

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED

11 March 2024

DATE

SIGNATURE

CASE NUMBER:

19397/2022

In the matter between

LERATO SIBONGILE FENYANE

Applicant

and

NELISWA NDENGANE N.O

First Respondent

LI COAL CLEAN COAL GASIFICATION (PTY) LTD

Second Respondent

NALEDI ENERGY HOLDINGS (PTY) LTD

Third Respondent

UNDISMART (PTY) LTD

Fourth Respondent

TRANSNET SOC LIMITED

Fifth Respondent

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Sixth Respondent

THE SOUTH AFRICAN LEGAL PRACTICE

COUNCIL

with

AMEY LEIGH ALEXANDER

First Amicus

Curiae

CORTNE DYASON

Second Amicus Curiae

Coram: VALLY J, ADAMS J and DOSIO J**Heard:** 18 October 2023**Delivered:** 11 March 2024

ORDER

DOSIO J (ADAMS J concurring):

- (a) that the words 'appear' in the High Court, the Supreme Court of Appeal or the Constitutional Court, in terms of s25(3) of the LPA, refer to appearance before Judges of such Courts, not to appearance before taxing masters of such Courts, and that,
- (b) any duly admitted and enrolled attorney may appear on behalf of their client before a taxing master of such Courts.
- (c) Each party is to pay their own costs.

JUDGMENT

DOSIO J (ADAMS J concurring):***Introduction***

[1] This is an application for a judicial review, under s6 of the Promotion of Administrative Justice Act, 2000 ('PAJA'), brought in terms of rule 53. The applicant seeks declaratory relief in

respect to a decision taken by the first respondent ('the taxing master'). The taxing master decided that the applicant, who is a duly admitted attorney, could not appear at a taxation without a right of appearance in the Superior Courts, under s25(3) of the Legal Practice Act, 2014 ('LPA').

[2] The applicant seeks to set aside the decision of the taxing master as unlawful, unconstitutional, and invalid and that this court must order that the applicant be allowed to appear on behalf of her clients before the taxing master.

[3] The applicant accordingly seeks relief to the following effect:

- (a) that the words 'appear' in the High Court, the Supreme Court of Appeal or the Constitutional Court, in terms of s25(3) of the LPA, refer to appearance before judges of such courts, not to appearance before taxing masters of such courts, and that,
- (b) any duly admitted and enrolled attorney may appear on behalf of their client before a taxing master of such courts.

[4] The amici support the position of the applicant that the impugned decision of the taxing master be reviewed and set aside and in addition that s25(5)(a)(ii) and s25(3) of the LPA be properly interpreted to also allow candidate attorneys to appear before taxing masters.

Submissions of the applicant

[5] The applicant contends that the only reasonable interpretation of 'appear', is to appear before a judge and that the first and sixth respondent's ('the respondents') construction, that the legislature intended it to include appearance before a taxing master, is not reasonable, considering the context, purpose and background of the section.

[6] It was further contended that even if 'appear' were reasonably capable of bearing the meaning urged by the respondents, the applicant's interpretation must be preferred, because it better promotes the spirit, purport and objects of the Bill of Rights. This is because the respondent's interpretation limits the right of attorneys to practise their profession freely in terms of s22 of the Constitution, as well as the right of the public to access justice in terms of s34 of the Constitution.

[7] It was accordingly argued that the controversy between the applicant and the respondents pertaining to the word 'appear', should be restrictively interpreted by way of a declaratory order to mean 'appear' before a judge.

[8] It was argued that a decision to disallow someone from appearing at a taxation would be an administrative action that is reviewable.

Submissions of the respondents

[9] The respondents contended that the taxing master's decision to refuse the applicant's appearance before her was justified. It was argued that the taxing master is not a separate entity from the court and as such, the provisions of s25(3) also apply to the taxing master. It was contended that the appearance falls within the scope of a legal practitioner's practice and that the limitation of the applicant's right to appear before a taxing master is Constitutionally valid.

[10] The respondents contend that the taxing master correctly interpreted the provisions of s25(3) of the LPA, as well as the matter of *Bill of Costs and Another v Registrar Cape*,¹ in that the only persons who can appear before a taxing master, in a Superior Court, are persons who are permitted to practise in such Superior Courts. It was submitted that the term 'appear' in the High Court, the Supreme Court of Appeal and the Constitutional Court also includes the taxing masters of those respective courts, as they are an extension of the courts.

[11] With reference to the matter of *Bill of Costs*,² it was contended that when a case is adjudicated upon by a judge, it is not regarded as being finalised, until the taxing master completes the taxation and issues an *allocatur*. It was argued that taxation is regarded as an integral part of the judicial process and the rights and obligations of the parties to a suit are not finally determined, until the costs ordered by the court have been taxed. It was further contended that the matter will still have the same case number when it is handed over to the taxing master and that the role of the taxing master is to finalise the matter which was heard by the judge. The liability of costs is determined by the court and the amount of liability is determined by the taxing master. Accordingly, an attempt to separate the taxing master's duties from those of a judge is incorrect.

[12] It was contended that the taxing master, apart from taxing a bill of costs, also conducts a hearing in opposed taxations and adjudicates on complicated issues of law, thereby exercising a judicial function and not merely as an administrator. It was further contended that the issuing of the *allocatur* has the same status as a court order.

[13] It was argued that due to the fact that the taxing master is an extension of the Superior Court, it cannot be regarded as a board or tribunal.

¹ *Bill of Costs and Another v Registrar Cape* 1979 (3) SA 925 (A).

² *Ibid.*

[14] Reference was made to s33 of the LPA which states that:

‘Authority to render legal services.—(1) Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward— (a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or...’

[15] It was contended that s 33 does not place ‘appearance’ as a separate function of ‘practice’, It was submitted that ‘appearance’ forms part of a legal representative’s practice and that the separation of the words ‘practice’ and ‘appear’ is solely for the LPA to outline the requirements that should be met in order to obtain the right to appear before the Superior Courts and that there is a valid and fair reason why the limitation put in place in respect to s25 of the LPA should be applied to taxation proceedings in court.

[16] It was argued that an attorney without a right of appearance or a candidate attorney, cannot appear in the Superior Courts because their practice is still limited by the LPA. Once they have met the requirements which are set out in s25(3)(4) and (5) of the LPA, then they will be able to run an unrestricted practice which is not limited with regards to appearance.

