



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. 11034/14

KWAZULU-NATAL BOOKMAKERS SOCIETY

Applicant

and

KWAZULU-NATAL GAMING and BETTING BOARD

First Respondent

THE PREMIER of the PROVINCE of KWAZULU-NATAL

Second Respondent

REVIEW OF TAXATION

17 June 2015

MOODLEY J

[1] This is a review of the taxation of a bill of costs as between party and party presented by the applicant's attorneys on 31 July 2014.

[2] The bill was presented in respect of an application in which the applicant sought firstly to have a 'guideline decision' taken by the first respondent in respect of licensed bookmakers in KwaZulu-Natal reviewed and set aside; and secondly, to have the dismissal by the second respondent of the applicant's appeal against the decision of the first respondent reviewed and set aside.

[3] The parties were directed to file full written argument by the Judge President because the finalised application papers were voluminous. The matter was set down for argument on the opposed roll on 12 December 2013. However on that day, the matter was settled by way of a consent order in terms of which the aforesaid guideline was reviewed and set aside, with costs including costs of senior and junior counsel.

[4] The taxation of the bill drawn by the applicant's attorneys was attended by legal representatives the applicants and the first respondent. The applicant was dissatisfied with several rulings by the taxing mistress and availed itself of the recourse available in terms of Rule 48(1) of the Uniform Rules and requested the taxing mistress to state a case in respect of the disputed rulings. Subsequently, the taxing mistress's stated case, the submissions of the applicant and first respondent and the taxing mistress's final report in compliance with Rule 48(5), were placed before me for a determination in terms of Rule 48(6).

LEGAL PRINCIPLES

[5] Attorneys' fees and disbursements in a party and party bill of costs are taxed in accordance with the provisions of Rule 70(3) of the Uniform Rules which provides:

'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 in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[6] Advocates' fees which are usually reflected as disbursements in the attorney's bill of costs, are taxed in accordance with Rule 69. Rule 69(5) provides:

'The taxation of advocates' fees as between party and party shall be effected by the taxing master in accordance with this rule and, where applicable, the tariff. Where the tariff does not apply, he shall allow such fees (not necessarily in excess thereof) as he considers reasonable.'

[7] The general principle applicable to all awards of party and party costs was restated by Kriegler J in *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another*:¹

‘This Note² underscores that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds. The Taxing Master is also enjoined by SCA Rule 18G(5) Note II to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. This it does in the following terms:

Note II-The taxing Master shall be entitled in his or her discretion at any time to depart from any of the provisions of this tariff in extraordinary or exceptional circumstances where the strict execution thereof would be unjust, and in this regard shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant.’

[16] The ultimate question raised by the respondents’ application for review of taxation is therefore whether the Taxing Master struck this equitable balance correctly in the light of all the circumstances of this particular case.’

[8] Although Kriegler J was specifically referring to costs in the Constitutional Court and the Supreme Court of Appeal, the relevance to party and party bills of costs presented for taxation in the High Court is apparent, as Note I to SCA Rule 18G(5) is effectively the same as Rule 70(3) of the Uniform Rules.

It is apparent from the words ‘as appear to him’ and ‘which appear to the Taxing Master’ in Rule 70(3) and ‘as he considers reasonable’ in Rule 69(5), that the taxing master is invested with a discretion in deciding which costs and disbursements are reasonable and necessary, and which are either incurred or increased through over-caution, negligence or mistake or by payment of an unusual expense.

Consequently the same question arises on review in the High Court as in the Constitutional Court and the SCA: whether the taxing master has struck an

¹ 2002 (2) SA 64 (CC) para [15] and [16] at 74B- I

² Note 1 to SCA Rule 18G (5)

‘equitable balance correctly in the light of all the circumstances of this particular case’.

[9] As stated by the authors in *Law of Costs*:³

‘The discretion vested in a Taxing Master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words ‘reasonable’ and ‘in the opinion of the Taxing Master’ that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the court.’

[10] The taxing mistress has therefore correctly pointed out that she has a discretion to award such costs ‘as appears (to him) to have been necessary or proper for the attainment of justice or defending the rights of another party’.⁴

[11] Interference on review is justified where a reviewing court finds that the taxing master:

‘has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable person would have given’.⁵

[12] It is also trite that a court of review will not interfere with a ruling made by a taxing master unless it is satisfied that the taxing master was clearly wrong. In *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others*,⁶ Rabie CJ re-stated the test to be:

³ AC Cilliers : *Law of Costs* 3rd edition 1997 para 13.03 (issue 28)

⁴ *Visser v Gubb* 1981 (3) SA 753 (C) at 754H-755C

⁵ *Preller v Jordaan* 1957 3 SA 201 (O) 203

⁶ 1984 (3) SA 15 (A) at page 18F-G

‘ . . . 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.’ ⁷

[13] It is also necessary to remain mindful that the successful party is not entitled to a full indemnity but only party and party costs. The distinction between party and party costs and attorney and client costs is set out by Kriegler J in *President of the Republic of South Africa & others v Gauteng Lions Rugby Union & Another*:

