



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

CASE NO: 4564/13

THE SOCIETY OF ADVOCATES OF KWAZULU-NATAL

Applicant

And

EDWARD LEVIN

Respondent

REVIEW OF TAXATION

Delivered 6 July 2015

MOODLEY J

[1] This is a review in terms of Rule 48 of the Uniform Rules of certain rulings made at the taxation of an attorney and client bill of costs presented by the applicant's attorneys on 18 February 2013.

[2] The Society of Advocates of KwaZulu-Natal brought an application under Case 7050/ 2011 to remove an independent advocate, Edward Levin, from the roll of advocates, alleging that he was not a fit and proper person to practice as an advocate as a result of his conduct in disregarding the referral rule and performing the functions of an attorney.

The respondent opposed the application and raised several constitutional challenges to the referral rule. The matter was referred for the hearing of oral evidence on 21-25 May 2012. The presiding judges directed the parties to file comprehensive heads of argument.

[3] On the first day of the hearing the respondent consented to his removal from the roll of advocates and to an order, which included provision for costs, which was subsequently made an order of court dated 21 May 2012.

The part of the order relevant to this review directs:

- '3. The Respondent is directed to pay the costs of the applicant on the scale as between attorney and client.
4. It is declared that the following were necessary witnesses:
 - 4.1 Leon Dunn
 - 4.2 Michael Pedersen
 - 4.3 Sean Chelin
 - 4.4 The Standard Bank of South Africa Ltd.
 - 4.5 The Applicant's representatives.
 - 4.6 The complaints referred to in the founding affidavit and their legal representatives.
5. The costs directed in paragraph 3 above include:
 - 5.1 Those consequent upon the employment of Senior Counsel, including preparation.
 - 5.2 Senior Counsel and the Applicant's attorneys costs of:
 - 5.2.1 Preparation
 - 5.2.2 Consultation
 - 5.2.3 Travelling costs and travelling time.
 - 5.2.4 Compilation, copying of and perusal costs of the following bundles:
 - 5.2.4.1 Bundle 1A
 - 5.2.4.2 Bundle 1B
 - 5.2.4.3 Bundle 2
 - 5.2.4.4 Bundle 3
 - 5.2.4.5 Bundles "A" to "G"
 - 5.2.4.6 Dunn Bundle
 - 5.2.4.7 Relationship with Dunn Bundle

5.2.4.8 Summary of Dunn's evidence.

5.3 The witness costs in respect of the witnesses referred to in paragraph 4 above, including witnesses fees, travelling time and travelling costs, it being recorded that only Leon Dunn was present at Court.

6. Each party is directed to pay its own costs in connection with the application for a postponement.

7. The Respondent is directed to pay the costs that reserved on the 02nd March 2012 on the attorney and client scale, such costs to include the costs consequent upon the employment of Senior Counsel.'

[4] The applicant thereafter presented its bills for taxation which was attended by representatives of the applicant and respondent, who presented oral and written submissions. Both parties were dissatisfied with certain rulings by the taxing mistress and availed themselves 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.

[5] The applicant was specifically dissatisfied with the rulings on senior counsel's fees as approximately R246 500 was taxed off her fees of R402 990 (including VAT). In a counter-review, the respondent requested the taxing mistress to state a case in respect of her assessment in respect of fees debited for preparation for hearing by two attorneys.

[6] Subsequently, the taxing mistress's stated case, the submissions of the applicant and respondent and the taxing mistress's final report in compliance with Rule 48 (5) in the review and counter-review, were placed before me for a determination in terms of Rule 48(6). At the request of the parties, oral submissions were made to me on 24 April 2014.

LEGAL PRINCIPLES

[7] Attorneys' bills of cost in the High Court are taxed in accordance with the provisions of Rule 70 of the Uniform Rules.

Rule 70(1) provides:

'The taxing master shall be competent to tax any bill of costs for services actually rendered' by an attorney in his capacity as such in connection with litigious work' and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff;...'

Rule 70(3) 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.'

Rule 70(5)(a) stipulates that :

'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.'

Rule 70(3) confers a discretion on the taxing master to award such costs 'as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party'. Rule 70(5)(a) confers on him a discretion to depart from the tariff 'in extraordinary or exceptional' where costs awarded in terms of the tariff would not constitute fair and reasonable remuneration to the party claiming the fee.¹ In *Loots v Loots* the court held that 'This discretion relates perhaps in particular to attorney and client bills of costs, and is confined to extraordinary and exceptional cases'.²

¹ Jacobs & Ehlers : Law of Attorneys Costs & Taxation Thereof Juta 1979 p 51-52

² 1974(1)SA431(E)at 434C-D

ATTORNEY AND CLIENT COSTS

[8] An award of 'attorney and client costs' is meant to ensure that a successful party will recoup expenses he/she has incurred as a result of the litigation. However this does not mean that all costs which an attorney is entitled to recover from his/her client or the disbursements made by the attorney on behalf of his/her client and for the professional services rendered by him/her, may be recovered by the successful party from the losing party in an attorney and client bill.

