the present review pertains to an urgent application;

(b) In the *Naval Services* matter the use of two sets of attorneys in South Africa, more specifically KwaZulu-Natal, was not challenged and the issue related to the use of and fees of solicitors in Australia where directors and shareholders of the Defendant resided and where 'policy decisions and final decisions are made entirely by the Australian members of the Board' and where 'all decisions concerning the governance of the company are made in Australia';

(c) In the *Naval Services* matter it was not an issue whether the Head Office or registered office was situated in more than one city in South Africa, but rather that they had a further office in Australia, the fees

10 Visser v Gubb 1981 (3) SA 753 (C) at 754H-755B.

(b) A judge or a Court on review will not interfere with the exercise of such discretion 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 have considered, or he has failed to bring his mind to bear on the question in issue, or he

(a) Rule 70 (3) provides that taxation of a bill of costs is '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'. It confers a discretion on the taxing master to award such costs 'as appears to him to have been necessary or proper for the attainment of justice or defending the right of another party'.¹⁰

[7] As much as there are these distinguishing features, the decision in *Naval Services* reaffirms important principles which remain valid and applicable also in the present review. These include the following:

RELEVANT LEGAL PRINCIPLES:

relating to which were disallowed by the taxing master, and that decision upheld on review.

has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but it 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 i.e. 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.¹¹

(c) Looked at from the perspective of an unsuccessful litigant, such litigant before embarking on instituting or defending an action or application would give consideration to the so called 'down side' of being unsuccessful, part of which consideration would be the associated legal costs. An important factor would be whether the prospective opposing party to the litigation is resident at the seat of the court and if not the reasonable and necessary need for there to be more than one set of attorneys for that litigant.¹²

At the one extreme would be that all the costs of any attorneys a successful litigant may employ, wherever situated, should be permitted. This is not an approach that has found favour in our law. On the other extreme is the position that where a litigant for whatever reason elects not to employ an attorney in the area he resides, he loses the benefit of

¹¹ *Visser v Gubb (supra)* at 755A – B

¹² *Naval Services* pg 4.

being entitled to recover the costs of any attorney he instructs other

than a set of attorneys at the seat of the court.¹³

(d) A healthy balance between these two extremes must be sought to be

achieved. This is done by adopting what has been termed a 'realistiese

en gesonde verstand benadering'.¹⁴

(e) In *Schoeman v Schoeman*¹⁵ it was held¹⁶:

'[I]t is, in my judgment not correct to say that in the choice of a local attorney a litigant is necessarily restricted to an attorney practising in the town where he lives or carries on business. Much would depend on the circumstances of the case and a realistic and common sense approach should be adopted.'

DISCUSSION REGARDING THE CAPE TOWN ATTORNEYS CHARGES:

[8] It is trite law that a company may for jurisdictional purposes be 'resident' in

more than one place where its registered office and principal place of business are

located at different venues.¹⁷ The principal place of business would ordinarily be the

¹³ An approach expressly disapproved of in *Naval Services*.

¹⁴ See *Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk* 1993 (2) SA 144 (O) 155B. Contrast *Stadsraad van Benoni v Meyer* (Witwatersrand Local Division Case No. 34133/93), *Vorster v Vorster* (Eastern Cape Division Case No. 151/90) and *Human v The Administrator of the Cape of Good Hope and Others* (Eastern Cape Division Case No. 567 where this 'common sense approach' has not been followed as a general trend. On the other end of the scale is the strict view adopted in *Sonnenburg v Molima* 1987 (1) SA 571 (T) to the effect that where a litigant for whatever reason elects not to employ a local attorney, he loses the benefit of being entitled to recover the costs of an attorney other than one at the seat of the court.

¹⁵ 1990 (2) SA 37 (E).

¹⁶ At page 42H.

¹⁷ *Rex Trueform Clothing Company Ltd v Hutton & Cook* (Eastern Cape Division Review Case No. 1483/96), Case No. 642/95 referred to in *Naval Services* at pg 6 where it was said, 'Principal place of business, being the place of central control, would ordinarily be the place

place where the company decides whether to institute or defend actions and also the place where it would make decisions relating to litigation and where it would be expected to consult with its attorneys. In a different context it has been held that a company resides at the place where its general administration is located, i.e. at the seat of its general management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business'.¹⁸

[9] In *casu*, in considering the downside of litigation, the Applicants on what is before me as their version would on probability have proceeded on the basis that the Respondent, which the First Applicant believed was represented in the dealings with him by Mr Alexander, had its principal place of business in Pietermaritzburg and that the dealings concerning the subject matter of the application i.e. the sharing of field results, had been within the jurisdiction of this Court. Such consideration is however not conclusive on the issue before me.

[10] Although reference was made by the Respondent in support of the proposition that these charges should have been allowed to the sale of shares agreement and the employment agreement, it is not clear whether these are agreements referred to in paragraph 1.7.2 of the Respondent's contentions where it refers to 'the attorneys

where the company would decide whether to institute or defend actions. That is also the place where the company would make decisions relating to litigation and where it would be expected to consult with its attorneys.'