‘ Here the inherent anomaly of assessing party and party costs should be borne in mind. One is not primarily determining what are proper fees for counsel to charge their client for the work they did. That is mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When taxing a party and party bill of costs the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid or has to pay on her or his own side. Or, to put it differently, how much of the client’s disbursement in respect of her or his own counsel’s fees would it be fair to make recoverable from the other side?’ ⁸

[14] Although the learned judge was referring to counsel’s fees the principle remains applicable to all fees and charges: the successful party is not entitled to a full indemnity in respect of all of its costs, but only those costs reasonably and necessarily incurred in the course of litigation are recoverable as party and party costs.⁹

⁷ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111

⁸ Para [47] 85C-E

⁹ *Camps Bay Ratepayers’ and Residents’ Association v Harrison* 2012 JDR 1723 (CC) at page 3:
‘[4] The principles applying to a taxation of a bill of costs in this Court were established in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*, 7 and were restated in slightly expanded form in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another (Hennie de Beer)*. Their nub is that a successful party gets costs as an indemnification for its expense in having been forced to litigate, and that a moderating balance must be struck to afford the innocent party adequate indemnification within reasonable bounds. All circumstances must be taken into account, and an overall balance struck. The Court will not interfere with the Taxing Master’s award simply because its views are different. It will interfere only when the Taxing Master’s view is so materially different as to vitiate the ruling.’

[15] Counsel's fees remain contentious at taxations because the taxing master is called upon to exercise a discretion in respect of matters in which the scope and complexity of the issues and the work necessarily and reasonably done in connection therewith, may not be apparent to a person who was not involved in the matter or who is unable to grasp the nature of the matter from a mere inspection of the file.

The difficulty that then arises is that the taxing master cannot correlate the complexity and the time necessarily spent on preparation before a pleading is drafted or the matter argued with the fee debited by counsel, particularly on a time spent basis. The result is a ruling in accordance with what appears 'reasonable' to the taxing master, having duly considered the submissions made at the taxation and the taxing master's own assessment on what was necessary.

[16] Therefore in order to assist the taxing master, counsel should provide a detailed report of the work done in preparation. The taxing master should also be apprised of the experience of counsel and the importance and complexity of the matter, as factors relevant to the assessment of counsel's fees.

These factors are significant because the taxing master is also constrained to consider whether the volume of the matter in which the bill is taxed has been unnecessarily increased through over-caution, negligence or mistake. Further, unnecessary or duplicate copies of documents, notices and correspondence frequently burden a file unduly, but are nevertheless included in the bill of costs presented for taxation.

[17] Fees in the bill of costs under review were charged on a time spent basis. I share the view expressed by Sholto-Douglas AJ in *City of Cape Town v Arun Property Development (Pty) Ltd and Another*:

'The modern trend- if I may call it that- of charging a fee based on time actually expended is both acceptable and in the interest of transparency'.¹⁰

[18] It was pertinently held in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC & Another*:¹¹

¹⁰ 2009 (5) SA 227 (C) para [22] at 234G

‘The Supreme Court of Appeal has taken note of ‘the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related’. The principle flowing from this is that time charged is not decisive. An objective assessment of the features of the case in primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work. The reason is that time alone would put a premium on slow and inefficient work and would conduce to the charging of fees wholly out of proportion to the value of the services rendered.’

[19] But while the time spent by counsel may not always be a reliable indication of the value of the services rendered, the recompense allowed to counsel must be fair, with due regard to all the relevant factors and the fact that counsel must be fairly compensated for preparation and presentation of argument. A reasonable guide, which would find application in most cases where the reasonableness or otherwise of counsel's fee had to be determined on the taxation, was formulated in *City of Cape Town v Arun Property Development (Pty) Ltd and Another*:

‘(a) Consideration should have been given to the importance of the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed. In this regard the taxing master should have had regard to the nature of the matter, the issues in dispute, the volume of the record and such other factors as may have assisted her in obtaining an impression of the matter relevant to assessing its importance and complexity. The taxing master may have been assisted by the submissions made by the representatives of the parties attending the taxation.’¹²

[20] The decisive criterion is, however, the value of the work done.¹³

[21] To assist me in the review of counsel's fees, I have had recourse to a ‘Survey of fees ordinarily charged by Silks as at 1 July 2004’ and a ‘Survey of Current Junior Counsel Fees at January 2005’ compiled by the Society of Advocates of KwaZulu-Natal. I have been advised that the current fee parameters charged by senior counsel in KwaZulu-Natal are between R2 4000 – R4 500 per

¹¹ 2010 (5) SA 124 (CC) para [9]

¹² Para [25] at 235G-H

¹³ AC Cilliers Law of Costs 3rd ed par 13.19 - *Sublime Technologies (Pty)Ltd v Jonker* 2010(2) SA 522 (SCA) at 177-181 - *Ocean Commodities* at 22H-I

hour for consultations; trial and opposed application fees range between R19 200 to R36 000 per day (8 times the consultation fee).¹⁴

[22] I have also perused the court file in this matter, as a prerequisite to reviewing the taxing mistresses's assessment of the complexity of the matter and the volume of the case.