[9] In *Ben McDonald Inc v Rudolph*³ Van Dijkhorst J stated :

- '1 Where the losing party in litigation is to pay attorney and client costs to the successful party, this means all reasonable costs incurred on behalf of the client although not strictly necessary or 'proper'.
- 2 Attorney and own client costs, where they are to be paid by the losing party to the successful party means all costs incurred except where unreasonable. Agreed items or amounts are presumed to be reasonable.'

In *Aircraft Completion Centre (Pty) Ltd v Roussouw*,⁴ Stegmann J held that as a matter of law, there is no difference between an order to pay costs as between attorney and client and costs 'taxed as between attorney and own client'.

[10] Therefore the taxing master will tax an attorney and client bill in accordance with the provisions of Rule 70 as with a party and party bill, but will in general allow, in addition to the usual party and party costs, the costs of unopposed applications or motions, and certain attendances and consultations which are ruled to be reasonable.⁵

However in *Nel v Waterberg Landbouwers Kooperatiewe Vereeniging*,⁶ Tindall JA held:

'An attorney is not necessarily entitled to a higher fee for what he does as between attorney and client than the client could recover in a party and party bill.'⁷

³ 1997(4)SA 252(T) at 255 D

⁴ 2003 (3) ALL SA 617(W)

⁵ *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at 86 E – the predominant criterion in an attorney & client bill is the reasonableness of the fee.

⁶ 1946 AD 597 p 607

and further:

‘There is a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party. For instance, in the taxation of the attorney’s bill against his client, the latter could not object to a special fee, however high, to counsel which he had specially authorised.... But before the amount of an attorney and client bill can be recovered against the opposite party it must be taxed against the latter.... Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid by the client to his attorney.... We have no Rule of Court on the subject but it seems to me that here also, when the bill is taxed against the losing party, it is essential to apply a stricter taxation to prevent injustice to the latter as the result of the award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation.’⁸

Therefore an attorney and client bill will be taxed more strictly when taxed against an unsuccessful party than when taxed against the attorney’s client, subject to the general rule that each bill will be taxed with due consideration of the factors relevant to the assessment of its reasonableness.

[11] While the tariff is applied strictly in the taxation of party and party bills except where the taxing master is specifically granted a discretion,⁹ the tariff is not binding on an attorney who is entitled to attorney and client costs. However it is accepted practice that the tariff is used as a guide except when there is an agreement that a higher fee may be charged, as when the client has signed a fee mandate or an order has been made authorising the attorney to charge a higher fee.¹⁰

⁷ See also *Oshry & Lazar v Taxing Master* 1947(1)SA657(T) at 660

⁸ p 607-608

⁹ Rule 70 (6)(a) and (7)

¹⁰ Jacobs & Ehlers : p 50-51

COUNSEL'S FEES

[12] Advocates' fees, which are usually reflected as disbursements in the attorney's bill of costs, are taxed in accordance with Rule 69 of the Uniform Rules. 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.'

There is no tariff that is applied to services of counsel in litigious matters in the High Court, except when the amount or value of the claim falls below the jurisdiction of the Magistrates' Court.¹¹ It is apparent from the words 'as he considers reasonable' in Rule 69(5), that the determination of counsel's fee to be allowed on taxation is pre-eminently within the discretion of the taxing master.

[13] Consequently the assessment of Counsel's fees have become 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 issues in 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, but is disputed by the parties to the taxation.

[14] 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.

¹¹ Rule 69(3)

[15] 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, and may be disallowed even in an attorney and client bill as unreasonable.

[16] 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’.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*,¹³ Rabie CJ re-stated the test to be:

‘. . . 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.’¹⁴

[17] Counsel’s 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’.¹⁵

¹² *Preller v Jordaan* 1957 3 SA 201 (O) 203

¹³ 1984 (3) SA 15 (A) at page 18F-G

¹⁴ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111

¹⁵ 2009 (5) SA 227(C) para[22] at 234G. See also Erasmus: Superior Court Practice pB1-420 to B1-422

It was pertinently held, albeit in respect of counsels' fees for appeals, in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC & Another*:¹⁶

'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.'

[18] 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.

[19] A useful 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.

(b)

(c) An assessment should have been made as to the reasonableness of counsel's fees.'¹⁷

[20] The decisive criterion, however, in respect of both counsel's and attorney's fees, is the value of the work done.¹⁸

¹⁶ 2010 (5) SA 124 (CC) para [9]

¹⁷ Para [25] at 235G-H

[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 400 – R4 500 per hour for consultations; trial and opposed application fees range between R19 200 to R36 000 per day (8 times the consultation fee).¹⁹

[22] I have also perused the applicant's heads of argument, the written submissions by Senior Counsel, the court files and bundles of documents in this matter, as a prerequisite to reviewing the taxing mistress's assessment of counsel's fees, the complexity of the matter and the volume of the documents filed. I have remained mindful of the further oral submissions made by the parties on 24 April 2014.

MAIN REVIEW : COUNSEL'S FEES

[23] The following rulings on counsel's fees by the taxing mistress were referred for review:

- i) Items 1, 3, 4, 5, 6, 7, 8, 9, 11, 13, 15, 17 and 19 in the email dated 22 March 2013 from the taxing mistress;²⁰ and
- ii) The fees charged for consulting with and considering documents supplied by K. Mulder on 4th March 2012, and the consultations held on 11th April 2012 and 26 April 2012 with instructing attorney.²¹

¹⁸ 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.

