

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 40207/2013

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

In the matter between: -

MARK ANTHONY RAISUN

Applicant

and

PETERSEN HERTOOG & ASSOCIATES

Respondent

In re: -

MARK ANTHONY RAISUN

Plaintiff

and

ATTORNEYS FIDELITY FUND

Defendant

And in re: -

MARK ANTHONY RAISUN

Claimant

and

ALEXANDER PETER STANILAND

First Respondent

LLEWELLYN MICHAEL TAYLOR

Second Respondent

J U D G M E N T

Georgiades AJ: -

- [1] This is an application for rescission of a taxation of two bills of cost by the Taxing Master of this Court. The bills were taxed in the applicant's absence. The disputants are an attorney and his client. A brief history is necessary.
- [2] On 1 June 2012 the applicant instructed the respondent, an attorneys firm, to assist him with a claim against the Attorneys Fidelity Fund. The applicant's funds had been misappropriated from an attorney's trust account.
- [3] The respondent was to settle affidavits in pursuance of the applicant's claim against the Fidelity Fund. The respondent charged a fee for this service. The

applicant contested these charges.

- [4] On the same date the applicant also instructed the respondent to assist him with a dispute against his co-members in a close corporation. The dispute was to proceed to arbitration. A pre-arbitration conference was arranged where the respondent represented the applicant. The arbitration did not proceed. No ruling was made by the arbitrator as to costs. As expected, the respondent invoiced the applicant for its services. Again, the applicant took issue with the fees charged by the respondent.
- [5] It appears that in both instances there was no written fee agreement between the parties. What followed was a series of correspondence between the applicant's present attorneys and the respondent pertaining to the fees charged in both invoices. It is not necessary for me to detail the content of this correspondence. This on-going dispute culminated in the applicant requesting that the costs be taxed. The respondent agreed and undertook to set the matters down for taxation.
- [6] The respondent served a notice of intention to tax a bill of costs on the applicant's attorney's Docex address in Johannesburg on 31 July 2013. There was no agreement that service could be effected on Docex.
- [7] Later, in August 2013, the applicant's attorney received an e-mail from

Cyril Muller Attorneys with the attached notice of taxation.

[8] On 5 September 2013 a Mr Graham Fourie of the respondent enquired from the applicant's attorney whether they had received the notice of taxation. The applicant's attorney, Mr Roets, on 5 September 2013 returned Mr Fourie's call and spoke with one of his staff named Irena. He states that he requested Irena to request Mr Fourie to return his call. He also informed her that it was his instruction to oppose the taxation. He did not file a notice of intention to oppose at this stage.

[9] It appears that the notice of taxation did not contain a date on which the taxation would be held. The applicant's attorney was not informed of the date of taxation.

[10] Nevertheless the taxation was set down by the respondent on 18 September 2013 where the Taxing Master proceeded to tax the bills of costs submitted by the respondent in the absence of the applicant.

[11] Subsequently, the applicant's attorney made an offer of settlement and also faxed the applicant's objections to the taxations to the respondent. It was too late as the taxation had already taken place.

[12] Thereafter, on 1 October 2013 the applicant's attorney received notification that

the bills of costs had already been taxed. This led to the present application.

[13] There are two issues that fall to be determined in this matter: -

[13.1] Firstly, whether there was proper service of the notice of taxation; and

[13.2] Secondly, whether the Taxing Master had the jurisdiction to tax the bills of costs.