[17] It was contended that the Constitution allows the respondents to be well within their rights when enforcing the limitations found within the LPA. It was submitted that the limitation is not only justified, it is also fair in that it seeks to protect people from receiving sub-paralegal representation as a result of legal representatives attempting to appear without the relevant experience. It was contended that the applicant will get the opportunity to appear in the Superior Courts in due course and as such, the applicant’s temporary limitation should not outweigh potentially permanent repercussions, which may be faced by clients who will suffer losses in the form of time and money if they receive inadequate representation.

Submissions of the amici

[18] The amici contend that s25(5)(a)(ii) of the LPA ought to be interpreted to allow a candidate attorney to appear before a taxing master. It was submitted that the position held by a taxing master in the High Court is not equivalent to that of a judge and the ambit of s25(5)(a)(ii) is wide enough for taxing masters to fall into. As a result, it was argued that in terms of s25(5)(a)(ii) of the LPA, candidate attorneys can also appear and make representations at taxation proceedings and that the taxing master incorrectly relied on the matter of *Bill of Costs*, thereby making her decision influenced by an error of law. It was contended that the *Bills of Costs* case

in fact supports the applicant's case, in that the Appellate Division, (as it then was), expressly assumed that an admitted attorney has a right of audience before a taxing master.

[19] It was contended that allowing a candidate attorney to appear at taxation proceedings aligns with their role and duties. Moreover, such a finding aligns with the transformation and restructuring imperatives of the legal profession and more importantly, promotes the broadening of access to justice in terms of s34 of the Constitution.

[20] It was contended that a taxing master is not the equivalent of a judge, and at best holds the position of a quasi-judicial official, similar to the chairperson in a tribunal.

Historical context

[21] When the judgment in *Bills of Costs*³ was handed down, the legal position in South Africa was that only duly admitted advocates had the right of appearance in the superior courts, while they and admitted attorneys had the right of appearance in the lower courts. That is no longer the position. An admitted attorney may now appear in the Superior Courts after being granted the right of appearance by the registrar under s25(3) of the LPA. The judgment in *Bills of Costs*⁴ explains in detail why it was considered necessary to restrict such an appearance to qualified lawyers and to exclude non-lawyer parties from that number.

[22] The question this court is asked to determine is whether the decision of *Bill of Costs*⁵ is outdated due to the application of the Constitution.

[23] Before I deal with the Constitution, the question to be considered is whether Uniform rule 53 was the correct procedure to follow and whether PAJA is applicable.

The applicability of Uniform rule 53

[24] In the matter of *Helen Suzman Foundation v Judicial Service Commission*,⁶ the Constitutional Court stated that the purpose of Uniform rule 53 is to 'facilitate and regulate applications for review'.⁷

[25] Rule 53 provides for review proceedings of decisions and proceedings of any tribunal, inferior court, board or officer performing judicial, quasi-judicial or administrative functions.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC).

⁷ Ibid para 13.

[26] In the matter of *Democratic Alliance v The Acting National Director of Public Prosecutions*,⁸ the Supreme Court of Appeal stated that:

‘in its express wording Uniform Rule 53 appears to be confined to dealing with decisions of particular institutions and officials performing certain categorised functions, namely, judicial, quasi-judicial or administrative functions. It is worth noting that Uniform Rule 53 was introduced at a time when judicial review was perhaps the most significant method of controlling the exercise of public power. The then Supreme Court developed a body of principles to control the exercise of public power.’⁹

[27] In the matter of *Turnerland Manufacturing (Pty) Ltd v Taxing Master Western Cape High Court*,¹⁰ the court held that a taxing master performs quasi-judicial functions.

[28] In the matter of *Jockey Club of South Africa v Forbes*,¹¹ the Appellate Division, (as it then was), stated that procedurally any application for review has to be brought under Uniform rule 53.¹² The court went further to say that the purpose of Uniform rule 53 is not to protect the ‘decision-maker’ but to facilitate applications for review and to ensure their speedy and orderly presentation.¹³

[29] I accordingly find that the review application was correctly brought in terms of Uniform rule 53.

The applicability of PAJA

[30] PAJA defines ‘administrative action’ as:

‘any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or

performing a public function in terms of an empowering provision, ...’

⁸ *Democratic Alliance v The Acting National Director of Public Prosecutions* [2012] ZASCA 15.

⁹ *Ibid* para 35.

¹⁰ *Turnerland Manufacturing (Pty) Ltd v Taxing Master Western Cape High Court* [2023] ZAWCHC 164 (13 July 2023).

¹¹ *Jockey Club of South Africa v Forbes* [1993] 1 All SA 494 (A).

¹² *Ibid* page 500.

¹³ *Ibid* page 505.

[31] In *Jonker v Lambons (Pty) Ltd*,¹⁴ the court held that:

'the Promotion of Administrative Justice Act ('PAJA') is a pathway for a judicial review of administrative actions. A Taxing Master performs a quasi-judicial function and not an administrative function. PAJA is therefore not applicable.'¹⁵

[32] In the matter of *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works*¹⁶ ('*Grey Marine*'), the Supreme Court of Appeal stated that:

'What constitutes administrative action – the exercise of the administrative powers of the state – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:

'Administrative action means any decision of an administrative nature made...under an empowering provision [and] taken...by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...'¹⁷

' Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state.] Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.¹⁸ [my emphasis]

[33] In the recent matter of *J.J.V.R v Taxing Master, High Court of South Africa (Western Cape Division)*¹⁹ the court held that in light of the findings in the matter of *Greys Marine*,²⁰ that a

¹⁴ *Jonker v Lambons (Pty) Ltd* [2018] ZAFSHC 186.

¹⁵ *Ibid* para 4.

¹⁶ *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA).

¹⁷ *Ibid* para 21.