¹⁹ *City of Cape Town v Arun Property Development (Pty) Ltd and Another* at para [25] 235I:
'(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.'

²⁰ annexure B to Notice ito Rule 48(1) Bundle 1 p 9

²¹ not dealt with in Annexure "B"

Applicant's submissions:

[24] The applicant's main objection to the rulings on the aforesaid items, is that although the attorney and client costs were ordered by the court and the order specified the necessary witnesses and directed that preparation and consultations fees of Senior Counsel and the applicant's attorneys were included in the order, the taxing mistress misdirected herself by not allowing the aforesaid fees of counsel.

[25] The applicant contended further that the taxing mistress:

- i) applied the wrong principles and taxed the bill of costs on a party and party basis instead of on an attorney and client basis;
- ii) disregarded specific written and verbal submissions made to her. All senior counsel's fees were fully substantiated and supported by fee invoices.
- iii) misdirected herself by holding that a portion of counsel's fees which were debited at the rate R2 400 per hour and R24 000 per day in accordance with the costs order, provided for attorney and client costs.
- iv) failed to appreciate the nature and complexity of the matter, the volume of the documents and the legal research required in respect of the constitutional challenges in the respondent's defence to the referral rule in the Advocates' profession ;
- v) erred in disallowing consultations with necessary witnesses, one being Leon Dunn, and consultations by counsel with the instructing attorney on the basis that the client was not present at the consultations although paragraph 5.2.2 of the Court Order allowed Senior Counsel's cost for such consultations. The consultations were necessary and reasonable as the application was referred to oral evidence;
- vi) erred in allowing only 2 days for preparation which involved the scrutiny of voluminous documents; the preparation was also necessary and proper for the attainment of justice and for upholding the profession of Advocates;
- vii) erred in taxing the drafting of Heads of Argument by counsel and other notices on a per page basis at the fee allowed for attorneys, instead of

applying the rate on a time spent basis which would result in a fair and reasonable remuneration for the work done;

- viii) failed to take into account that the court had directed that detailed heads be prepared, the length and content of the heads and the list of authorities furnished;
- ix) failed to appreciate that the matter was one of public interest as the decision would have affected the legal profession as a whole and the Advocates' profession in particular;
- x) failed to take into consideration that the applicant was ready to proceed with the leading of oral evidence on 21 May 2012, when the respondent consented to the order which was subsequently made an order of court on that day.

Taxing Mistress's submissions:

[26] The following factors were duly considered:

- i) the fees recovered by the attorney in the bill of costs;
- ii) the complexity of the matter;
- iii) the reasonableness of the fee; and
- iv) the usual function of an advocate.

[27] The bill was taxed on an attorney and client basis according to the principles stated in *Ben McDonald Inc v Rudolph*.²² Rulings were therefore based on what costs were reasonable.

[28] The argument for the complexity of the matter was premised on:

- i) the application was referred for oral evidence;
- ii) Facts in this matter dealt with issues that are specific to the legal profession which amounted to complex legal issues;

²² 1997 (4) SA 252 (T) at 257G – 258F. Also see *Cambridge Plan AG v Cambridge Diet (Pty) Ltd & others* 1990 (2) SA 574 (T) and *Aircraft Completions Centre (Pty) Ltd v Rossouw & others* 2004 (1) SA 123 (W).

- iii) issues included whether a practising advocate can deal directly with the public which question is complex in fact and in law, as is apparent from the court order, briefing of senior counsel, etc.

[29] Although the costs order was taken by consent, both parties agreed that the taxing master always has a discretion to determine what constitutes fair and reasonable fees and the provisions of Rule 70(5) were duly applied.²³

[30] Advocates and attorneys receive the work they do through different procedures. Therefore the instructing attorney was fully compensated for the work he had done.

[31] Counsel's fees which were debited at the rate R2 400 per hour provided for attorney and client costs. An objective test was applied in determining the quantum of counsel's fees: the actual time spent by counsel, taking into account the importance and complexity of the matter, was balanced against what would be reasonably and objectively allowed for a brief of that nature.²⁴

Factors considered when determining the reasonableness of counsel's fees included:

- i) The complexity of the case, inflation, fair compensation of counsel for preparation and presentation, volume of the case and prevailing counsel's fees.²⁵
- ii) The quantum of counsel's fee is determined by the value of the work done and not by the eminence of counsel.²⁶

Drafting of documents for counsel in this division is allowed on a page basis. A reasonable fee of R600-00 has been allowed for counsel to draft the heads of argument etc. in accordance with Rule 69 of the Uniform Rules.

[32] The instructing attorney consulted with the advocate without the client being present. Therefore the consultation costs are not attorney and client costs but rather

²³ *Coetzee v Taxing Master, South Gauteng High Court and another* 2013 (1) SA 74 (GSJ) headnote at 74 and para 25

²⁴ *Reef Lefelbvre (Pty) Ltd v SA Railways and Harbours* 1978 (4) SA 961 (W).