REVIEW OF ITEMS IN DISPUTE

[23] The following rulings were referred for review:

Counsels' Fees

Items No 171, 354, 357, 451, 454, 473 and 476 for counsels' fees in the sum of R818 411.10 was reduced by the taxing mistress by R647 587.30 and allowed in an amount of R143 823.80.

[24] Applicant's Submissions

- (i) The applicant was awarded the costs of the employment of senior and junior counsel. The complexity of the matter required a significant amount of preparation and perusal and consideration by counsel of the record filed in terms of Rule 53 by the respondents. The judge president directed that the parties file full written argument for the assistance of the court. The matter was only settled on the morning it was to be argued.
- (ii) At the taxation it was not disputed that the applicant's senior and junior counsel spent the time on the matter that they had charged for. As the applicant accepted that counsels' fees debited on time spent as fair and

¹⁴ *City of Cape Town v Arun Property Development (Pty) Ltd and Another* at para [25] 235l:

'(b) The work actually done by counsel and the rate at which he charged should have been considered. A comparison between the rate charged and the Cape Bar Council's fee parameters ought to provide a sound basis for determining the reasonableness of the rate charged by counsel, and, as long as regard is had to the fee parameters for the appropriate period, the question of inflation ought not to play any significant role, if it arises at all.'

reasonable, and paid the fees, in disallowing the fees as charged the taxing mistress effectively penalised the successful party to the litigation.

- (iii) The taxing mistress misdirected herself by failing to accord due weight to the complexity of the matter, the actual time and labour expended, the urgency and importance of the matter to the applicant and those represented by the applicant and the considerable volume of the application papers and the record filed in terms of Rule 53. Her assessment of a reasonable fee for the work done by counsel is therefore inadequate and prejudicial to the applicant.
- (iv) Charging a fee based on time actually expended is acceptable and in the interests of transparency.¹⁵ The matter was brought on an urgent basis and was brought to finalization within 3 months. There was therefore no opportunity for inefficient or slow work.

[25] In my view, the applicant's reliance on the fact that it accepted and paid Counsel's fees as reasonable must be qualified by the fact that as a general rule, the fees debited by the applicant's attorney would include attorney and client costs (and there is no reason to conclude otherwise), while the applicant's indemnity is restricted to party and party costs viz what was reasonable and necessary for the litigation. Further as 'volume' does not automatically equate with 'relevance' or 'necessary' and 'time spent' does not equate with 'reasonable', an objective assessment is required.

GENERAL RULINGS ON REVIEW

[26] Having perused the file in this matter and considered the submissions of the applicant, the taxing mistress and the first respondent, I am satisfied that this was a matter in which the complexity, the importance to the parties and members of the applicant in particular, and the constitutional issues raised justify interference on review in respect of the rulings on counsels' fees. Although the correct principles were applied at the taxation, this is a matter which, in my view, required a substantially increased effort and work by counsel in order to pursue

¹⁵ *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) para 22

the application successfully, and therefore warrants as 'reasonable and necessary' more time than that allowed on taxation.

[27] In the premises, the following **general rulings** are issued:

- (i) **Senior counsel's fees have been charged at the rate of R3 000 per hour. This rate has been accepted by the taxing mistress in respect of some of the disputed items. The rate is not disputed by the first respondent. I am of the view that there is no basis for interference with the rate charged, having perused the court file with a view to assessing what may be considered 'fair and reasonable' in this case, with due regard to the relevant guidelines and the current fee parameters set out above.**
- (ii) **In terms of Rule 69(2) junior counsel is entitled to 50 % of the fee of senior counsel. A fee of R1 500 per hour is therefore to be applied to junior counsel's fees.**
- (iii) **The consent order dated 12 December 2013 contemplates fees consequent upon employment of one senior and one junior counsel.**
- (iv) **Fees for attendance on the Judge President and presiding judge should be allowed in full. Neither the attendance nor the time spent is susceptible to reduction on the basis that it is not reasonable, particularly as legal representatives of both parties were present.**
- (v) **The fees are charged on a time spent basis. No explanation is offered by the taxing mistress as to why she has allowed a drafting fee per page. In my view a consistent approach, based on a fee calculated on the time reasonably spent, should be maintained.**
- (vi) **VAT is to be added to all fees allowed on review.**

I proceed with the review of the disputed items individually.

