

FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT

ECJ:

PARTIES: **DEAN DE VILLIERS**

AND

EDNA PAULINE DE VILLIERS

Registrar: **CA 116/2009**

1. Magistrate:

2. High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **08/03/10**

DATE DELIVERED: **05/05/10**

JUDGE(S): **JONES J, CHETTY J, SANGONI J**

LEGAL REPRESENTATIVES –

Appearances:

for the Appellant(s): **ADV: E A S Ford SC**

for the Respondent(s): **ADV: D De La Harpe**

Instructing attorneys:

1 for the Appellant(s): **NETTELTONS ATTORNEYS**

for the Respondent(s): **DOLD & STONE ATTORNEYS**

CASE INFORMATION -

a) *Nature of proceedings:* **CROSS-APPEAL - COSTS**

Not reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown

In the matter between

CA 116/2009

DEAN DE VILLIERS

**Appellant on Appeal
Respondent in the Cross Appeal
Defendant *a quo***

and

EDNA PAULINE DE VILLIERS

**Respondent on Appeal)
Appellant in the Cross Appeal
Plaintiff *a quo***

Summary: Costs – taxation – review of taxation – whether the taxation of fees in a bill by a second set of attorneys had improperly been disallowed – whether counsel fees had been improperly reduced – whether certain expert fees and charges had been properly or improperly disallowed.

Coram: Jones, Chetty and Sangoni JJ

JUDGMENT

JONES J:

[1] The parties were formerly husband and wife. They were divorced in the proceedings giving rise to this appeal. The defendant-husband was ordered to pay the plaintiff-wife's taxed party and party costs of the proceedings. In due course the plaintiff had her bills of costs taxed.

[2] Taxation of the bills took, I believe, some three days. The plaintiff-wife was dissatisfied with the result. She objected to the taxing master's rulings on a considerable number of the items in the bills and called for a review of the taxation thereof in terms of rule 48.

[3] The taxing master stated her case for review in terms of rule 48(3). The review came before Greenland AJ. He dealt with a considerable number of disputed items in a full judgment. The parties have accepted his decision on many of them. But they both remain dissatisfied in respect of certain confined issues. They have appealed and cross-appealed.

The defendant is the appellant in the appeal, which is opposed. The plaintiff's cross-appeal is also opposed. Both the appeal and the cross-appeal are now before us. For convenience I shall continue to refer to the parties as the plaintiff and the defendant.

[4] The defendant's appeal (which is first in chronological order) is in respect of two instances in which Greenland AJ overruled a decision by the taxing-master in his favour. The first instance related to a reduction of certain fees charged by counsel, and the second was in respect of the fees and charges of an expert witness Nobre which had been significantly reduced by the taxing master. The plaintiff's cross-appeal is mainly directed against Greenland AJ's refusal to upset the taxing master's decision to disallow items in a bill of costs by a second set of attorneys employed by her (the East London attorneys) because they were an unnecessary or unreasonable duplication of fees already allowed in the bill presented by the attorneys of record. Secondly, she argues on appeal that Greenland AJ had no discretion to review, or grounds for the review of, the decision to reduce certain fees in respect of consultations with the clinical psychologist Meyer.

[5] What began as a hard fought taxation in respect of many items in the bill has come down to disputes on three confined points – the fees of a second set of attorneys, certain aspects of counsel's fees, and certain aspects in respect of the fees and charges of two expert witnesses. Before dealing with these points specifically, I would refer generally to the approach of the courts in hearing reviews or appeals against a taxing master's rulings on taxation. Kroon J summed up the proper approach in *Schoeman v Schoeman* 1990 (2) SA 37 (E) 43 I-44 B:

For the sake of completeness I should mention that although the present proceedings are termed a review they are in fact a 'revision' of the Taxing Master's decision and the Court's power to interfere is not limited to that applicable to the ordinary type of review *stricto sensu* which concerns the interference by the Court with improper exercise of a discretion. Thus the Court has the power to interfere not only where the taxing official has improperly exercised the discretion entrusted to him by, eg, disregarding factors which ought properly to have been taken into consideration or considering matters which it was improper to take into account or giving a grossly unreasonable ruling or where he failed to apply his mind to the matter or

where he acted on a wrong principle, but also where the Court is of the view that the taxing official has been clearly wrong in regard to some matter, even one involving degree. The Court will, however, not lightly interfere with the decision of the taxing official. The matter must go further than mere disagreement therewith and the Court must be distinctly of the opinion that the decision is wrong before interference therewith will be warranted. See Cilliers Law of Costs 2nd ed at 226 - 8 and the cases there cited.