²⁵ *President v Gauteng Lion's Rugby Union and another* 2004 (2) SA 64 (CC)

²⁶ *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (4) SA 453(T)

attorney and own client costs. It is not reasonable for the attorney to consult with the advocate without the client being present.

[33] All the facts advanced by both parties were duly considered and fees reasonable under these circumstances were allowed.²⁷

Respondent's submissions

[34] The parties agreed the terms of the court order dated 21 May 2012.

The taxation was duly conducted on an attorney and client basis and in accordance with the recognised principle that attorney and client bills of cost must be taxed with due regard to the reasonableness of the fees.

[35] The relevant factors to be considered when evaluating counsel's fees *in casu* are:

- i) The historical background to the matter: The existence of other complaints was raised at the pretrial conference on 11 April 2012, and by May 2012 it was established that Dunn would testify. An adjournment was formally requested on 14 May 2012 at the resumed Rule 37 conference because of the respondent's ill health and the introduction of the evidence of Leon Dunn, as the respondent intended to consult witnesses and file an amended Discovery Affidavit. The respondent was advised to make a substantive application for adjournment. It was therefore highly unlikely that the matter would proceed on 21 April 2012 as the respondent would have been afforded the opportunity to receive a fair hearing in accordance with the *audi alteram partem* rule.
- ii) Complexity: During taxation the applicant failed to point out sufficiently the complexity either of law or fact in this matter, which is nevertheless disputed by the respondent. The alleged misconduct on the part of the respondent was admitted by the Respondent. Therefore the bulk of the allegations were common cause, and the onus on the applicant was substantially reduced. Further it is evident from the papers and the Rule 37 Minutes that the issues referred to oral evidence were limited.

²⁷ *Majola v Union and South West Africa Insurance Co Ltd* 1978 (2) SA 154 (SE)

- iii) Bulk of documentary evidence involved: The entire fee in respect of the attorney's perusal of each and every document of 2697 pages in total – firstly for identification and secondly for compiling discovery (at a reduced rate) were allowed. Advocates do not assist in sifting through documents for trial preparation.
- iv) Time actually spent: Counsel consulted for a total of 36.5 hours over a period of 6 weeks from 02.04.2012 to 21.05.2012. All pleadings were drafted by the client (Society of Advocates). Time actually spent by counsel is no more than a “pointer” in assessing a reasonable fee.²⁸ Further using the actual time spent in evaluating a reasonable fee may in some instances result in putting a premium on slow and inefficient work.²⁹
- v) The Court Order: The taxing mistress complied with the ambit of the order in every respect, with due regard to the principle of reasonableness and the application of the order. The time spent by counsel must be reasonable and fees must be determined according to the work actually done.³⁰ It is unfair and unreasonable to burden the party liable for fees pay for work done “twice” ie by attorney and the advocate.

[36] Therefore the taxing mistress exercised her discretion judiciously and the counsel's fees as allowed are reasonable, and no interference with the taxed bill is warranted.

GENERAL RULINGS ON REVIEW

[37] The Taxing Mistress correctly stated that she is obliged in terms of Rule 70(5) to determine the fees to be allowed in an attorney and client bill of costs on the basis of what is reasonable, even when the parties have consented to an order for attorney and client costs.

²⁸ *Naval Servicos A Vanegcauo Limitada vs Strang Rennies Metal Terminals (Pty) Ltd.* 2008 JDR 1002 at 16.

²⁹ *JD van Niekerk EN Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A)

³⁰ *President of the RSA vs Gauteng Lions Rugby Union* 2002 (2) SA 64 (CC)

Nevertheless the agreed rate of counsel's fees and the items listed in the order of court dated 21 April 2012, ought to have been presumed reasonable at the taxation except if the taxing mistress was persuaded otherwise for compelling reasons.³¹

[38] As the current fee parameters charged by senior counsel in KwaZulu-Natal are between R2 400 – R4 500 per hour for consultations and trial and opposed application fees range between R19 200 to R36 000 per day, the rate of R2 400 per hour for consultations and R24 000 per day for the hearing charged by counsel in this matter is undoubtedly on the lower end and therefore cannot be considered unreasonable, although the Taxing Mistress stated that in her view a rate of R1 800 per hour was reasonable, and the additional R600 allowed for the attorney and client portion of the fee.

Therefore all counsel's fees charged and allowed on review on a time spent basis are allowed at a rate of R2 400 per hour, except for travelling which is allowed at fifty percent (50%) of her rate.

[39] Counsel's fees for drafting heads of argument were charged on a time spent basis. The only explanation offered by the taxing mistress as to why she has allowed a drafting fee per page and not according to the time spent by counsel is that it is the practice in this division to do so. In my view a consistent approach, based on a fee calculated on the time reasonably spent, should be maintained.³² Further it was relevant to take into consideration that the presiding judges requested detailed heads of argument which was a clear indication of the complexity of the issues and the volume of the documentation to be considered (although volume does not necessarily equate with relevance or significance).