[28] **Item 171: Senior Counsel's Fee note dated 30 September 2013**

- (i) **9 September 2013: Considering and settling draft affidavit and notice of motion (97 pages): R18 000 charged; R13 200 taxed off; R4 800 allowed.**

(ii) 19-23 September 2013: Considering correspondence from Venn Nemeth & Hart and formal application for postponement and advice (2 hours): R6 000 charged; R6 000 taxed off.

(iii) 26 September 2013: On attending Vahed J and JP's registrar (1 hour): R3 000 charged; R2 400 taxed off; R600 (30 min) allowed.

Total fee: R30 780; R22 572 taxed off; R5 400(+VAT) allowed.

Taxing Mistress's submissions

(i) 19-23 September 2013: Part of Counsel's brief.

First Respondent's submissions

(i) The founding affidavit was not complex as it was drafted by a 'gambling law expert'; 2 hours is reasonable for senior counsel to settle the founding affidavit.

(ii) Considering correspondence and advice is for the benefit of the applicant and its attorneys and is therefore an attorney and client attendance.

(iii) 30 minutes for the consultation is reasonable.

On Review

(i) 9 September 2013 – 2 hours x R3 000 – R6 000 is allowed, per submission of First Respondent.

(ii) 19-23 September 2013 – Ruling correct. Review is denied.

(iii) 26 September 2013 – 1 hour x R3 000 – R3 000 is allowed (as charged).

[29] Item 354: Senior Counsel's Fee Note dated 31 October 2013

(i) 1 October 2013: Meeting with Judge President: future conduct of the matters (2 hours) counsel: R6 000 charged; R3 600 taxed off; R2 400 (1 hour) allowed.

(ii) 22-24 October 2013: Considering records filed and settling supplementary affidavit; R60 000 charged; R40 000 taxed off; R20 000 allowed.

Total fee of R75 240; R43 600 (+VAT) taxed off; R22 400 (+VAT) allowed.

Taxing Mistress's submissions

- (i) Fee for considering the records and various preparatory and refresher and/or day fees 'ridiculous' and did not fall under the ambit of party and party costs. Preparatory and refresher or day fees are to be taken in account together in order to assess the reasonableness of counsels' fees.¹⁶ R20 000 fee reasonable in the circumstances.

First Respondent's submissions

- (i) One hour allowed for meeting with Judge President is reasonable.
- (ii) The bulk of the documents making up the filed record were in the applicant's possession and /or knowledge when the founding papers were drafted. Therefore this item is a duplicate perusal by Counsel.
- (iii) Time billed for 'settling supplementary affidavit' is excessive as the facts and arguments were not new.
- (iv) The preparatory and refresher fee was correctly taken into account but 'the time spent should not displace an objective assessment of a proper fee for the work.'¹⁷

On Review

- (i) 1 October 2013 – 2 hours x R3 000 – R6 000 is allowed**
- (ii) 22-25 October 2013 – Filed record was necessarily perused; preparatory and refresher were properly taken into account – 2 days x 8 hours at R3 000 per hour – R48 000 is allowed.**

[30] Item 451: Senior Counsel's Fee Note dated 29 November 2013

- (i) 8 November 2013: Fee of R6 000 charged for settling a further affidavit (9 pages). R1 200 (30 minutes) allowed. Considering further options is an attorney and client fee.
- (ii) 18 November 2013: Fee of R3 000 charged for perusing answering affidavit taxed off; part of counsels' fee on brief.
- (iii) 21 November 2013: Fee of R18 000 (6 hours) charged for settling 42 page affidavit; unreasonable – 1 hour at R2 400 allowed.

¹⁶ *City of Cape Town v Arun Property Development (Pty) Ltd and Another and Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* regarding slow and inefficient work and what is reasonable to charge

¹⁷ *Scott v Poupard & Another* 1972(1) SA 686 (A) at 690

- (iv) 26 November 2013: Fee of R90 000 charged for settling heads of argument, short heads, practice note and chronology (3 days). R85 200 taxed off; R4 800 (2 hours) allowed for 72 pages of heads of argument.

Total fee: R136 800; Taxed off R128 400; R8 400 allowed.

Taxing Mistress's submissions

- (i) Slow and inefficient work should not be rewarded.¹⁸ 'Reasonable time' is assessed as the time a competent professional, acquainted with the matter and surrounding issues, would take.
- (ii) Heads of argument are generally an inclusive fee for preparation for argument and not a separate charge.¹⁹

First Respondent's submissions

- (i) Fee charged for 8 November 2013: Attorney and client costs. Further supplementary affidavit added nothing to the substance of the applicant's case.
- (ii) Fee charged for 18 November 2013: Should be included in counsels' fee on brief as a preparation attendance.²⁰ Senior counsel's fee for settling the replying affidavit is an all-inclusive fee which includes attendances such as perusing the answering affidavit and any consultations. But the entire fee should be struck off as junior counsel had already settled the affidavit; settling by senior counsel constitutes a duplicate attendance.
- (iii) Fee charged for 21 November 2013: It is reasonable for senior counsel to settle 40 pages per hour.
- (iv) Fee charged for 26 November 2013: Taxing mistress correctly ruled that drawing heads of argument in a party and party bill of costs falls under the

