# IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**REPORTABLE**

**CASE NO 28/2002**

**In the matter between**

**PRICE WATERHOUSE MEYERNEL**
**Applicant**

**and**

**THE THOROUGHBRED BREEDERS' ASSOCIATION OF SOUTH AFRICA**
**Respondent**

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**CORAM:** **HEFER AP, VIVIER ADP, HOWIE, HARMS et CONRADIE JJA**

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**Date Heard:** 5 November 2002

**Delivered:** 15 November 2002

**Review of taxation in SCA - inclusion of VAT on fees - quantum of counsel's fees**

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**J U D G M E N T**

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**HOWIE JA**

HOWIE JA

**[1]** This is a review of taxation in terms of Rule 17 of the Rules of the Supreme Court of Appeal. The applicant was the respondent in an appeal before this Court arising out of an action in which it was the defendant. The present respondent - the plaintiff in the action - sued for damages on the ground that the applicant had breached its contractual obligation to conduct an annual audit of the respondent's books of account with reasonable care and so failed to expose extensive thefts by one of the respondent's employees. I shall refer to the parties as "plaintiff" and "defendant" respectively.

**[2]** The trial Judge held that the audit had been negligently carried out and that this breach of the parties' auditing agreement entitled plaintiff to damages. Although plaintiff sued in contract and not in delict the trial Court upheld reliance by defendant on the Apportionment of Damages Act 34 of 1956. Having found that plaintiff had itself been negligent in relation to its loss, and considerably more at fault than defendant, the learned Judge awarded substantially reduced damages. Both parties appealed.

Apart from other issues, each challenged the finding of fault against it and plaintiff contested the applicability of the Apportionment of Damages Act.

**[3]** On appeal three judgments were handed down. The finding of fault on both sides was unanimously upheld and by a majority of four to one it was decided that the Apportionment of Damages Act did not apply in the case of a contractual action. It followed that plaintiff's own negligence did not serve to affect its claim. The order made by this Court was accordingly one awarding plaintiff its damages in full in the sum of R1 389 801.90 together with costs, including the costs of two counsel. The judgments in both Courts are reported: see *Thoroughbred Breeders' Association of South*

*Africa v Price Waterhouse* 1999 (4) SA 968 (W) and *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA).

**[4]** Plaintiff's Johannesburg and Bloemfontein attorneys proceeded to draw their respective bills of costs pertaining to the appeal and in due course these were presented for taxation.

**[5]** Included in the items claimed were disbursements for fees of senior counsel in the total sum of R495 396.00, for fees of junior counsel in the overall sum of R166 654.80 (both sums exclusive of VAT) and value-added tax ("VAT") on all fees, disbursements and costs.

**[6]** At taxation defendant objected to the quantum of fees charged by both plaintiff's counsel and to the inclusion of VAT on the fees charged by plaintiff's counsel and attorneys.

**[7]** The Taxing Master reduced senior counsel's fee by 20 per cent but rejected defendant's objections in all other respects. Hence this review.

**[8]** In his case stated in terms of Rule 17(3) the Taxing Master records that at the taxation proceedings defendant's attorney handed in a letter explaining its objection to the inclusion of VAT in the costs claimed. The thrust of this letter, which forms part of the record on review, was that VAT was only properly open to inclusion where payment of VAT amounted to a "cost" incurred and that it would accordingly be required of plaintiff to provide satisfactory proof to the Taxing Master that VAT paid by it amounted to a true disbursement and had not been asserted by plaintiff to the revenue authorities to be input VAT. According to the Taxing Master this letter captured the essence of the objection raised by defendant on the VAT aspect, in response to which plaintiff's attorney had no submissions to make. Without giving any reasons the Taxing Master proceeds to state that he held that whether plaintiff was a registered VAT vendor, and whether it was entitled to an input VAT credit, were issues for resolution between plaintiff and the Receiver of Revenue, thereby conveying that they were not for

decision by him.