I am of the view that assessment of fees on a time spent basis ought to become the practice at taxations conducted in this Division, as is the general practice in most other divisions, because presently, fees are generally charged on a time spent basis by advocates and attorneys.³³

³¹ *Ben McDonald Inc supra*

³² *Naval Servicos A Vanegcauo Limitada* p15

³³ when written mandates for attorney and own client fees are obtained by attorneys

Ms Annandale has furnished detailed submissions on the nature and purpose of heads of argument, generally and in the specific context of this matter, substantiates the argument advanced by the applicant that the allowed fee is inadequate. In my view the taxing mistress erred in her assessment of a fair and reasonable remuneration for the drafting of the heads of argument because she failed to accord proper weight to the relevant factors within the specific context of this application.

[40] The respondent contended that the issues were curtailed because of the admissions of the respondent. Nevertheless the respondent consented to all the parties listed in paragraph 4 of the costs order being declared necessary witnesses, thereby acknowledging the integral importance of these witnesses to the applicant's case.

In *Gouws v Montesse Township & Investment Corporation (Pty) Ltd (2)*, *Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank Ltd (2)*³⁴, it was held that the question of whether a witness is a 'necessary witness' should be looked at through the eyes of counsel at the time when counsel was advising on evidence and at other stages up to the time when the witness was brought to court. In my view, the logical conclusion following on this statement is that, although advice on evidence and consultations with necessary witnesses may be considered attorney and client costs, these charges ought not be disallowed as unreasonable in an attorney and client bill, even when payable by the unsuccessful party.

Further in her written submissions Ms Annandale has set out in detail why the consultations in dispute were necessary and how some arose in the course of the matter eg pursuant to proposals by the respondent's attorney at the Rule 37 conference instructions had to be taken from the applicant.

Consequently it ought to have been accepted by the taxing mistress that consultations with these witnesses by counsel and attorney would not only have been reasonable but necessary, although the duration and number of the consultations were susceptible to assessment. The main criterion to be applied is

³⁴ 1964 (3) SA 609(T) at 610; LAWSA Vol 3 Part 2 para 421

whether, with due regard to the complexity and seriousness of the matter, the consultations were reasonable.³⁵

[41] Although as a general rule a client is expected to attend the consultations with attorney and counsel, given the nature of this matter and the constitution of the applicant, the client (in the form of a representative of the Society of Advocates) could not reasonably have been expected to attend every consultation between instructing attorney and counsel, in order to justify an allowance of a consultation fee. Consequently I am of the view that the taxing mistress failed to consider the particular circumstances of this matter and has furnished no cogent reason for her ruling other than that it was not reasonable for the attorney to consult with the advocate without the client being present and that such consultation costs are attorney and own client costs.

[42] Although the disputes of fact referred to oral evidence may have been curtailed by the respondent's admissions, the legal issues, including the constitutional challenges raised by the respondent, had to be comprehensively presented and determined on the papers. It is therefore apparent that these constitutional issues necessitated extensive research and perusal of relevant documentation and caselaw, as contended by the applicant. Further, as the issues arose consequent to the defences relied on by the respondent, the complexity of the matter and the legal issues ought not to have been disputed by the respondent; nor was the taxing mistress justified in assessing the matter as 'semi-complex'.

[43] I am also in agreement with the applicant's contention that the constitutional issues raised by the respondent are of significance as they relate to the legal profession as a whole and specifically affect the advocates' profession as the constitutionality of referral rule was challenged. This contention was not disputed by the respondent. Ms Annandale also made submissions on the nature of the application, the defences of the respondent and the ramifications thereof, and the *sui generis* nature of strike off proceedings, intended to assist the taxing mistress in the evaluation of the significance and complexity of the matter.

³⁵ *City Deep Ltd v JHB City Council* 1973 (2) SA 109 (W) at 117C.

[44] It was not in dispute that the relevant documentation was voluminous, as a substantial perusal fee was allowed to the attorney. The logical consequence of that perusal by the attorney is however, that he would have to consult with counsel in order to assist counsel distil and determine the authorities relevant to the issues referred to the court.

Therefore the allowance of a perusal fee to the attorney does not preclude a consultation or preparation fee by counsel nor does it mean that a fee is debited twice for the same service, as contended by Ms Leppan. Further, although as a general rule, charges by an attorney for consultation with counsel after a brief on application are not allowed, the rule is subject to the qualification that the nature of the matter may require such consultations, rendering the charges therefor reasonable.³⁶

[45] I am mindful that the application was drafted prior to Ms Annandale being briefed in the matter, which would necessarily have increased the time expended by her in preparation for the hearing and in drafting of heads of argument. I am therefore in agreement with the taxing mistress that this fact is relevant to the assessment of a reasonable fee for the aforesaid services, although Ms Annandale has pointed out that no fee was rendered for the work done previous to her brief. Further, while contending that the preparation fee allowed for 2 days was unreasonable, Mr Dickson conceded that 7 days could also be considered excessive for the preparation.