¹⁸ *Bisonboard Ltd. v K Braun Woodworking Machinery (Pty) Ltd.* 1991 (1) SA 482 A.

[11] The field trials in respect of the sample of chemical were to be conducted by the University of KwaZulu-Natal, which has campuses within the jurisdiction of this Court. Although this did not appear clear from the founding papers, it seems that the communication on 16 September 2011 between the First Applicant and Alexander occurred within the jurisdiction of this court. If nothing else, there is nothing before me to suggest that these events did not occur within the jurisdiction of this court.

for the Respondent, De Klerk and & Van Gend, also having been responsible for drafting the Respondent's shareholders agreement and other commercial agreements 'relevant to this application'. *Prime facie* a 'shareholders agreement' would be something different to a sale of shares agreement. It is not clear whether 'commercial agreements which was (sic) relevant to this application' necessarily entailed the two agreements to which the First Applicant referred to in the founding affidavit.¹⁹ Certainly, the 'Contentions' of the Respondent did not refer to these agreements as such by name. In any event, these agreements were strictly speaking not relevant to the Applicant's application, although they appear to have significance in respect of the counter application.²⁰ The present review is not concerned with the costs of that counter application.

¹⁹ These were in any event simply alluded to by the First Applicant 'in order to obviate any confusion created by my current status as an employee of the Respondent'.
²⁰ In the affidavit by Mr Mocke in support of the Counter application he asked that the answering affidavits be read as part of his affidavit in support of the counter application. The terms of these agreements were dealt with in some detail.

[12] What would probably have been contemplated on the 'downside' of the application by the Applicants would have been consultations having to take place with and affidavits being obtained from Derek Alexander²¹ and Matthys Coetzee²², the persons the First Applicant had dealt with.

[13] In the Respondent's contentions it is variously stated that the Respondent 'has a head office in the jurisdiction of the above Honourable Court' and that the Respondent however 'has its registered address in the jurisdiction of the Cape High Court'. Whether the registered address might just be an official address with a professional firm or otherwise, does not appear. What is stated is that 'this is also the place where some²³ of the Respondent's directors²⁴ and/or employees²⁵ reside'. By analogy with the judgment in *Naval Services*, the presence of some directors and/or employees of a company does not mean that the 'general superintendence of its affairs' took place in the jurisdiction of the Cape High Court. Nothing conclusive is advanced to suggest that the day to day running of the business of the Respondent,

²¹ According to the affidavit of Mr Derek Norman Alexander, a director of the Respondent, he resides in Kroonstad, but he did visited Pietermaritzburg 'two or three times per month during June to December 2011'.

²² According to the affidavit of Mr Matthys Johannes Coetzee, the technical manager of the Respondent, he resides at Umhlanga, Kwazulu-Natal.

²³ Not all the directors reside in the Cape. It is not disclosed how many reside in the Western Cape. The underlining is mine.

²⁴ According to the affidavit of Mr Matthys Mocke he resides at Durbanville, Western Cape. According to the affidavit of Mr Herbert Cloete, he resides at Cape Town. Mr Alexander apparently resides in Kroonstad.

²⁵ The employees who deposed to affidavits, namely Mr Coetzee (technical manager) and Cynthia Barbara Du Toit (office manager) reside in Kwazulu-Natal at Umhlanga and Balgowan respectively.

including facts relevant to the application and more specifically facts in opposition thereto, were not in Pietermaritzburg.

[14] The fact that the matter was decided on the basis of the absence of authority on the part of Mr Alexander, which would require evidence from a higher echelon in the corporate structure of the Respondent, even if from 'some of the Respondent's directors and/or employees' residing in the jurisdiction of the Cape High Court, would at the level of a 'realistiese en gesonde verstand benadering' not necessarily dictate that the employment of Cape Town attorneys was reasonable and should be allowed on taxation. The authority point was a simple one²⁶, which would not *per se*, reasonably and as a matter of 'gesonde verstand' demand the appointment of attorneys in the Western Cape.

[15] It was also contended that the attorneys De Klerk & Van Gend and the junior counsel Mr H Rademeyer 'have handled substantial amounts of legal work for the Respondent over the last couple of years preceding this application'. A perusal of the application would not *per se* suggest that the present application (as opposed to the counter application) was so intricately related to any unidentified 'substantial amounts of legal work' conducted for the Respondent 'over the last couple of years preceding this application' to, at a realistic and common sense approach, require the employment of the Respondent's attorneys in Cape Town. If the Respondent felt

²⁶ Mr Alexander had not yet been appointed to a position of authority in the Respondent at the time the alleged agreement relied upon by the Applicants was alleged to have occurred.

[17] That consultations with deponents to the affidavits resisting the above application were also undertaken in Cape Town because some of the deponents to the affidavits reside there, does not in my view entitle the Respondent to the costs of the Cape Town attorneys on a party and party scale, other than 'as if they were based in Pietermaritzburg'. Instructions could have been obtained from these witnesses and the affidavit prepared by local attorneys.