¹⁸ *Ibid* para 24.

decision of the taxing master did not constitute administrative action under PAJA. The court said in this regard,

'I consider that the ruling of the Taxing Master in this matter that Ms. Erasmus did not enjoy the right of appearance before her, did not constitute the exercise of the type of public power considered [in *Greys Marine*]. Given the legal position set out above, there was no question of the Taxing Master exercising any form of discretion on an issue which is purely a question of law...'²¹

[34] In the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Other*,²² the Constitutional Court held that:

'...the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.'²³ [my emphasis]

[35] In the matter of *Nedbank Limited v Mollentze; Firstrand Auto Receivables (RF) Ltd v Radebe*,²⁴ the court stated that:

'Starting with the definition of quasi-judicial functions, it means ...a judicial act which is performed by an official who is either not a judge or not acting in his or her capacity as a judge. According to Merian-Webster Dictionary, quasi-judicial means having a partly judicial character by possession of the right to hold hearings and conduct investigations into dispute claims and alleged infractions of rules and regulations and to make in the general manner of courts.'²⁵ [my emphasis]

[36] The function of a taxing master is quasi-judicial and not administrative. For this reason, I find that PAJA has no application.

The applicability of the principal of legality

[37] In the matter of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,²⁶ the Constitutional Court held that the principle of legality is a fundamental principle of constitutional law, in that it requires all public power to be exercised in

¹⁹ *J.J.V.R v Taxing Master, High Court of South Africa (Western Cape Division)* [2023] ZAWCHC 261 (20 October 2023).

²⁰ *Greys Marine* (note 16 above).

²¹ *J.J.V.R* (note 19 above) para 91.

²² *President of the Republic of South Africa and Others v South African Rugby Football Union and Other* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

²³ *Ibid* para 141.

²⁴ *Nedbank Limited v Mollentze; Firstrand Auto Receivables (RF) Ltd v Radebe* [2022] ZAMP MHC 5; 2022 (4) SA 597 (ML).

²⁵ *Ibid* para 53.

²⁶ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17.

accordance with the law.²⁷ In South Africa, the principle of legality is derived from the Rule of Law, which is enshrined in section 1 of the Constitution of the Republic of South Africa, 1996.²⁸

[38] In the matter of *Transet SOC Ltd v CRRC E-LoCo Supply (Pty) Ltd*,²⁹ the court stated that:

‘the appropriate starting point is to acknowledge the constitutional *grundnorm* that the Rule of Law is supreme. Upon that foundation rests the Principle of Legality. That principle finds its most potent expression in the maxim that every exercise of a public power must be authorised by law. Any purported exercise of a public power that fails that test is unlawful.’³⁰

[39] In *Chirwa v Transnet Limited*,³¹ the Constitutional Court stated that:

‘...what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power.’³²

[40] In the matter of *J.J.V.R.*,³³ the court followed the decision of *Fedsure*³⁴ and stated that a taxing master in the discharge of her functions, under the control of the court, is an organ of State, who is bound by the rule of law and the principle of legality.³⁵

[41] I accordingly find that the principle of legality applies to a taxing master.

Evaluation

[42] Section 25 of the LPA provides the following:

(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.

²⁷ Ibid para 56.

²⁸ Ibid para 57.

²⁹ *Transet SOC Ltd v CRRC E-LoCo Supply (Pty) Ltd* [2022] ZAGPJHC 228.

³⁰ Ibid para 14.

³¹ *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC).

³² Ibid para 138.

³³ *J.J.V.R.* (note 19 above).

³⁴ *Fedsure* (note 26 above).

³⁵ *J.J.V.R.* (note 19 above) para 65.

(3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney—

(a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules;

(ii) is in possession of an LLB degree; and

(iii) has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or

(b) has gained appropriate relevant experience, as may be prescribed by the Minister in consultation with the Council, if the attorney complies with paragraph (a) (iii).

[43] Section 25(5)(a)(ii) of the LPA provides that:

'A candidate attorney is, subject to paragraph (b), entitled to appear—

(i) in any court, other than the High Court, the Supreme Court of Appeal or the Constitutional Court; and

(ii) before any board, tribunal or similar institution on behalf of any person, instead of and on behalf of the person under whose supervision he or she is undergoing his or her practical vocational training.' [my emphasis]

[44] It is clear that a candidate attorney is permitted to appear before the Competition Tribunal, the Office of the Tax Ombud, the South African Human Rights Commission, and others. It is common cause that a candidate attorney is also allowed to appear before a tribunal and a Magistrate Court. I however distinguish between a candidate attorney and an attorney who has been admitted. An attorney who is admitted has passed the Attorney's Board exam and has completed their articles. The Legal Practice Council at the stage of admission has taken into consideration all the experience of the attorney to be admitted and has approved such admission. This elevates the capability, suitability and the expertise of the admitted attorney, as compared to a candidate attorney who has not as yet been approved by the Legal

Practice Council. It is on this basis that I find that a candidate attorneys should not be able to appear before a taxing master, until such stage as they are admitted.

[45] As regards the appearance of an admitted attorney before a taxing master, I find that the respondent's argument based on the level of the complexity of matters to be argued before a taxing master as being too complex, is misplaced. Allowing an admitted attorney to appear before a taxing master, even without a certificate of rights of appearance in the Superior Courts, will hone these skills and increase an attorney's confidence and skills.

[46] As stated supra, a taxing master acts in a quasi-judicial role with regard to the taxation of bills of costs and their role cannot be equated to that of a judge.

[47] The taxing master is the registrar of the court and is appointed by the Minister in terms of s11 of the Superior Courts Act 10 of 2013. This section provides that:

'(1) (a) Subject to paragraph (b), the Minister must appoint for the Constitutional Court, the Supreme Court of Appeal and each Division a court manager, one or more assistant court managers, a registrar, assistant registrars and other officers and staff whenever they may be required for the administration of justice or the execution of the powers and authorities of the said court.

(b) Any appointment by the Minister in terms of paragraph (a) must be made—

(i) in consultation with the head of court; and

(ii) in accordance with the laws governing the public service.

(c) ..."

[48] Judicial officers on the other hand are appointed in terms of s174 of the Constitution by the President of the Republic of South Africa.

[49] A taxing master is not a Constitutional Court, a Supreme Court of Appeal, a High Court or a Magistrates' Court. It is a quasi-judicial body. The question that needs to be answered is whether a quasi-judicial body falls within the ambit of s166(e) of the Constitution.

[50] Section 166 of the Constitution, states:

'The courts are—

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

- (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.'