[46] The taxing mistress expressed the view that the matter was 'in all likelihood going to be postponed'. The respondent also submitted that the matter was precluded from proceeding by the *audi alterem partem* rule, as he intended to investigate the allegations of Dunn. Ms Annandale has explained why the preparation had to continue despite the proposals by the respondent's at the Rule 37 conference. In any event, neither party could properly assume or conclude that the adjournment would be granted, as only the court could have determined whether the application for adjournment sought by the respondent ought to be granted. In the premises, I am satisfied that the applicant had to continue preparation for the hearing on the basis that it would proceed. The taxing mistress therefore misdirected herself

³⁶ Vaatz v Law Society of Namibia 1994(3)SA536 (Nm)

in accepting the respondent's submission in this respect, which impacted on her assessment of the preparation fee allowed to counsel.

[47] In my comments on the general principles relating to the taxation of counsel's fees I noted that it was important for the taxing master to be properly advised of the factors pertinent to the assessment of counsel's fees.³⁷ In this matter, detailed written submissions by counsel were furnished at the taxation. However it would appear that the taxing mistress had insufficient regard to these submissions while the submissions on behalf of the respondent, which were discordant with the nature of the application, were favoured. In the result, the majority of the rulings on counsel's fees became susceptible to review.

[48] Where applicable, VAT is to be added to the fees allowed on review.

REVIEW of ITEMS IN DISPUTE

[49] Item 1 : 2 April 2012 Consultation with instructing attorney:

Counsel's fee of R3 600 for this consultation of 1.5 hours was disallowed on the basis that it was an oral advice on evidence and the fees charged should be reasonable.

On Review:

- i) Although costs of advice on evidence is an attorney and client charge, it is not an unreasonable charge in an attorney and client bill. Ms Annandale explained that this first consultation was 'analogous to oral advice on evidence' but included a discussion of the factual and legal issues in dispute as well as the approach of the applicant to the litigation and strategy for the first Rule 37 conference. The fee for this consultation was allowed to the instructing attorney.
- ii) Fee of R3 600 allowed.

³⁷ General Rulings para[13]; see also *City of Cape Town v Arun Property Development (Pty) Ltd and Another* para[25] 235G-H

[50] Item 3 : 11 April 2012 Consultation with the instructing attorney

Counsel's fee of R2 400 for a 1 hour consultation was disallowed on the basis that the client was not present.

On Review :

- i) Although I do not agree with the reason for the fee being disallowed, I am not satisfied that a further consultation prior to the Rule 37 conference was reasonable.
- ii) Review denied.

[51] Item 4 : 11 April 2012 Telephonic consultation with Moerane SC:

Counsel's fee of R 1 200 for a 30 minute telephonic consultation was disallowed on the basis that no cross reference in the attorney's bill to him being party to the consultation could be found.

On Review:

- i) This was a telephonic consultation. The taxing mistress's reason is therefore ill-conceived.
- ii) The respondent had raised issues at the Rule 37 conference which required instructions from the applicant.
- iii) Duration of consultation and fee reasonable: Fee of R1 200 allowed.

[52] Item 5 : 17 April 2012 Consultation with instructing attorney

The taxing mistress held that this consultation charged at R4 800 was not reasonably incurred under the circumstances.

On Review:

- i) Given the paucity of details, I am unable to find that the taxing mistress exercised her discretion improperly.
- ii) Review denied.

[53] Item 6 : 19 April 2012 : Consultations and telephonic consultations with Van Niekerk SC, Moerane SC and instructing attorney re Dunn.

This consultation charged at R3 600 for 1.5 hours was disallowed on the basis that counsel is not allowed to consult with the client without the attorney being present; there is no cross reference in Mr Essa's bill.

On Review:

- i) The circumstances under which the consultations became necessary and took place urgently on that day is set out by Ms Annandale in her submissions.
- ii) The attorney did not attend the consultation. However the telephonic discussions between counsel and attorney on that day are reflected as attendances in items 282 and 284 of the attorney's bill. Documents were also sent by counsel to Mr Essa in connection with Dunn, as reflected in items 286 and 287.
- iii) The parties are not lay litigants and must be aware of the rules relating to consultations with clients. However they deemed that the nature of the matter and the proximity of the date of hearing warranted the urgent consultations with client without the presence of the instructing attorney.
- iv) In my view the taxing mistress disregarded the foregoing factors which were proper for her to consider.³⁸
- v) Fee of R3 600 allowed.

[54] Item 7: 22 April 2012 Consultation with Leon Dunn:

Counsel's fee of R9 600 inclusive of travel was allowed at half of counsel's hourly rate for travel and a two hour consultation was allowed as being reasonable under the circumstances.

On Review:

- i) Review of travel fee denied as the rate allowed is reasonable.
- ii) This was the first consultation with who was probably the most important witness for the applicant. Three bundles of documents were compiled in

³⁸ *Preller v Jordaan supra* at 203

respect of his evidence and he was present at court as the first witness to be called by the applicant.

- iii) While 3 subsequent consultations were held with this witness, only 2.5 hours in total were allowed on taxation for these three consultations. None of these rulings have been referred for review.
- iv) I am therefore of the view that the taxing mistress exercised her discretion incorrectly in permitting only 2 hours for the first consultation.³⁹
- v) Fee of R 7 200 for consultation of 3 hours allowed.

[55] Item 8 : 3 May 2012 Heads of Argument

R15 000 of Counsel's fee of R45 000 was allowed on taxation. The taxing mistress allowed a drafting fee of R600 per page for the 25 page document (word count of 250 per page applied), in accordance with the practice in this Division.