¹⁸ *Hennie De Beer Game Lodge CC* at para[9] at 127C-E

¹⁹ *JD van Niekerk en Genote v Administrateur, Transvaal* 1994 (1) SA 595 (A)

²⁰ *Toxopeus v Kwanda Tile & Concrete Works (Edms) Bpk and Others* 1988 (3) SA 440 (T) at 441I '... the preparation done by counsel should be included in his fee on appeal. There is no warrant for a separate fee, call it what you will.'

fee for preparation for argument and is generally not charged as a separate fee.²¹

On Review

- (i) **18 November 2013 – R 3 000 (1 hour) is allowed.**

Charge for considering further options is an attorney and client fee.

- (ii) **18/19/21 November 2013 – Perusing answering affidavit; conference; settling replying affidavit (42 pages) – 4 hours x R3 000 – R12 000 is allowed.**

- (iii) **26 November 2013 – Full written argument was prepared on direction of the Judge President. Therefore although heads are usually regarded as part of preparation for argument, under these circumstances, a separate fee is warranted for settling heads drafted by Junior counsel.²² 10 hours x R3 000 – R 30 000 is allowed.**

[31] Item 357 and Item 454: Junior counsel's fees

- (i) Item 357: Fee Note dated 29 October 2013: R86 184 charged; R78 660 taxed off.
- (ii) Item 454: Fee Note dated 29 November 2013: R121 752 charged; R92 682 taxed off.

Taxing Mistress's submissions

- (i) Rule 69(2) provides 'the fees to be permitted in respect of any additional advocate shall not exceed one half of those allowed in respect of the first advocate.' Therefore junior counsel is only entitled to half of senior counsel's fees.²³

²¹ *De Jager v Secretary for Inland Revenue* 1975 (4) SA 968 (T) at 963 states that 'Ordinarily no fees are allowable as between party and party in respect of counsel's heads of argument which are regarded as an aid to argument, and the preparation of which is regarded as being part of the preparation of argument'; *Ocean Commodities* at 19C 'Heads of argument are drawn when counsel has done his research and prepared for the appeal. They reflect the result of that research and preparation...'.
²² cf *Ocean Commodities* page 20D-E : 'Heads of argument, admittedly documents of great importance, have always been required by the Rules of this Court, but this fact has never been considered to be a sufficient reason for allowing a separate fee for the drawing thereof...'.
²³ Rule 69(2); Van Loggerenberg et al : Erasmus: *Superior Court Practice* (2013 – service number 41) B1-419 - *Toxopeus v Kwanda Tile & Concrete Works (Edms) Bpk* 1988 (3) SA 440 (T)

First Respondent's submissions

Item 357:

- (i) Any research undertaken by the counsel for the applicant is an attorney and client cost.
- (ii) Fee charged for 6/7/8 October 2013: The taxing mistress' decision to tax the amounts off is correct; only the costs of two counsel allowed in this matter. One hour allowed by the taxing mistress too lenient; further perusal of the Rule 53 record was not necessary.
- (iii) Fees charged for 11/16/19-21 October 2013: Mainly attorney and client costs.
- (iv) Fees charged for 22-25 October 2013 (the taxing mistress allowed 3 hours in total): The submissions were the same as for senior counsel.
- (v) Fee charged for 28/29 October: R600 correctly allowed for drafting of Rule 30A notice (2 pages).

On Review

- (i) Costs of one junior counsel are allowed.**
- (ii) Fees, which include fee for drafting, have been charged on a time-spent basis. No reason is given for the drafting fee being allowed at R300 per page.**
- (iii) 1 October 2013 – 2 hours x R1 500 – R3 000 is allowed.**
- (iv) 6/7/8/11/16 October 2013 – perusal of record and related documents included in fee for 22-25 October 2013. Review is denied.**
- (v) 22-25 October 2013 (inclusive per (iv) – 2 days x 8 hours at R1500 per hour – R24 000 is allowed.**
- (vi) Rule 30A notice – R1 500 is allowed.**

[32] Item 454: Junior Counsel's Fee Note dated 29 November 2013

First Respondent's submissions

- (i) November 2013: 9 x R300 per page for drafting reasonable. Perusal of further opinions should be included in Counsel's fee on brief.

- (ii) 18/19 November 2013: Attendances fall within all-inclusive fee for drafting Replying affidavit.
- (iii) 20 November 2013: Duplication as replying affidavit settled by Counsel in Item 451; 1 hour therefore lenient.
- (iv) 21 November 2013: Amendment of same documents; not a party and party charge.
- (v) 22-27 November 2013: R300 per page allowed lenient as drafting of heads of argument not allowed as a separate fee in a party and part bill; should be included in Counsel's fee on brief for argument.