**[9]** As to counsel's fees, the Taxing Master goes on in his stated case to say that because he considered the matter to be of an extraordinary and exceptional nature, in relation to which fees normally allowed to counsel in this Court would be inappropriate, he postponed the taxation proceedings in order for defendant to produce a statement of the fees charged by its own counsel. Having been provided with these details, he allowed plaintiff's counsel what he did. This decision, so he explains, was made after due regard to the complexity of the matter, the amount of work involved and the extraordinary nature of the appeal, and then by using the fees charged by defendant's counsel "as a yardstick" to determine the fees to be allowed for plaintiff's counsel. He adds:

> "I allowed senior counsel for the [plaintiff] a comparable and all inclusive fee of R451 801.15 (after 20% of fees charged had been taxed off) and junior counsel a comparable and all inclusive fee of R183 379.20 (as charged)."

(It is to be noted that the fee amounts he refers to included VAT.)

**[10]** After the parties filed their contentions in terms of Rule 17(4) the Taxing Master framed a report as required by Rule 17(5). On the VAT point he says this:

> "The taxing master has never enquired or been concerned with the implications of Vat claimed in a bill of costs ...and has always regarded it as a

matter between the successful litigant and the Receiver of Revenue."

**[11]** Concerning counsel's fees, the Taxing Master sets out in the report the considerations which persuaded him that the case was outside the ordinary and then says he called for details of the fees of defendant's counsel because "there is no precedent in this Court for fees allowed for counsel in extraordinary appeals". In arriving at his decision on the quantum of the plaintiff's counsel's fees, he says he compared them with those charged by defendant's counsel and "found them to be comparable". His reduction of the fee charged by plaintiff's senior counsel he explains as follows. He assumed that the fees reflected in the relevant bill were attorney and client charges and because it is "generally the practice in this Court to determine an attorney and client fee by increasing a party and party fee by 20 per cent", he simply reversed the process in this instance in order to arrive at a reasonable party and party figure for senior counsel's fee. As for junior counsel's fees, it is, he says, the practice in this Court to allow two-thirds of senior counsel's fees. In the present matter, because junior counsel had charged less than two-thirds his fees were allowed in full.

**[12]** Relevant statistics reflecting something of the extent of the case as it was on appeal are these:

1. The record comprised 68 volumes containing 6471 pages in all.
2. The trial judgment comprised 115 pages.
3. Defendant's heads of argument comprised 69 pages and those of plaintiff 120 pages.

4. Argument lasted two full days.

5. The three judgments delivered in this Court total 217 pages.

**[13]** It remains, in completing the background survey, to indicate what the fees were that were charged by defendant's counsel and their involvement in the litigation.

**[14]** At the trial defendant was represented by senior and junior counsel. They were again briefed on appeal. In addition, a second senior counsel was brought in for the appeal, to whom, for convenience, I shall refer as "leading senior counsel". We were informed and accept, that leading senior counsel was briefed especially to deal with aspects of the case that were expected to be of crucial importance to the auditing profession. Essentially, these concerned controversies such as whether and to what extent an auditor must search for and prevent fraud and theft.

**[15]** We were also informed that it is the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related and, in so far as appeals are concerned, for counsel to

charge separately for preparation, heads of argument and time in Court. In addition - again according to the information placed before us by counsel in argument - in marking a brief counsel will state the relevant fee and then add VAT separately. In line with that approach, and also because VAT is dealt with separately from fees in Rule 17, it is appropriate to continue to refer to fees exclusive of VAT, as indeed I have done already in paragraph [5] above.

**[16]** The total fee charged by defendant's leading senior counsel was R432 000.00. It was based on a daily fee of R12 000.00 for every full day's work. Apart from charging that fee for each of the days the appeal involved in court, counsel charged it for each of 33 days for preparation. In addition, there were two instances of a part-day fee, also in respect of preparation. The second senior counsel who, as I have indicated, appeared at the trial, charged a total of R219 600.00. That sum comprised separate fees (also apparently based on a time charge of R12 000.00 per day) for studying the trial judgment and consulting, for studying the record and preparing heads of argument, for preparation for the appeal and for the appeal itself. Defendant's junior counsel charged R146 400.00, the details of which it is unnecessary, for present purposes, to mention, save that he, too, charged separately for heads, preparation and the hearing. It is manifest from what the Taxing Master says and did that the real "yardstick"

he used was the fee charged by defendant's leading senior counsel.