On Review:

- i) Heads are usually regarded as part of preparation for argument.⁴⁰ But a separate fee is warranted in this matter both as an attorney and client fee and because counsel was directed by the presiding judges to file comprehensive heads of argument, an indication of the complexity and volume of the matter. Counsel has indicated that it took approximately 3 days to finalise the heads.
- ii) In *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another*⁴¹ Kriegler J drew a distinction between the practice in the Constitutional Court and the SCA in respect of the heads of argument and the associated appearance of counsel at the hearing. He pointed out that 'in the SCA the emphasis is on the oral presentation of argument by counsel in open court with heads of argument serving largely

³⁹ Jacobs & Ehlers p 60 : 'Applying the principles relating to attorney and clients costs...the following instances of work should in appropriate cases be allowed, having regard to the circumstances of each case:.....(f) longer consultations than would perhaps be allowed as between party and party.'

⁴⁰ *Ocean Commodities supra* 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...'

⁴¹ 2002 (2) SA 64 (CC) para [15] and [16] at 74B- I

as a preliminary guide to the Court, while in the Constitutional Court, the emphasis is on written submissions, which are not regarded as succinct heads of argument forming the basis of the argument to be presented, but the argument itself together with all the supporting material.’⁴²

And further that ‘In an appropriate case, therefore, it may be reasonable to make some special allowance for counsel’s fees for preparing written argument for this court. This is expressly contemplated by subrule (2) of the CC Rule 21.’⁴³

- iii) There is no reason why a similar consideration should not apply to the assessment of counsel’s fees in this matter.
- iv) I have perused the relevant heads of argument and having considered the submissions of Ms Annandale on the general and specific purpose and content of heads of argument, I am of the view that the taxing mistress misdirected herself in assessing the fee at R600 per page, as such an assessment even on a per page basis, is disproportionate to the effort involved in drafting the heads and fails to take into account the issues dealt with therein.⁴⁴
- v) I have already commented on the need for a uniform practice in accordance with the generally accepted computation of fees on a time spent basis, which will provide fair and reasonable remuneration for the service rendered.
- vi) A fee of R36 000 for 1.5 days at R2 400 per hour is allowed as a fair and reasonable attorney and client charge.

[56] Item 9 : 4 May 2012 Consultation with instructing attorney

The taxing mistress has stated that this 30 minute consultation at R 1 200 was disallowed as ‘it should have only been dealt with by the attorney’.

⁴² page 84 C-F

⁴³ Para[45]

⁴⁴ See also general rulings *supra*

On Review:

- i) Ms Annandale has submitted that the consultation was held to co-ordinate what needed to be done going forward.
- ii) I am not persuaded that this charge is reasonable. The review is denied.

[57] Item 11: 6 May 2012 Consultation with instructing attorney

This consultation charged at R1 400 was disallowed as it entailed “traversing further documents”.

On Review:

- i) Review is denied.

[58] Item 13 : 10 May 2012 Inspection of files/ procurement of copies/ consultation with instructing attorney at offices of attorney Sean Chelin

Counsel’s fee of R13 800 was disallowed on the basis that it is not the function of counsel, but that of the attorney, to inspect files; the attorney was well compensated for his work.

On Review:

- i) The taxing mistress properly held that the inspection of the files was the attorney’s function, as was the procurement of copies.
- ii) However a consultation was also held at the same time with Chelin, who was also declared a necessary witness.
- iii) Chelin’s relationship with the respondent had to be properly canvassed given that the applicant’s case against the respondent was premised on his relationship and mode of practice with certain attorneys, one of whom was the said Chelin. No further consultations were held with Chelin.
- iv) Ms Annandale has explained that, because of the number of relevant files in Chelin’s possession, it was convenient to consult with him at his offices instead of uplifting the files.

- v) The taxing mistress failed to take into consideration the necessary consultation that was held with Chelin, and the reason that it was conducted in his offices.
- vi) In the premises, a fee of R7 200 for a consultation of 3 hours and R1 200 as a fee for travel is allowed.

[59] Item 15 : 14 May 2012 The resumed Rule 37:

Counsel's fee of R4 200 was disallowed on the basis that the attorney should have had this telephonic conversation because it related to a postponement.

On Review:

- i) The resumed Rule 37 conference was convened. It was not a telephonic conversation, nor was it restricted to the application for an adjournment, as indicated in the minutes of the pre-trial conference.
- ii) In consequence of the taxing mistress's error, her ruling in disallowing counsel's fees is vitiated.
- iii) Counsel's fee of R4 200 is allowed.

[60] Item 17 : 18 May 2012 Various consultations with instructing attorney

Counsel's fees of R13 600 for 3 consultations were disallowed on the basis that the consultations were unreasonable as the attorney was allowed his full fee for preparation.

On Review:

- i) According to counsel, these consultations were convened to discuss the sequencing of witnesses, logistical arrangements etc because of the proximity of the hearing. I am also not persuaded that these were reasonable charges.
- ii) Review is denied.