On Review

- (i) 7 November 2013 – further supporting affidavit – R3 000 is allowed.**
- (ii) 18/19/20/21 November 2013 – consultations, settling and amending replying affidavit – 10 hours x R1 500 – R15 000 is allowed.**
- (iii) 22-27 November 2013 – full argument prepared at the Judge President's request; 3 days reasonable; 3 days x 8 hours x R1 500 – R36 000 is allowed.**

[33] Item 473

Fee charged for preparation for opposed hearing (3 days) R90 000, and on hearing R30 000; Total R120 000 Taxed off R42 000. Allowed R54 000 (+VAT).

Taxing Mistress's submissions

- (i) One day for preparation was allowed and fee for the hearing was reduced to R24 000 was allowed as being reasonable under the circumstances.²⁴

First Respondent's submissions

- (i) This fee is included in either item 451 or 171 as a preparation fee or fee on brief and this is therefore either a duplication or an attorney and client attendance.
- (ii) The allowance for 1 day is reasonable.
- (iii) Senior counsel's day fee is excessive in a party and party bill.

²⁴ *Reef Lebevre (Pty) Ltd v SA Railways & Harbours* 1978 (4) SA 961 (W) - *Camps Bay Ratepayers' & Residents' Association v Harrison* 2012 JDR 1723 para10

On Review

- (i) Fee allowed for settling heads. Preparation of 2 days for opposed hearing therefore reasonable – 8 hours x 2 days x R3 000 – R48 000 is allowed.²⁵**
- (ii) Fee on opposed hearing – allowed at 8 times the hourly rate – R24 000 allowed on taxation is therefore reasonable. Review is denied.**

[34] Item 476: Junior Counsels' Fee Note dated 13 December 2013

Fee charged R96 000. Taxed off R72 000. Allowed R24 000(+VAT).

Taxing Mistress's submissions

- (i) One day allowed for preparation and 1 day on appearance.
- (ii) A party will be indemnified only for those fees that are reasonable and necessary for the proper attainment of justice.²⁶

First Respondent's submissions

- (i) Preparation for hearing was included in item 454. Submission in respect of the heads of argument reiterated.
- (ii) The 1 day fee permitted for junior counsel was fair and the same as permitted for senior counsel.

On Review

- (i) Fee has been allowed on review for settling heads. Preparation of 2 days for opposed hearing is therefore reasonable – 8 hours x 2 days x R1 500 – R24 000 is allowed.**
- (ii) Fee on opposed hearing – is allowed at 8 times the hourly rate²⁷ – R12 000 is allowed.**

²⁵ *Cape Town v Arun Property Development (Pty) Ltd and Another* para [27-[29] at 236B-E and 236J

²⁶ Rule 70(3) of the Uniform Rules - *Visser v Gubb* 1981 (3) SA 753 (C) at 754H-755B. See also para 1 of this Stated case

²⁷ See para [21]

ATTORNEY'S FEES

[35] The general rule is that the tariff must be strictly applied.²⁸ However Rule 70(5)(a) provides:

'The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.'

[36] The taxing master has, as in the determination of 'reasonable and necessary' counsel's fees on taxation, a discretion to depart from the tariff if he/she regards a case 'extraordinary or exceptional' and the tariff fee would not be fair recompense for the relevant service rendered. Interference on review must be limited to decisions in respect of which the taxing master has not exercised his/her discretion properly.

PERUSAL OF THE DOCUMENTS PERTAINING TO THE APPEAL TO THE PREMIER: ITEMS 6 AND 7

[37] Applicant's submissions

- (i) The taxing mistress failed to appreciate that the application was necessitated by the second respondent's failure to address the applicant's complaint.
- (ii) The documents annexed to the application papers were integral to the applicant's case.
- (iii) This is not a re-perusal as the ruling was only delivered in August 2013. (The first appeal to the premier was lodged in August 2012 and the second appeal in April 2013)
- (iv) In the *Tulbagh Municipality* matter a lesser fee ie one third, was allowed for documents previously perused where there was a relatively long lapse in time.

²⁸ *Law of Costs* para 13.05 at 13-11 - see also *Thornycraft Cartage Co v Beier & Co (Pty) Ltd* 1962 (3) SA 26 (N)

- (v) But the length of the time between perusals is not the only factor. The length, nature and complexity of the document being re-perused are also significant.
- (vi) A perusal fee to the attorney ought to be allowed as he cannot be expected to recall all the contents of the document previously perused.

Taxing Mistress's submissions

- (i) The appeal was finalised on 15 April 2013 and the review was brought on 10 September 2013, five months later. As the same documents were perused at both stages, the contents of the documents must have been fresh in the attorney's mind.
- (ii) A perusal fee was already claimed in the appeal hearing. A full perusal fee should be allowed after the lapse of a relatively long time.²⁹

First Respondent's Submissions

- (i) A very short period had lapsed between the documents being perused.
- (ii) Therefore, as held in *Greenblatt and Another v Wireohms South Africa (Pty) Ltd*.³⁰

It is obvious that the task of perusing the record of a case in which a person has been previously engaged must necessarily be far lighter than it would be to peruse the record of a case with which one had had nothing to do previously.'