[51] In the matter of *Ledla Structural Development (Pty) Ltd v Special Investigating Unit*,³⁶ the Constitutional Court held that:

'a plain reading of section 166(e) reveals that it applies to a court established or recognised in terms of an Act of Parliament. It also includes a court of similar status to the High Court or the Magistrates' Courts. It does not apply to a tribunal.'³⁷

[52] In the matter of *Turnerland Manufacturing (Pty) Ltd v Taxing Master Western Cape High Court*,³⁸ the court held that a taxing master would not fall in the bracket of section 166(e) because the function of a taxing master is quasi-judicial in nature.

[53] The taxing master is not a judicial officer as contemplated in s166 of the Constitution. It is clear that judges and taxing masters are appointed in terms of two very different empowering provisions and appointed by two very different authorities.

[54] There is something constitutionally special about a judge as opposed to an adjudicator sitting in another body, in that judges make law to an extent. Judges create precedent and apply precedent. For this reason, the function of advocacy that is performed before a judge has to be done by people who can give the court a warranty that they are up to date in respect to the law. This is because the function of advocacy is to give a comprehensive assessment of the law, based on a forensic competence in applying the law to the evidence, thereby resulting in the creation of precedents by the Superior Courts. This is what makes High Court judges different from magistrates and adjudicators in other bodies. High Court judges also make declarations of constitutional invalidity, differentiating the role of a judge as compared to a taxing master. It is accordingly simply untenable to suggest that a taxing master has the same

³⁶ *Ledla Structural Development (Pty) Ltd v Special Investigating Unit* [2023] ZACC 8; 2023 (6) BCLR 709 (CC); 2023 (2) SACR 1 (CC).

³⁷ *Ibid* para 49.

³⁸ *Turnerland Manufacturing (Pty) Ltd v Taxing Master Western Cape High Court* [2023] ZAWCHC 164.

status for the purposes of appearance, as a judge, to justify the limitation as suggested by the respondents.

[55] Despite the matter having the same case number and being between the same parties when it is handed over to the taxing master, the taxing master has no powers to rehash the issues and rehear the matter. As a result, I do not believe that the taxing master is an extension of the court.

[56] A taxing master's function could be viewed as similar to that of a commissioner in the CCMA. In the matter of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.³⁹ the Constitutional Court stated that:

'...The CCMA is not a court of law. A commissioner is empowered in terms of section 138(1) to conduct the arbitration in a manner he or she considers appropriate in order to determine the dispute fairly and quickly, but with the minimum of legal formalities...The CCMA does not follow a system of binding precedents. Commissioners do not have the same security of tenure as judicial officers.⁴⁰ [my emphasis]

[57] In the matter of *Botha v Themistocleous*,⁴¹ the position of the taxing master was equated to that of an arbitrator, or a referee appointed to determine what a just remuneration should be for an attorney's service in a particular case.⁴²

[58] In the matter of *National Automobile and Allied Workers' Union v Brown, Hurly & Miller*,⁴³ the court held that the registrar is not an official that wears two different hats. There is one office, that of the registrar and one of the registrar's duties is to tax bills in the capacity as a taxing master.⁴⁴

[59] In the matter of *Nedbank Limited v Gordon NO and Others*⁴⁵ ('Nedbank'), the court held that the function of the taxing master is to exercise control over the costs that may be legally recovered. It was stated that:

'... it is not the function of the taxing master to interpret statutes...'⁴⁶

³⁹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).

⁴⁰ *Ibid* para 85.

⁴¹ *Botha v Themistocleous* 1966 (1) SA 107 (T).

⁴² *Ibid* 111-B.

⁴³ *National Automobile and Allied Workers' Union v Brown, Hurly & Miller* 1990 (2) SA 9 26 (E) at 931D.

⁴⁴ *Ibid* 931 D.

⁴⁵ *Nedbank Limited v Gordon NO and Others* (GP) (unreported case no 8938/17, 16-8-2019).

⁴⁶ *Ibid* para 21.

[60] In the matter of *Nedbank*,⁴⁷ the court held that:

'...whether the services have been performed, whether the charges are reasonable or according to tariff and whether disbursements properly allowable as between party and party have been made; his [the taxing master's] function is to determine the amount of the liability, assuming that liability exists, and the fact that he requires to be satisfied that liability exists before he will tax does not show that there is any liability. The question of liability is one for the court, not for the taxing master.'⁴⁸ [my emphasis]

[61] It is clear from Uniform rule 70 that a taxing master does not have the same powers as a judge or that a taxing master's role is elevated to that of a judge when the taxation of the bill of costs ensues.

[62] A taxing master derives authority to tax bills from Uniform rule 70 and is accordingly a creature of statute and is imbued with only those powers conferred by law.

[63] The circumscription of the taxing master's powers is clearly shown in rule 70(5A)(d) and (e). These sub rules provide that:

'(d) Where a party or his or her attorney or both misbehave at a taxation, the taxing master may-

(i) expel the party or attorney or both from the taxation and proceed with and complete the taxation in the absence of such party or attorney or both; or

(ii) adjourn the taxation and refer it to a judge in chambers for directions with regard to the finalisation of the taxation; or

(iii) adjourn the taxation and submit a written report to a judge in chambers on the misbehaviour of the party or attorney or both with the view to obtaining directions from the judge as to whether contempt of court proceedings would be appropriate.

(e) Contempt of court proceedings as contemplated in paragraph (d) (iii) shall be held by a judge in chambers at his or her direction.'

[64] The above merely illustrates that the taxing master only has the power to expel a party or attorney or both from a taxation and adjourn the proceedings in order to refer it to a judge for directions with regard to the finalization of the proceedings or as to whether contempt of court proceedings would be appropriate. A taxing master's powers are not elevated in this instance to hear the contempt of court proceeding, a judge would hear that.

⁴⁷ Ibid.

⁴⁸ Ibid paragraph 23 reference made to the case of *Martins v Rand Share and Broking Finance Corporation (Pty) Ltd* 1939 WLD 159 at 165.

[65] In the matter of *Lubbe v Borman*,⁴⁹ the court exemplified the unfettered powers of a taxing master in that a taxing master does not have jurisdiction to adjudicate defences of payment and prescription. It is also not the taxing master's function to assess the nature and extent of a plaintiff's claim and the defendant's counterclaim.

[66] It is accordingly clear from Uniform rule 70 that a taxing master does not have the same powers as a judge. Although their functions are similar to court proceedings, their powers are considerably constrained as opposed to a judge's powers.