**[17]** As at taxation, the issues on review are the inclusion of VAT and the quantum of the fees charged by plaintiff's counsel. Essentially the focus is on plaintiff's senior counsel's fee because if it is liable to reduction then a reduction of the junior's fee (to the extent appropriate in the Taxing Master's judgment) is bound to follow.

**[18]** As far as the VAT issue is concerned Rule 17(2) provides:

> "Value-added tax may be added to all costs, fees, disbursements and tariffs in respect of which value-added tax is chargeable".

Counsel for defendant in the review ventured the submission that the word "may" in the sub-rule conferred a discretion on the Taxing Master. I do not think that that can be so. Whether VAT is indeed chargeable depends on application of the relevant statutory provisions, properly construed, to the facts. When the answer to that enquiry has been established it is then that the question arises whether such VAT may be included in the bill. Certainly that offers a choice but only a choice for the party whose bill it is. Once that party decides to include the VAT the Taxing Master has to decide whether such inclusion is proper. That is not a matter of discretion. A costs order - it is trite to say - is intended to indemnify the winner (subject to the limitations of the party and party costs scale) to the extent that it is out of

pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show - and the Taxing Master has to be satisfied about - is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket. The sub-rule is consequently an empowering provision. It enables the party concerned to claim reimbursement of the items referred to but obliges the Taxing Master to allow or disallow them depending on whether they are expenses of the nature I have described.

**[19]** The question then is whether the VAT included in plaintiff's bills would indeed be expenditure of that nature.

**[20]** VAT is payable by reason of the provisions of the Value-Added Tax Act 89 of 1991, s 7(1)(a) of which demands the levying and payment of VAT at 14 per cent on the value of the supply by any vendor of goods or services which it supplies in the course or furtherance of an enterprise it carries on. It is not in dispute that plaintiff and all the legal practitioners involved are registered vendors in terms of the Act or that VAT is payable on the fees in question. In terms of the definition section of the Act, the VAT payable under s 7(1)(a) on those fees is, in so far as it is charged and received by the practitioners concerned, their output tax. They are obliged under s 7(2) to collect it and pay it to the Receiver of Revenue.

**[21]** The same VAT, in so far as it is paid by plaintiff to its legal advisers, is, by definition in the Act, plaintiff's input tax. The significance of the output-input classification is this. For each tax period (usually one month) a vendor must calculate its fiscal indebtedness and render a return to the revenue authorities (s 16(1)). In terms of s 16(3) it is obliged to pay the Receiver of Revenue only the excess by which, in each tax period, its output tax is greater than its deductible input tax. It follows that if the vendor's output tax in that period is less than the input tax, or there is no output tax, the vendor is entitled, if not to a refund of input tax, then at least to a credit in respect of the input excess. In short, any payment of input tax will inevitably be matched by a credit or refund. Consequently, if plaintiff is entitled to claim from the Revenue, as an input tax, the VAT which it is required to pay to its attorney, it does not, in respect of such input tax incur an out of pocket expense.

**[22]** For present purposes it is unnecessary to concern oneself with the statutory requirements for input tax deductibility. Neither in response to the letter produced at taxation, to which I have already referred, nor in argument in the review was it ever suggested on plaintiff's behalf that any of those requirements could not be met in relation to the fees under consideration. Accordingly, as matters stand at present, the VAT inclusions

in plaintiff's bills cannot be characterised as items in respect of which plaintiff is out of pocket. They may eventually prove to be. That is not for us to decide. It is sufficient to say that it was clearly wrong for the Taxing Master to hold that the VAT issue was not for him to determine. It plainly was. It must go back to him for reconsideration subject to such proof and arguments as the parties may wish to present. Nothing suggests that his enquiry into this issue will have to involve complications of evidence or analysis. And should he be left in doubt such uncertainty will be to the disadvantage not of defendant but of plaintiff. It is not without interest and significance that in England VAT may be included in a claim for costs but a specific Practice Direction decrees that it must not be included if the party entitled to costs is able to recover VAT as input tax: see *Halsbury's Laws of England,* 4th edition Reissue, vol 10, para 24.