- (iii) The perusals are wholly attorney and client charges.

On Review

- (i) **Although the attorney read the documents previously for the purposes of the appeal, a further perusal would have been necessary for the purpose of the review, as he could not reasonably be expected to recall all the contents. However, the further perusal would have been easier because of his familiarity with the documents.**
- (ii) **30 % of the tariff fee is allowed.**

²⁹ *Tulbagh Municipality v Waveren Boukontrakteur (Edms) Bpk* 1968 (3) SA 246 (C) per van Wyk J

³⁰ 1960 SA 2 (C) 527 at 528

ITEMS PERTAINING TO THE APPEAL TO THE PREMIER: ITEMS 13, 14, 15 AND 16

[38] Applicant's Submissions

- (i) The applicant's attorney had a duty to peruse the ruling in respect of the appeal and thereafter to consult with the applicant in order to take instructions. Had the appeal to the second respondent been successful, the review to this court would not have been necessary.

Taxing Mistress's Submissions

- (i) Attorney and client costs.
- (ii) Also costs of appeal.

First Respondent's submissions

- (i) Dr Mkhize's Ruling included in Rule 53 record.
- (ii) Costs incurred prior to institution of review proceedings.
- (iii) Also formed part of appeal proceedings.

On Review

- (i) **Fee for perusal of Ruling is allowed later in bill. Review is denied.**

DUPLICATE PERUSALS: ITEMS 47, 56, 57, 58, 62, 63, 71, 74, 81, 224, 240, 244, 248, 288, 289, 290, 292, 298, 308, 317, 318, 319, 320 AND 321 (disallowed in totality or in part)

[39] Applicant's submissions

- (i) There was a duty on the applicant's attorneys to peruse and consider the record delivered by the respondent in its entirety. The duplicated documents could only be established when the applicant's attorney read the documents.
- (ii) As the record of proceedings upon which an administrative decision was made, it was essential for the attorney to have a proper knowledge of the

documents in the record, in order to proceed with the review and place all the relevant documentation before the court.

- (iii) By allowing only a portion of the fee for perusing and considering the record the successful litigant is not indemnified in accordance with Rule 70(3).
- (iv) Given the volume of documents, it was not easy for the applicant's attorneys to recall and consider the documents without an adequate perusal.

Taxing Mistress's submissions

- (i) An identification fee was allowed for documents which appeared in both the records and as annexures to any of the affidavits; duplication of perusal of the same documents was disallowed.
- (ii) Extraction of documents from a record that are material to the case are attorney and client costs (perusal of all duplicated documents).

First Respondent's submissions

- (i) All documents mentioned in the items had been received and perused by the applicant's attorneys before the founding affidavit was drafted; ruling therefore correct.³¹

On Review

- (i) **Ruling of taxing mistress is correct. Review is denied.**

TIME SPENT SORTING AND ARRANGING AND CONSULTATIONS WITH CLIENT: Items 94, 112, 284, 259, 346 and 396

[40] Items 94, 284, 346 and 396

Applicant's Submissions

- (i) Tariff allows for sorting and arranging pleadings; annexures are an integral part of pleadings and have to be correctly labelled and annexed to the relevant affidavit.

³¹ *Wapenaar v Todt and Another* 1962 (1) SA 239 (W) at 243

- (ii) The fees were therefore reasonably and necessarily incurred by the attorney ensuring that the papers were properly before court.

Taxing Mistress's submissions

- (i) Rule 70(2)(C) makes provision for sorting and paginating papers to pleadings but not for sorting and arranging annexures to an affidavit. Therefore not allowable on a party and party scale.

First Respondent's submissions

- (i) "The fact that documents are annexed to an affidavit does not make them part of the affidavit nor one document with the affidavit."³² These are therefore attorney and client costs.
- (ii) Also a duplication of an attendance as identification fees for items 47, 56, 62, 63, 71, 74 and 81 were allowed which is essentially sorting and arranging.

On Review

- (i) **The reliance on *Vaatz* is misplaced – the ruling in *Vaatz* was in respect of perusal fees.**
- (ii) **Affidavits are the equivalent of pleadings in motion proceedings and annexures thereto are an integral part of the affidavit.**
- (iii) **Sorting and arranging follow on identification, and cannot be considered the same.**
- (iv) **Annexures consist of Annexure "RS1" to Annexure "RSfurthersupp4" (approximately 900 pages). But perusal fee allowed for annexures and copies of annexures made:**
 - (a) RS1-52 – see items 36-90.**
 - (b) RSsupp 1-36 – see items 28-322.**
 - (c) Annexures RSfurthersupp1-4 – perused and traversed with client – see items 345 and 347-350.**
 - (d) Annexures RSReply1-2 – see items 399-400.**

³² *Vaatz v Law Society of Namibia* 1994 (3) SA 536 (NM) at 542I/J-J

(v) Consequently, additional charge for arranging and sorting annexures is unreasonable and not necessary. Review is denied.