[67] It is important to note that Uniform rule 70(5A)(d) makes provision for a taxing 'party' or an 'attorney' at taxation proceedings. Rule 70(5A)(d) does not specify that such attorney must be one with rights of appearance. Rule 70(5A)(d) states the following:

'(d) Where a party or his or her attorney or both misbehave at a taxation, the taxing master may —

- (i) expel the party or attorney or both from the taxation and proceed with and complete the taxation in the absence of such party or attorney or both; or' [my emphasis]

[68] In the matter of *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality*,⁵⁰ the Constitutional Court stated that:

'a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute'.⁵¹

[69] A purposive reading of Uniform rule 70(5A)(d) supports the argument that admitted attorneys, without a right of appearance can appear before a taxing master. I accordingly find that a legal practitioner who has been admitted to practise as a legal practitioner by a South African High Court and who does not have a right of appearance, can practise and appear before any board, tribunal or similar institutions including before a taxing master, who is an executive official performing a quasi-judicial function.

The meaning of 'practise' and 'appear'

[70] In *NW Civil Contractors CC v Anton Ramaano Inc*,⁵² the court held that:

⁴⁹ *Lubbe v Borman* 1938 CPD 211

⁵⁰ *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality*, [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC).

⁵¹ *Ibid* para 13.

⁵² *NW Civil Contractors CC v Anton Ramaano Inc* [2018] ZALMPHC 1.

'The word practise in the context of the legal practitioner means to carry out or perform (or purports to act) or execute the mandate as instructed by his/her client.'⁵³

[71] In *Rafoneke v Minister of Justice and Correctional Services*,⁵⁴ the court stated that:

'The verb 'practise' is not defined in the LPA. It is defined as 'carry out or perform habitually or constantly... work at, exercise, or pursue a profession, occupation, etc., as law or medicine ...'I must make plain that to practise may also mean performing a single isolated act of practising as an attorney or legal practitioner. In *Lake v Law Society, Zimbabwe* [1987 (2) 459 (ZHC)] the equivalence of the expressions 'to practise' and 'to carry on a business' was accepted after a thorough investigation of the meaning of the phrase 'to practise'. I am convinced of their equivalence in the context of section 24(2) of the LPA.⁵⁵ [my emphasis]

[72] Section 24 of the LPA which refers to admission and enrolment states that:

'(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—

- (a) is duly qualified as set out in section 26;
- (b) is a—
 - (i) South African citizen; or
 - (ii) permanent resident in the Republic;
- (c) is a fit and proper person to be so admitted; and
- (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.'

[73] Section 24 of the LPA encapsulates fully what is required for admission.

⁵³ Ibid page 13.

⁵⁴ *Rafoneke v Minister of Justice and Correctional Services* [2021] ZAFSHC 229; [2022] 1 All SA 243 (FB); 2022 (1) SA 610 (FB).

⁵⁵ Ibid para 70.

[74] In the matter of *Cool Ideas 1186 CC v Hubbard*⁵⁶ (*'Cool Ideas'*), the Constitutional Court stated that:

'a fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'⁵⁷ [my emphasis]

[75] A purposive interpretation is a technique of paying attention to what the lawmakers intended to achieve by enacting the provision in question.⁵⁸

[76] The purposive interpretation of s25(3) of the LPA should be understood from the prism of both the preamble and s3 of the LPA.

[77] The preamble to the LPA declares that:

'WHEREAS section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;

AND BEARING IN MIND THAT—

- the legal profession is regulated by different laws which apply in different parts of the Republic and, as a result thereof, is fragmented and divided;
- access to legal services is not a reality for most South Africans;
- the legal profession is not broadly representative of the demographics of South Africa;
- opportunities for entry into the legal profession are restricted in terms of the current legislative framework;

AND IN ORDER TO—

⁵⁶ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) 2014 (8) BCLR 869 (CC).

⁵⁷ *Ibid* para 28,

⁵⁸ see *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2019 (11) BCLR 1403 (CC); 2020 (1) SA 428 (CC) para 58,

- provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body;
- ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- ensure that legal services are accessible;
- regulate the legal profession, in the public interest, by means of a single statute;
- remove any unnecessary or artificial barriers for entry into the legal profession;
- strengthen the independence of the legal profession; and
- ensure the accountability of the legal profession to the public.'

[78] In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁵⁹ the Supreme Court of Appeal stated that:

'interpretation is the process of attributing meaning to the words used in a document,...Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'⁶⁰

[79] The ordinary meaning of the word 'appear', 'appeared; appearing; appears' according to the Merriam Webster Dictionary is defined as:

'to come formally before an authoritative body.'

[80] The LPA does not define 'appear', neither did its predecessors, namely, the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964. I find that the term 'appear' in the context of s25 of the LPA has no convoluted inner obscure meaning.

⁵⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

⁶⁰ Ibid para 18.

[81] A purposive interpretation should simply mean that an admitted attorney can appear before a taxing master to represent a client.

[82] The term 'legal practitioner' means an advocate or attorney admitted and enrolled as such in terms of ss24 and 30 of the LPA respectively. No mention is made of a certificate of right of appearance. [Section 1 of the LPA.]

The purpose of the Constitution is to allow an admitted attorney to appear before a taxing master without a right of appearance

[83] When assessing the Bill of Rights in the Constitution, the provisions of ss7(3) and 36(1) relay that the Bill of Rights may be limited only in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors.

[84] Section 39(2) of the Constitution states that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[85] In relation to s39(2) of the Constitution, the Constitutional Court in the matter of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO*⁶¹ ('*Investigating Directorate*') stated that:

'this means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'⁶² [my emphasis]

[86] The Constitutional Court in the matter of *Investigating Directorate*⁶³ stated further that:

⁶¹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC).

⁶² *Ibid* para 21.

⁶³ *Ibid*.