[14] The relevant Uniform Rules of Court relating to taxation are the following: -

[14.1] Rule 70(1)(a) provides: -

*“The Taxing Master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such **in connection with litigious work** and such bill shall be taxed subject to the provisions of sub-rule (5), in accordance with the provisions of the appended tariff: **Provided that the Taxing Master shall not tax costs in instances where some other officer is empowered to do so.**”* (my emphasis)

[14.2] There are three issues that arise out of this definition: -

[14.2.1] Firstly, whether the Taxing Master can tax a bill of costs between an attorney and his/her client;

[14.2.2] Secondly, whether the work carried out by the respondent can be said to be in connection with litigious work; and

[14.2.3] Thirdly, whether in this instance there was some other officer who is empowered to tax the respondent's costs which effectively would mean that the Taxing Master would not have the requisite jurisdiction;

[14.3] Rule 70(3B) provides that: -

“Prior to enrolling a matter for taxation, the party who has been awarded an order for costs shall, by notice as near as may be in accordance with Form 26 of the First Schedule –

(a) afford the party liable to pay costs at the time therein stated, and for a period of ten (10) days thereafter, by prior arrangement, during normal business hours and on any one or more such days, the opportunity to inspect such documents pertaining to any item on the bill of costs; and

(b) require the party to whom notice is given, to deliver to the party giving the notice within twenty (20) days, a written notice of opposition, specifying the items on the bill of costs objected to, and a brief summary of the reasons for such objection.”

[14.4] Uniform Rule 70(4) also provides the following: -

“The Taxing Master shall not proceed to the taxation of any bill of costs unless he or she is satisfied that the party liable to pay the same has –

- (a) received due notice in terms of rule (3B); and*
 - (b) received due notice as to the time and place of such taxation and notice that he/she is entitled to be present thereat: Provided that such notice shall not be necessary –*
 - (i) if the party liable to pay the costs has consented in writing to taxation in his/her absence;*
 - (ii) if the party liable to pay costs failed to give notice of intention to oppose in terms of sub-rule (3B); or*
 - (iii) for the taxation of writ and post-writ bills,*
- provided further that, if any party fails to appear after having given notice of opposition in terms of sub-rule (3B)(b), the taxation may proceed in their absence.”*

[15] Mr Marx, on behalf of the applicant, submitted that: -

[15.1] The Taxing Master did not have jurisdiction to tax the bills of costs as

there was no pending litigation between the parties. There was no cost order made against the applicant. He argued that Rule 70(3B) required notice of taxation be given by the party awarded costs. This implied that the Taxing Master could only tax a bill pursuant to a court awarding costs to a party and not as between an attorney and his/her client;

[15.2] The work performed by the respondent was not of a litigious nature;

[15.3] The bill of costs should have been taxed by another officer, namely the Law Society of the Northern Provinces, who is a body empowered to do so due to the non-litigious nature of the work performed. This would take place in terms of rule 80 of the Attorneys Act, 53 of 1975;

[15.4] The second bill of costs in relation to the arbitration matter could be taxed in terms of the Rules of the Arbitration Foundation of South Africa;

[15.5] There was no proper service of the notice of taxation on the applicant's attorney in terms of Uniform Rule 4(1)(a).

[16] I shall analyse each of these submissions in turn.

[17] The question of the Taxing Master's jurisdiction to tax a bill of costs between an

attorney and his client is within the jurisdiction of the Taxing Master. In **Malcolm Lyons and Munro v Abro and Another**¹ this Court dealt with a review of taxation of former attorneys and their erstwhile clients in a bill of costs drawn as between attorney and their own client. The Taxing Master, it was held, was empowered to satisfy himself that the fees claimed related to work specifically authorised by the client and that the fees charged were reasonable.²

[18] Rule 70(1)(a) clearly states that the Taxing Master is empowered to tax a bill as between an attorney and his/her client.

[19] However, there are two jurisdictional requirements that need to be present in order for the Taxing Master to have jurisdiction: -

[19.1] Firstly, the bill of costs must be for services rendered by an attorney in connection with litigious work;

[19.2] Secondly, there is a proviso that the Taxing Master shall not tax costs in instances where some other officer is empowered to do so.

[20] The question as to what constitutes litigious work was analysed by

¹ 1991(3) SA 464 (W).

² *Supra* at 469E.