[61] Item 19: Cumulative fee for preparation

Counsel's fee of R168 000 for preparation was charged for seven days at the rate of R24 000 per day. The taxing mistress allowed as reasonable 'after taking all facts into consideration'⁴⁵, two days at a rate of R16 000 per day.

On Review:

- i) The taxing mistress correctly held that the preparation by Ms Annandale would have taken longer as she did not draft the application papers.⁴⁶
- ii) However there is no cogent reason offered as to why the rate per hour was reduced.
- iii) The taxing mistress misdirected herself by taking regard of the respondent's submission that the matter was going to be postponed and failing to consider the submissions by the applicant, and Ms Annandale in particular, why the preparation had to continue.⁴⁷
- iv) A fee for the preparation of heads of argument has been allowed on review.
- v) In the light of the foregoing considerations, a reasonable fee for preparation by counsel is, in my view, 4 days at the rate of R24 000 per day.
- vi) A fee of R96 000 is allowed to counsel for preparation.

[62] Fees charged for consulting with and considering documents supplied by K. Mulder on 4th March 2012, and the consultations held on 11th April 2012 and 26 April 2012 with instructing attorney.⁴⁸

Counsel's fees of R2 400 and R4 800 debited in her fee note dated 30 April 2012 for consultations with the instructing attorney on 11 April 2012 and 26 April 2012 respectively, were disallowed in total.

⁴⁵ *Naval Servicos A Vanegcauo Limitade supra*

⁴⁶ See my comments under General Rulings para[44]

⁴⁷ See my comments under General Rulings para[45]

⁴⁸ not dealt with in Annexure "B"

On Review:

- i) No item which correlates with the consultation on 4 March 2012 appears in the applicant's bill or in counsel's fee note, although there is an attendance fee of R2 400 debited by counsel in her fee note dated 31 May 2012 for an attendance on K Mulder and instructing attorney on 4 May 2012 and a correlative fee debited by the instructing attorney for a consultation with counsel and Ms Mulder on the same date. I have therefore accepted that the consultation took place on 4 May 2012 during which the documents supplied on 4 March 2012 were considered.
- ii) As reflected in the bill of costs, on taxation, consultation fees were allowed to the instructing attorney for 1 hour on 11 April 2012 (item 239 on bill) and for 2 hours on 26 April 2012 (item 343 on bill) and for 1 hour on 4 May 2012 (item 456 on bill).
- iii) It is therefore not only reasonable but logical that counsel's fees for the same consultations should have been allowed. The taxing mistress therefore misdirected herself by disallowing counsel's fees as charged.
- iv) Counsel's fees for the consultations are allowed at R2 400 for 11 April 2012, R4 800 for 26 April 2012 and R2 400 for 4 May 2012.

THE COUNTER-REVIEW

[63] Item 638 : Fees for preparation for hearing

The applicant's attorney claimed 'fees iro preparation for hearing for two attorneys (*based on decision in Naval Servicos: bundles before court totalling 2697 pages*) – *67 hours limited to 1.5 days*'.

The taxing mistress allowed the attorney a fee of R12 780 which was limited to 1.5 days or 15 hours.

Respondent's submissions:

- i) There is no provision in the tariff for an attorney to function as a junior counsel. The application of Rule 69 and 70 are mutually exclusive.

- ii) The attorney's preparation fee – as contained in the tariff – was charged for and awarded in various other charges as set out by the respondent.⁴⁹
- iii) The preparation fee as charged for at item 638 of the bill of costs is a therefore misnomer and a duplication:
- iv) Reliance on the *Naval Servicios* case is incorrect as there is no reference to a preparation fee for an attorney.

Taxing Mistress's submission

- i) The attorney was allowed a preparation fee in accordance with paragraph 5.2.1 of the Court Order 21 May 2012.

Applicant's submissions

- i) The taxing mistress correctly applied her mind to the considerations, circumstances and facts of the matter, the Court Order and took the correct principles into account. She therefore exercised her discretion judicially and/or properly.

On Review:

- i) Reliance on the *Naval Servicios* case is misplaced.
- ii) Although the tariff is used as a guide in the taxation of attorney and client bills, Rule 70(1) provides that a attorney's fees 'shall be taxed subject to the provisions of subrule (5)', which confers upon the taxing master a discretion to depart from the tariff in extraordinary and exceptional cases.⁵⁰
- iii) The usual services performed by an attorney and as tabulated by the respondent are not contemplated by the preparation fee that was ordered.
- iv) The respondent consented to the preparation fee for the attorney, which was included in the order of court dated 21 April 2012.
- v) The taxing mistress properly deferred to the order.
- vi) The Counter review is denied.

⁴⁹ Bundle 2 – Counter-review p 14-15

⁵⁰ *Loots v Loots* 1974(1)SA431 (E) at 434C-D

COSTS OF REVIEW and COUNTER-REVIEW

[64] 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.’

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

ORDER:

- 1 The charges allowed on review are substituted for the amounts allowed by the taxing mistress.
- 2 The *allocatur* of the Taxing Mistress is set aside and referred back to her to be calculated in accordance with the charges allowed on review.
- 3 There is no order in respect of costs of review and counter-review.

MOODLEY J

Date of Judgment :

6 July 2015

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