'...The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'⁶⁴ [my emphasis]

[87] Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.⁶⁵

[88] In the matter of *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*,⁶⁶ the Constitutional Court held that when a statute is capable of two reasonable interpretations, both of which are consistent with the Constitution, a court must prefer the meaning that better promotes the spirit, purport and objects of the Bill of Rights.⁶⁷

[89] Section 33 of the LPA states that:

'(1) subject to any other law, no person other than a practicing legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward—

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear.' [my emphasis]

[90] In the matter of *Rabalao v Trustees for the time being of the Legal Practitioner's Fidelity Fund: South Africa*,⁶⁸ ('*Rabalao*') the court held that:

'the LPA, its Rules, and the Code of Conduct promulgated in terms of the Act, provides the legislative framework for the transformation of the legal profession. Through its transformational character, the LPA is 'umbilically' bound to the Constitution. The transformational aim of the LPA, specifically as far as it is aimed at promoting access to justice to facilitate a 'more effective and open system of justice which is within reach of the ordinary person.'⁶⁹ [my emphasis]

[91] The court went further to say that:

⁶⁴ Ibid para 22.

⁶⁵ See *Investigating Directorate: Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) para 23].

⁶⁶ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

⁶⁷ Ibid paras 45 to 46.

⁶⁸ *Rabalao v Trustees for the time being of the Legal Practitioner's Fidelity Fund: South Africa* [2023] ZAGPPHC 909.

⁶⁹ Ibid para 20.

'within the all-encompassing constitutional interpretation matrix, the preamble to the LPA sets the tone for its interpretation.'⁷⁰

[92] Following the general principle laid down in *Cool Ideas*,⁷¹ it is my view that an admitted attorney appearing before a taxing master gives effect to the spirit, purport and objects of the Bill of Rights and the right to access of justice enshrined in s34 of the Constitution. Further, such an interpretation gives effect to the purpose of the LPA set out in s3. Section 3 provides as follows:

'3. The purpose of this Act is to—

(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;

(b) broaden access to justice by putting in place—

(i) a mechanism to determine fees chargeable by legal practitioners for legal services

rendered that are within the reach of the citizenry;

(ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and

(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;

(c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;

(d) protect and promote the public interest;

(e)...

[93] Both the preamble and s3 of the LPA suggest that the LPA was enacted to transform the legal profession. Transformation within the legal profession must be seen as a commitment to the Constitution. This suggests that the legislature intended that there be change from how things were in the past, in so far as the regulation of the legal profession is concerned. Allowing admitted attorneys to appear before a taxing master is part of that transformation given that that they were denied that right in the pre-constitutional dispensation.

⁷⁰ Ibid para 21.

⁷¹ *Cool Ideas* (note 56 above).

[94] Employing an admitted attorney, without rights of appearance, to appear before a taxing master, as opposed to an attorney with rights of appearance, or an advocate, means a lower rate charged to clients. This is in line with the goal to broaden access to justice and to transform and restructure the legal profession. In most instances clients would have spent large sums of money to obtain legal services in the first place and requiring them to instruct an attorney who has been practising for more than three years, or an advocate, would increase a client's legal costs exponentially. In addition, requiring an attorney that has a prescribed certificate to appear on behalf of clients significantly reduces the pool of legal representatives.

[95] Restricting a newly admitted attorney from appearing at taxation proceedings runs counter to the LPA that is geared towards enhancing skills.

[96] The term "admitted" according to the LPA appears to mean a legal practitioner admitted by the High Court to practise as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the requirements of s24(2) of the LPA.

[97] The term 'legal practitioner' means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively. [Section 1 of the LPA.]

[98] The matter of *Bills of Costs*⁷² was handed down in 1979 which is over four decades ago. During that time, there was no LPA, nor a transformative Constitution. As things currently stand, the LPA as alluded to both in its preamble and in section 3, is transformative. It further gives effect to a fundamental right as contained in s22 of the Constitution. The common-law position relied on in the matter of *Bills of Costs* should therefore be interpreted in light of the Constitutional normative framework.

[99] In the matter of *Thebus v S*,⁷³ the Constitutional Court held that:

'it seems to me that the need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.'⁷⁴ [my emphasis]

⁷² *Bill of Costs* (note 1 above).

⁷³ *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

⁷⁴ *Ibid* para 28.

[100] In the matter of *K v Minister of Safety and Security*,⁷⁵ the Constitutional Court held that:

‘it is necessary to consider the difficult question of what constitutes “development” of the common law for the purposes of section 39(2). In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.’⁷⁶ [my emphasis]

[101] In the matter of *King N.O. v De Jager*,⁷⁷ the Constitutional Court held that:

‘this Court has accepted that “the normative influence of the Constitution must be felt throughout the common law”. It has been said that “the mission of section 39(2) is to carry out the audit and re-invention of the common law”. Section 1 of the Constitution provides for our cherished founding values. Notably, the constitutional normative value system has been sketched as follows: “The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society which breaks clearly and decisively from the past and where institutions which operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system”⁷⁸ [my emphasis]

[102] Therefore, the common law relied on in the matter of *Bills of Costs*⁷⁹ should be interpreted in light of the Constitution and the LPA which gives effect to the Constitution.

⁷⁵ *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) ; [2005] 8 BLLR 749 (CC); (2005) 26 ILJ 1205 (CC).

⁷⁶ *Ibid* para 16.

⁷⁷ *King N.O. v De Jager* [2021] ZACC 4; 2021 (5) BCLR 449 (CC); 2021 (4) SA 1 (CC).

⁷⁸ *Ibid* paras 45 to 46.

⁷⁹ *Bill of Costs* (note 1 above).

[103] Section 22 of the Constitution states that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[104] The Constitutional Court in the matter of *Affordable Medicines Trust and Others v Minister of Health*⁸⁰ (*Affordable Medicines*) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) held that:

'in broad terms ...section [22] has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society.'⁸¹ [my emphasis]

The court went on further to state that s22 embraces both the right to choose a profession and the right to practise the chosen profession.⁸²

[105] The court in *Affordable Medicines*⁸³ stated that:

'the two sentences in section 22 must therefore be read together as defining the content of the right guaranteed by the provision. There are two components to this right: it is the right to choose a profession and the right to practise the chosen profession. This is implicit, if not explicit from the text of section 22. It refers to the right to choose a trade, occupation or profession in the first sentence and the regulation of the practice of a trade, occupation or profession in the second sentence. It contemplates that the chosen profession would be practised and protects both the right to choose a profession and the right to practise the chosen profession.'⁸⁴ [my emphasis]

[106] It follows that, any law which prohibits a trade altogether or bars any citizen from practising it, limits this right. Such a limitation is unconstitutional and invalid unless it can be justified in terms of s36 of the Constitution.⁸⁵

[107] The legal profession has been transformed as a result of the LPA. The transformation and restructuring goal which the LPA seeks to achieve would be encroached, particularly when considering s22 of the Constitution without justification. A taxing master is not a court as contemplated in s166 of the Constitution, therefore, there is no substantive reason why an admitted attorney should be deprived of the right to practice before a taxing master. That would

⁸⁰ *Affordable Medicines Trust and Others v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

⁸¹ *Ibid* para 58.