**[23]** There is then the matter of the fees of plaintiff's counsel. In this regard counsel for defendant invited us to undertake a comparison of the salient features of the present case with those of the appeal which came before the Constitutional Court in *President of the Republic of South Africa and Others v South African Ruby Football Union and Others* 1999 (4) SA 147 (CC). Taxation of the successful party's costs bill in that case was the subject of a review, in respect of which the judgment is reported as

*President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC).

**[24]** In the view I take it is unnecessary, and perhaps undesirable, to effect the solicited comparison to the extent suggested. That is because the matter must, on this issue as well, be remitted for reconsideration. That being so, it would be out of place to express conclusions on features that will need to be evaluated by the Taxing Master in assessing afresh the issues in contention and the complexity and gravity of the case. It is enough to say that he will, no doubt, be assisted by much that is said by Kriegler J in the last-cited judgment of the Constitutional Court, *inter alia* in laying down guidelines pertinent to costs taxations and particularly where they bear upon appeals to this Court. He will also not overlook the basic consideration that the hearing of the appeal in the Constitutional Court took five days and involved issues of profound constitutional magnitude, some of them novel.

**[25]** I consider it reason enough for interference with the Taxing Master's decision on this issue that he erred fundamentally in using the fee charged by defendant's leading senior counsel as the appropriate measure by which to determine the fee to allow plaintiff's senior counsel. Apart from the fact that the former was specially sought out in order to deal with a subject of major concern to auditors, he was not involved in the trial and therefore had

necessarily to spend a considerable amount of time and effort in studying the record and preparing himself to deal with issues of fact and law with which his opponent would, by then, already have been familiar. It follows that the respective situations of the parties' leading counsel were manifestly not comparable and that the fee for plaintiff's senior counsel should be assessed according to the work which he did. In this regard we were urged by counsel for plaintiff (who did not appear in either the trial or the appeal) to substitute our own assessment of a reasonable fee for his client's erstwhile senior counsel. There are two reasons for our not doing so. The first is that it would not avoid remittal. The case must be referred back on the VAT issue in any event. Secondly, determination of a reasonable fee will, in the light of the arguments raised on behalf of the defendant before us, involve having regard to fees charged in major cases in this Court over the last few years. Unquestionably the Taxing Master is in a better position than we are, on the material before us, to undertake the necessary survey and evaluation.

**[26]** Counsel for plaintiff also pressed upon us the submission that the Court should lend its approval to the determination of fees on taxation on a time-related basis, given the prevailing tendency in the profession to charge on that footing. In *JD van Niekerk en Genote Ing v Administrateur,*

*Transvaal* 1994 (1) SA 595 (A) this Court disapproved of that approach to fee assessment for taxation purposes and held that the established practice was to fix a globular first day fee for heads, preparation and appearance. A departure from what was said there - and even a re-appraisal of that practice - would require evidence and argument far beyond that with which we have been presented in this matter.

**[27]** In the result the review succeeds on the two points in issue. It was not in dispute that such outcome should carry costs.

**[28]** The order of this Court is as follows:

1. The Taxing Master's *allocatur* is set aside and the matter is remitted to him for taxation afresh in the light of this judgment and in the light of such information and arguments as the parties may present on that occasion.

2. The respondent (plaintiff in the action and appellant on appeal) is to pay the cost of the review application.

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CT HOWIE

JUDGE OF APPEAL

CONCURRED:

Hefer AP

Vivier ADP

Harms JA

Conradie JA