Van Dijkhorst J in **In re Isaacs v Bloch**.³

[21] The judgment dealt with the meaning of litigious within the context of the Rules of Taxation. The pertinent passage of His Lordship's judgment bears repetition: -

"It is clear that the word 'litigious' has to bear the same meaning in the Supreme Court Rules as in the TLS Rules as the latter is intended to catch the fish that slipped the net of the former.

It seems to me that between what undoubtedly will be viewed as a litigious work and what will with equal certainty be regarded as non-litigious work lies a grey area which may contract or expand according to the definition applied. There springs to mind the work of an attorney in matters pertaining to the Water Court, the Income Tax Court, the Court of the Commissioner of Patents, the Industrial Court, Arbitration, the Valuation Court, the Rent Control Board, the Liquor Licencing Board and numerous licensing and zoning tribunals. In all these cases there may be heavily contested issues, resolved by evidence, tested by cross-examination, and decided according to law after proper adjudication. Which are litigious matters and which are not?

The word 'litigious' has a wide meaning. The Oxford English Dictionary defines it as: '(1) Of persons, their actions, dispositions and utterances (a) fond of disputes, contentious (now rare) (b) fond of litigation; eager to go to law (c) engaged in

³ 1990(4) SA 597 (T).

litigation or contention; litigant (obs). (2) Open to dispute or question; disputable, questionable; productive of litigation or contention (obs) (b) disputable at law; that is or is liable to become the subject of a law suit, especially of a benefice. (3) Of or pertaining to law suits or litigation.'

The word 'litigate' is defined in that work as: '(1) To be a party to, or carry on, a suited law; to go to law. (2) To make the subject of a law suit; to contest at law; to plead for or against. (b) generally to dispute, contest (a point etc).'

'Litigation' is therein defined as: '(1) The action or process of carrying on a suit in law or equity; legal proceedings; in litigation: in process of investigation before a court of law (b) the practice of going to law. (2) Disputation (now rare).'

The concept 'hofwerk' used in the Afrikaans version of the Rules is in my view narrower than 'litigious work'. The term 'hofwerk' is unknown to the leading Afrikaans dictionary, Die Afrikaanse Woordeboek. It states 'hof' is an abbreviation for 'gereghshof' (court of law) but also gives 'hof van arbitrasie' (arbitration court) as an example. 'Hofwerk' is also not defined in other standard Afrikaans dictionaries like HAT and Bosman, Van der Merwe and Hiemstra. The trilingual dictionary of Hiemstra and Gonin renders it as 'court work'. (One has to fall back to some extent on one's own feeling which is that 'hofwerk' does not encumber licencing and valuation tribunals but does include, apart from the courts of law in the strict sense (like the Supreme Court and Magistrate's Court), other bodies which bear the name 'Court' and function as if there were courts of law applying legal

principles and not administrative discretion in the settlement of disputes.

Thus defined, 'hofwerk' has a more constricted meaning than 'litigious work'. The latter term is therefore to be interpreted according to the common denominator and bears the meaning I have ascribed to the former."

[22] In light of the definition of "*litigious work*" or "*hofwerk*", I am of the view that the work done by the respondent on behalf of the applicant in relation to settling affidavits for his claim against the Fidelity Fund was not litigious work or in connection with litigation. There was nothing contentious in the claim against the Fidelity Fund for the money stolen from the said attorney's trust account. There was no evidence that any law suit ensued or that any work was carried on in connection with such law suit. There was no contest at law so to speak.

[23] In the circumstances, I am in agreement with the applicant that this jurisdictional fact was absent in relation to the first bill of costs.

[24] The same cannot hold in relation to the litigation that was contemplated before the Arbitration Foundation of South Africa. In those circumstances it appears that there was a dispute between members of a close corporation, which included the applicant. The arbitrator found that there was no dispute to arbitrate. This does not however mean that that the work was not carried out in

contemplation of litigation or in connection with litigious work.

[25] However, in relation to the second bill of costs incurred in the arbitration matter, the proviso that the Taxing Master shall not tax costs in instances where some other officer is empowered to do so, is applicable. These costs can competently be taxed under the auspices of AFSA.