⁸² *Ibid* para 66.

⁸³ *Ibid*.

⁸⁴ *Ibid* para 63.

⁸⁵ see *Becker v Financial Services Conduct Authority* [2022] ZAGPPHC 22 at para 30.

be defeating the Constitutional purpose and by extension the LPA itself, which gives effect to the Constitution.

Order

[108] In the premises, the following order is made:

- (a) that the words 'appear' in the High Court, the Supreme Court of Appeal or the Constitutional Court, in terms of s25(3) of the LPA, refer to appearance before Judges of such Courts, not to appearance before taxing masters of such Courts, and that,
- (b) any duly admitted and enrolled attorney may appear on behalf of their client before a taxing master of such Courts.
- (c) Each party is to pay their own costs.



**D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG**

I agree/concur

**L ADAMS
JUDGE OF THE HIGH COURT
JOHANNESBURG**

VALLY J (dissenting):

[109] I have read the judgment of the majority. Unfortunately, I cannot agree with it. My reasoning for coming to a different conclusion are outlined below.

[110] The applicant is a practising attorney who does not have rights of appearance in the High Court. She is employed by the attorneys for the second and third respondents. Those respondents were mulcted with costs in a matter where they were applicants and the fourth and fifth respondents were the respondents. A bill of costs was drawn up by the

second and third respondents' attorneys and referred for taxation to the first respondent in her capacity as the Taxing Master (Taxing Master). The taxation was set down before the first respondent. The applicant was assigned to attend to the taxation by her principal. Upon presenting herself for the taxation before the first respondent, she informed the first respondent that she did not enjoy rights of appearance in the High Court. Upon this revelation, the first respondent denied her rights of appearance. Aggrieved by this decision she brought the present application where she seeks the following relief, including costs, from the first respondent and any other respondent that opposed her call for relief:

'1. The decision by the first respondent, to disallow the applicant from appearing on behalf of her clients at the taxation of a bill of costs in this Court on 14 April 2022 is reviewed, declared unlawful, unconstitutional, and invalid, and is set aside.

2. The first respondent is directed to allow the applicant to appear on behalf of any of her clients at the taxation of any bill of costs before the respondent.

3. It is declared that:

3.1 the words "appear in the High Court, the Supreme Court of Appeal of the Constitutional Court", in section 25(3) of the Legal Practice Act 28 of 2014, refer to appearance before judges of such Courts, not to appearance before taxing masters of such Courts;

3.2 any duly admitted and enrolled attorney may appear on behalf of their client before a taxing master of such Courts.'

[111] The application is brought in terms of s 6 of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

[112] The eighth respondent, the Law Society of South Africa, was cited for its interest in the matter. It filed an affidavit supporting the relief sought by the applicant. The affidavit, however, is titled 'explanatory affidavit'. Two individuals applied for and were granted permission to join the matter as *amici curiae*. They supported the case of the applicant, and went further by asking for the relief sought by the applicant to be widened. However, as this falls outside the remit of an *amicus curiae*, they abandoned their request at the hearing of the matter.

[113] The sixth respondent, the Minister of Justice and Correctional Services (Minister), was cited for his interest in the matter. He and the first respondent opposed the relief sought.

The case of the applicant

[114] The applicant contends, firstly, that the Taxing Master erred in law in that she misapplied s 25 of the Legal Practice Act, 2014 (LPA). Such error of law is anticipated in s 6(2)(d) of PAJA and is therefore reviewable in terms of PAJA. Secondly, the Taxing Master is not authorised by the LPA to refuse to grant her audience, and therefore her decision is reviewable in terms of s 6(2)(f)(i) of PAJA. Thirdly, the Taxing Master's decision is violative of her constitutional rights as set out in ss 22 (the right to practice her profession freely) and 34 (the right of access to courts) of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution), making it reviewable in terms of s 6(2)(i) of PAJA.

The respondents' opposition

[115] The Taxing Master is not an administrative official. Her decision can best be characterised as quasi-judicial. Her powers and functions are set out in rule 70 of the uniform rules of court. Sub-rule 70(2) empowers her to call for documents which in her opinion are necessary for her to make a determination on 'any matter arising in the taxation.'⁸⁶ Sub-rule 70(5A) empowers the Taxing Master to grant a party wasted costs, and to even order that wasted costs be paid *de bonis propriis* by the attorney. The same sub-section empowers her to expel a party or an attorney from the taxation should that party misbehave during the taxation, and even have that party referred to a judge to consider holding the party to be in contempt of court.⁸⁷ These powers and functions

⁸⁶ Sub-rule 70(2) reads:

'At the taxation of any bill of costs the taxing master may call for such books, documents, papers or accounts as in his opinion are necessary to enable him to properly determine any matter arising from such taxation.'

⁸⁷ Sub-rule 70(5A) reads:

- '(a) The taxing master may grant a party wasted costs occasioned by the failure of the taxing party or his or her attorney or both to appear at a taxation or by withdrawal by the taxing party of his or her bill of costs.
- (b) The taxing master may order in appropriate circumstances that the wasted costs be paid *de bonis propriis* by the attorney.
- (c) In making an order in terms of paragraphs (a) or (b), the taxing master shall have regard to all the appropriate facts and circumstances.
- (d) Where a party or his or her attorney or both misbehave at a taxation, the taxing master may –
 - (i) expel the party or attorney or both from the taxation and proceed with and complete the taxation in the absence of such party or attorney or both; or
 - (ii) adjourn the taxation and submit a written report to a judge in chambers for directions with regard to the finalisation of the taxation; or
 - (iii) adjourn the taxation and submit a written report to a judge in chambers on the misbehaviour of the party or attorney or both with a view to obtaining directions from the judge as to whether contempt of court proceedings would be appropriate.
- (e) Contempt of court proceedings as contemplated in paragraph (d)(iii) shall be held by a judge in chamber at his or her discretion.'

indicate that taxation is part of the judicial process. It is a continuation of the litigation process. It is simply that part of the process which quantifies the amount a condemned party has to pay. The court had already made an order imposing costs against a party, but had assigned the issue of determining the quantum to the Taxing Master, who is required to tax the bill of costs incurred by the successful party. Until the taxation is finalised the litigation process remains incomplete. Section 25 of the LPA does not entitle the applicant with a right of audience, nor does it endow a Taxing Master with a discretion to grant audience to an attorney who does not possess the necessary certificate issued by the Registrar. On the contrary, it specifically denies the applicant a right of audience in a taxation proceeding. The Taxing Master, therefore, denies misinterpreting or misapplying s 25 of the LPA.