[41] Item 112

Applicant's submissions

- (i) In compliance with the Practice Directive, papers are required to be properly indexed with each annexure itemised and described.
- (ii) The fee of R85 allowed for drafting index to each volume does not allow for the actual time spent in itemising each annexure to the affidavit.
- (iii) This work was necessary and proper and does not amount to being over-cautious, negligent or a mistake.

Taxing Mistress's submissions

- (i) Attorney and client charges.

First Respondent's submissions

- (i) This is an attorney and client cost.
- (ii) The fee for drafting an index includes sorting documents.

On Review

- (i) Ruling is correct. Drafting index charge is the proper party and party cost and has been allowed. Review is denied.**

[42] Item 256

Applicant's submissions

- (i) The fee was reasonable and necessary given the nature of the review application.
- (ii) It was reasonable and necessary to consult with client upon receipt of the record in order to ensure the record's accuracy and completeness.
- (iii) Fee ought to be allowed under item 70(2)(A)(9) of the tariff: 'any necessary consultations and discussions with a client not otherwise provided for'.

Taxing Mistress's submissions

- (i) Attorney and client charge.³³

First Respondent's submissions

- (i) Checking the correctness of the record does not fall under the provisions of the tariff and is therefore an attorney and client cost.

On Review

- (i) The Ruling is correct. Review is denied.**

TIME SPENT SORTING AND ARRANGING COUNSEL'S BRIEF: ITEMS 33, 124, 188, 191, 385, 388, 419, 422

[43] Items 124, 188 and 191: Conceded.

[44] Item 33

Applicant's submissions

- (i) Collation and assembling of the relevant documents for inclusion in counsels' brief is necessary and proper and provided for in the tariff : Item 70(C)(2).
- (ii) There was a significant amount of documentation that needed to be photocopied and arranged into coherent bundle for counsel to prepare the application papers.

Taxing Mistress's submissions

- (i) Counsel should prepare papers.

First Respondent's submissions

- (i) Although it is reasonable and necessary that counsel is properly briefed the sorting and arrangement of papers could have been done by counsel.

On Review

- (i) Sorting and arranging papers for counsel is provided for in Tariff. Charge of R426 is allowed.**

³³ See description of "party and party" costs in Ehlers: *Law of Attorneys Costs and Taxation thereof* para 31 on page 41

[45] Items 385, 388, 419, 422

Applicant's submissions

- (i) The taxing mistress failed to take into consideration the volume of documentation involved and that every time further papers were filed, the briefs for both counsel had to be supplemented and updated and then the entire application had to be re-indexed and paginated.
- (ii) It was a reasonable and necessary cost and not increased through overcaution.

Taxing Mistress's submissions

- (i) Every time a document is filed the attorney charges a fee for sorting and arranging counsels' papers.
- (ii) Items 419 and 422 were for the drafting the heads of argument. If the attorney was over-cautious, does not become a party and party charge.

First Respondent's submissions

- (i) Items 419 and 422 – effectively a preparation fee which is included in the fee for drafting heads of argument.
- (ii) Not a party and party charge.

On Review

- (i) **Ruling is correct. Review is denied.**

DRAWING INSTRUCTIONS TO COUNSEL: ITEMS 383, 386, 417 AND 420

[46] Applicant's submissions

- (i) It was necessary and reasonable to send instructions with the brief to counsel.
- (ii) Item B(2)(b) of the tariff provides for instructions to counsel and does not limit when and how many times instructions are sent.
- (iii) The items taxed off in respect of drawing instructions to counsel on drafting the replying affidavit and heads of argument was separate from the items allowed previously in respect of instructing counsel (items 31, 122, 186 and

189). The taxing mistress misdirected herself by disallowing these items on the basis that instructions to counsel had been allowed elsewhere.

Taxing Mistress's submissions

- (i) These items were unreasonable; instructions to counsel were already allowed in items 31, 122, 186 and 189.

First Respondent's submissions

- (i) No proof of instructions to counsel were furnished at the taxation.

On Review

- (i) **Review is denied for reasons furnished by the taxing mistress and first respondent.**

COSTS OF REVIEW

[47] Rule 48 (7) provides:

‘The judge or court deciding the matter may make such order as to costs of the case as he or she or it may deem fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge or court.’

Usually in a review of taxation, nominal costs are ordered in favour of the party which is substantially successful. In my view this is a matter in which an adverse costs order against either party would be inappropriate.

ORDER:

- 1 The charges allowed on review are substituted for the amounts allowed by the taxing mistress.
- 2 The allocator is set aside and is to be calculated in accordance with the reviewed amounts.
- 3 There is no order in respect of costs.

MOODLEY J

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