[16] The same reasoning would extend to the suggestion that the Cape Town attorneys had first-hand knowledge of the business structure and other information relevant to the application. What appears from the judgment of Ploos van Amstel J would not suggest that the actual business structure or other information which might be relevant to the application was of such magnitude and complexity as to necessitate the involvement of the Cape Town attorneys on a party and party basis.

that the knowledge of past substantial legal work which De Klerk & Van Gend had done was such that the Respondent would take comfort from them also acting in the present application, then that is an aspect for the attorney and client component at best, of any legal fees. At a realistic and common-sense level I am not persuaded that the taxing master erred and more precisely exercised a wrong discretion in disallowing such fees on a party and party scale.

27 1971 (3) SA 677 (C) at 680G.

[19] The Groenewald matter is clearly distinguishable as it concerned an action. In an action evidence is led and an attorney's intervention is necessary at times to assist in procuring information and documents for cross-examination and in rebuttal. At the risk of stating the obvious, in an application the case to be met is cast in stone as both the issues in dispute (*facta probanda*) and the evidence in support thereof (*facta probantia*) are contained in the affidavits. All that is required is that the attorney consults with his clients and relevant witnesses to draft the affidavits. Once the required number of copies have been made and filed, the attorney's involvement (assuming him not to appear to argue the matter him- or herself) is limited. The parties are confined in their argument to what is contained in the affidavits. Save for possible administrative issues which may arise relating to the filing and service of papers, heads of argument, practice notices and the like, no further contribution can

Town and Pietermaritzburg.

Based on this dicta, the Respondent submits that opposing an urgent application as *in casu* necessitated consulting on an urgent basis with witnesses in order to finalise the affidavits and that this necessitated the travelling of the attorney between Cape Town and Pietermaritzburg.

there is no reason why the Bloemfontein attorney should not have attended the trial instead of the Cape Town attorney. He apparently came to Cape Town with the object of attending the trial. It is clear that the charge of only one attorney attending the trial is allowable, but there is no rule against it being the country attorney. If he properly attends the trial, his travelling expenses may be allowed ...

travelled to Cape Town that:

[18] Reliance has been placed by the Respondent on *Groenewald v Selford Motors (Edms) Bpk.*²⁷ where it was held in a situation where Bloemfontein attorneys

[22] The manner in which some fees are charged and allowed have changed in recent times from what was allowed on taxation in the past. Thus, for example, whereas advocates in the past always charged for preparation in a matter by providing for an inflated first day fee, it is now accepted that they may also charge for

[21] Item 54 was allowed partially, by the taxing master taking note of the 'machine operator's time sheet'. This would relate to the attendance at court when the return date was postponed to the 30 May 2012. What has been disallowed appears to relate purely to the attendance on a consultation with senior and junior counsel as well as directors of the Respondent 'noting detailed particulars in order to draft and finalise opposing affidavits...';

DISCUSSION REGARDING ITEM 54 IN THE BILL OF COSTS:

[20] The considerations advanced by the Respondent, even taken cumulatively, have not caused me to conclude that the taxing master's discretion was not exercised judicially or that the taxing master was clearly wrong in respect of the rulings on the items relating to the Cape Town attorneys.

was based at the seat of the court, certainly on a party and party scale.
be made by the out of town attorney to any extent greater than as if that attorney

²⁸ See *Naval Services and President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) at 781 – 79D.

decision.

[23] On what has been placed before me, I am not persuaded that the taxing master had not exercised a discretion judicially or that the taxing master was clearly wrong in this regard, both being prerequisites to me reviewing the taxing master's

memorandum by counsel, or otherwise would be for attorney and client purposes. required to draft affidavits could have been identified by the attorneys, or listed in a particulars to draft and finalise the opposing affidavits'. Whatever might have been with senior and junior counsel and directors of the Respondent to note 'detailed of this matter was not such that it required 6 hours and 40 minutes of consultation and in many particularly complex matters justified, it seems to me that the complexity obtained to finalise the affidavits. As much as this has become a modern tendency then procuring any further documents or information regarding particulars to be affidavits might have to be obtained and arranging consultations in regard thereto, or consultations and taking notes of any further witnesses identified from whom the affidavits and the attorney adopting a more passive role of simply setting up the counsel's chambers where consultations then take place, counsel actively drafting modern tendency increasingly appears to be that the attorney accompanies clients to prepare the affidavits, which then might be submitted to counsel to be settled. The preparation of affidavits and applications in the past was that attorneys would to not reward incompetence or inexperience. The traditional practice in relation to the preparation on a time basis, but always having regard to what is reasonable²⁸ so as

[24] I am accordingly not persuaded that the review in respect of the second

category should succeed either.

COSTS:

[25] Costs are infrequently granted in reviews of this nature. The Applicants have however been successful in opposing the application and should to the extent that costs may have been incurred, be indemnified for such expense.

ORDER:

[26] Accordingly, the review is dismissed and the Respondent is directed to pay the Applicants' costs relating to the review.