Section 25 of the LPA

[116] Section 25⁸⁸ allows any person who has been admitted and enrolled to ‘practise’ as a legal practitioner to practise throughout the Republic. Any legal practitioner, whether

⁸⁸ Section 25 of the LPA reads:

- (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.
- (2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.
- (3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney—
 - (a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules
 - (ii) is in possession of an LLb degree; and
 - ...
- (4) (a) An attorney wishing to apply for a certificate contemplated in subsection (3) must serve a copy of the application on the Council, containing the information as determined in the rules.
 (b) A registrar of the Division of the High Court who issues a certificate referred to in subsection (3) must immediately submit a certified copy thereof to the Council.
- (5) (a) A candidate attorney is, subject to paragraph (b), entitled to appear—
 - (i) in any court, other than the High Court, the Supreme Court of Appeal or the Constitutional Court; and
 - (ii) before any board, tribunal or similar institution on behalf of any person, instead of and on behalf of the person under whose supervision he or she is undergoing his or her practical vocational training.

advocate or attorney, may appear in any court, board or tribunal, except that any attorney who wishes to appear in a High Court, the Supreme Court of Appeal (SCA) or Constitutional Court (CC) must apply to the Registrar of the Division in which the attorney was admitted and enrolled for a prescribed certificate authorising the legal practitioner to appear in the said three courts. The Registrar can issue the certificate if the attorney has been practising for a period of at least three years, or less if the Council's rules allow, and the legal practitioner holds an LLB degree. Very important for our purposes is subsection (3) for it denies a practising attorney who has not secured a certificate from the Registrar (such as the applicant) a right of appearance in the High Court, the SCA and the CC.

PAJA

[117] PAJA has been enacted in compliance with s 33(3) of the Constitution. It gives effect to the constitutional right of everyone to lawful, reasonable and procedurally fair administrative action and to be provided with reasons for the administrative action. The decision that the applicant seeks to review and set aside is not an administrative one. That much has been authoritatively declared by the common law. Bill of Costs⁸⁹ held that in terms of the common law, taxation was not a distinct process in the hands of an administrative official, but rather was an 'integral part' of the judicial proceedings:

'It follows from what has been said above that traditionally taxation has been, and still is regarded as an integral part of the judicial process and that the rights and obligations of the parties to a suit are not finally determined until the costs ordered by the Court have been taxed.'⁹⁰

[118] It follows further that the Taxing Master is not acting 'in an administrative capacity'.⁹¹ This conclusion is bolstered by another aspect of the Taxing Masters' powers. Sub-rules 70(5A)(d) and (e) allow the Taxing Master to expel a party or an attorney if they misbehave during the proceedings, and to submit a report to a judge seeking directions as to the finalisation of the taxation, and 'as to whether contempt of court proceedings would be appropriate'. Neither I, nor any of the counsel, was able to find an equivalent provision in any legislation – primary or delegated – dealing with an administrative body where

(b) A candidate attorney may only appear in a regional division established under section 2 of the Magistrates' Courts Act, 1944 (Act No.32 of 1944), as contemplated in paragraph (a) if he or she has previously practised as an advocate for at least one year or has undergone at least one year of practical vocational training.'

⁸⁹ *Bill of Costs (Pty) Ltd and Another v The Registrar, Cape, NO and Another* 1979 (3) SA 925 (A).

⁹⁰ Id at 946A-B.

⁹¹ Id at 944F. See further: *Nedperm Bank Ltd v Desbie (Pty) Ltd* 1995 (2) SA 711 (W) at 712G.

misbehaving before the said body could result in the miscreant being found to be in contempt of the court and not in contempt of the administrative body.

[119] PAJA, accordingly, has no role to play in the matter.

[120] We are bound by the finding in *Bill of Costs*. It was held there that only persons given right of audience before a Taxing Master in this court, which the then was called the Supreme Court, are those who are allowed to practise in this court. The applicant, not having been issued with a certificate by the Registrar to practise in this court, is not such a person. In other words, the applicant has not met the requirements set out in s 25(3) of the LPA granting her the right to practise in this court. She is not entitled to an audience before the Taxing Master. The Taxing Master correctly refused her right of audience. Viewed from another angle: the applicant did not enjoy a right of audience before the presiding judge that issued the order condemning the second and third respondents to pay the costs, notwithstanding the fact that she is employed as a practising attorney by the firm of attorneys representing the two respondents. This was so because she is not allowed to practise in this court. In one sentence then: a person seeking to appear before a Taxing Master in this court must be qualified to appear before the court itself.

[121] For these reasons, the application has to fail.

Costs

[122] The applicant sought to exercise her constitutional rights. Her case affects all attorneys holding the same status as herself. The matter is one of public importance. The judgment clarifies the position of attorneys who do not enjoy rights of appearance in the High Court, but who were instructed by their client to attend to taxation that follows upon the issuance of an order by the same court. The clarification is to the benefit of all practising attorneys who do not have a right of audience in the High Court as well as the litigating public. The matter, therefore, has all the hallmarks of one that is in the public interest. Accordingly, there should be no order as to costs.

Order

[123] Had this judgment commanded the majority, the following order would have been made:

(a) The application is dismissed.

(b) There is no order as to costs.

B VALLY
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 March 2024.

Appearances:

For the Applicant:	Adv. B Winks
Instructed by:	Ndyema Ndema Attorneys Inc.
For the First to Sixth Respondent:	Adv. T Machaba with Adv. P Muthige
Instructed by:	Johannesburg State Attorney
For the Amicus Curiae:	Adv. R Willis SC with Adv. K Plaatjies
Instructed by:	Stephen G May Attorneys