[26] The Taxing Master accordingly did not have jurisdiction, in my view, to tax each of the bill of costs for these reasons.

[27] In relation to the question of service of the notice of taxation, I am also of the view that the service by way of Docex was irregular. The parties did not agree to such service. The respondent should have served the application on the applicant in terms of one of the recognised forms of service referred to in Uniform Rule 4. There was also no agreement between the parties that any notice or pleadings would be served by way of e-mail. The applicant's attorney may be criticised for not having filed his notice of objection sooner. However, this can be countered by the fact that no date was stipulated on the notice of taxation and he was unaware that the matter had been set down before the Taxing Master. There is no doubt that having hotly disputed the items in the bill of costs and the fee structure, the applicant would have appeared at the taxation had he or his legal representatives been aware of the date.

[28] The respondent's counsel, Mr Bishop, contended that a rescission of the Taxing Master's bill is not a final judgment or order and cannot be rescinded. The relief sought is therefore incompetent. I do not agree with this submission. Taxation in the absence of notice of taxation may be declared invalid by a court. In **Brenner's Service Station and Garage (Pty) Ltd v Milne**⁴ Leveson AJ, as he then was, granted an application to set aside the taxation of a bill of costs as an irregular proceeding within the meaning of Rule 30(1) of the Uniform Rules of Court. The taxation was set aside on the basis that it was held on a later date than the one stipulated in the notice of taxation.

[29] In **Vegas Engineering (Pty) Ltd v Cranco**⁵ the applicant had not received notice of the taxation and successfully had it set aside in an application for review.

[30] Mr Bishop submitted that an application for review was the proper procedure to have the bills set aside. He submitted that the Taxing Master should have been joined to these proceedings. I disagree. It is not the taxation of items in the bills as taxed by the Taxing Master that are being challenged in these proceedings, but rather the fact that they were so taxed in the absence of the applicant and in circumstances where he lacked jurisdiction. Rule 48 provides that any party

⁴ 1983(4) SA 233 (W).

dissatisfied with the ruling of the Taxing Master as to any item objected to or disallowed may be reviewed. It is not the Taxing Master's discretion in allowing or disallowing items that is being challenged but rather the invalid act of taxing in these circumstances.

[31] I am guided by the decision of **Grunder v Grunder** ⁶ in which it was held that the common law principles applicable to the setting aside of default judgments apply also to the setting aside of the Taxing Master's *allocator*.

[32] In the present context, apart from the irregularity in the proceedings, I am also satisfied that the applicant has set out sufficient cause for the rescission of the *allocatur* . In other words the application is a bona fide. The applicant has explained his default and set out a bona fide defence.⁷

[33] In the result, I find that the taxation of the bill of costs by the Taxing Master in the absence of the applicant was irregular and invalid. I also find that it is so because in relation to the first bill of costs where services were rendered in pursuance of a claim that was not connected to litigious work. In relation to the second bills of costs concerning the arbitration, I find that these could be disposed of in terms of AFSA's Rules.

⁵ 1963(3) SA 337 (D) at 339B – 340B.

Accordingly, I make the following order: -

[1] The taxations granted in the absence of the applicant on 18 September 2013 by the Taxing Master are hereby rescinded and set aside;

[2] The respondent is ordered to pay the costs of this application.

CHRISTOS GEORGIADES
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 13 JUNE 2014

DATE OF JUDGMENT: 2 SEPTEMBER 2014

FOR THE APPLICANT:
ADV HEIN MARX
INSTRUCTED BY: -
ROETS & DU PLESSIS ATTORNEYS

FOR THE RESPONDENT:
ADV ANTHONY BISHOP
INSTRUCTED BY: -
PETERSEN, HERTOOG & ASSOCIATES

⁶ 1990(4) SA 680 (C)
⁷ Grant v Plumbers (Pty)Ltd 1949 (2) SA 470 (O); and
Barnard v Taxing Master of the High Court of SA (TPD) and others [2005] 2 All SA 485(T)