Before Greenland AJ was entitled to depart from the taxing master's decisions in this case he must have been satisfied either that she did not exercise her discretion properly, or that she was clearly wrong on the facts. And before we can depart from Greenland AJ's decision to uphold or set aside her decision, we are confined by the ordinary constraints of a Court of Appeal: we, too, must be satisfied that his conclusion was wrong, and this, in turn, involves an examination of the propriety of the taxing master's exercise of her discretion or a determination of whether or not she was shown to have been clearly wrong.

The costs of two sets of attorneys

[6] The plaintiff and the defendant were both domiciled and resident at Gonubie, which is within the area of jurisdiction of the East London Circuit Local Division. The plaintiff could have issued summons out of that Court. Instead, she sued in the Eastern Cape Division which has its seat in neighbouring Grahamstown and which has concurrent jurisdiction. She employed East London attorneys to whom she gave direct instructions, and they instructed a firm of attorneys to act as attorneys of record in Grahamstown. In due course she submitted two bills of costs, one from the attorneys of record and one from the East London attorneys. The taxing master disallowed a large number of items in the East London attorneys' bill as being unnecessary duplication of work. At issue is whether the plaintiff is entitled to have those items re-instated.

[7] The starting point here is uniform rule 70(8) which provides that 'where, in the opinion of the Taxing Master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him'.

Schoeman's case supra, Zeelie v General Accident Insurance Co Ltd 1993 (2) SA 776 (E) 778A, 779B-780C (Full Bench) and *Stuart-Lamb v Stuart-Lamb* 1997 (3) SA 140 (E) lay down that in such a case the rule gives the taxing master a discretion which he or she must exercise properly in the light of the facts and circumstances of the case, regard being had to the fundamental rule that costs orders must be fair to both sides. There are no hard and fast rules, and none should be laid down. The cases referred to not only set out the principles; they are also good examples of how the taxing master's discretion should be exercised.

[8] In the stated case the taxing master explains in her own words the principles upon which she operated. She said that 'although there is nothing wrong with having two sets of attorneys, however where the litigant chooses to instruct two firms of attorneys where services of only one is necessary, then only one fee will be allowed; and 'unnecessary correspondence between local attorney and attorney of record is not recoverable'; and 'where costs have been incurred improperly or without any reasonable cause, viz unnecessary duplication of costs,' they will not be allowed. The objection by Mr *De la Harpe* in argument before us on behalf of the plaintiff was that the taxing master paid mere lip service to her statement of principle. He argued that, in effect, she did not apply her mind individually to the need for both attorneys each to do an item of work, but instead applied a blanket ruling that in all cases where two fees were charged for the same item of work, there was unnecessary duplication. In short, he complained that she regarded any duplication as unnecessary. This may perhaps be a valid complaint if on the facts she followed a principle blindly without applying her mind properly to each disputed item on its merits. But those are not the facts. There is no proper basis for a concrete finding on the facts that she did not indeed apply her mind to each item in the bill; in other words that she did not give her considered attention to each item before she ruled on whether it should be allowed or whether it should be taxed off as unnecessary. Greenland AJ was not satisfied that, on any given item raised before him in the review, she was shown to have been clearly wrong in the manner in which she applied rule 70(8) to the taxation. Neither am I.

Counsels' fees

[9] Two points arise. First, Greenland AJ's order allows junior counsel's fees in an amount which is more than one half of the senior's fees. This was not part of the taxing master's ruling and it is in conflict with the provisions of rule 69(2) which reads

Where fees in respect of more than one advocate are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate shall not exceed one half of those allowed in respect of the first advocate.

It is common cause that the order by Greenland AJ in this regard is clearly wrong. It must be corrected on appeal.

[10] The second point is not common cause. It relates to the method of fixing the quantum of senior counsel's fees. In broad terms, the principle is that the amount of senior counsel's fees is a matter for the taxing officer's discretion, and that she must apply her mind to the matter in a proper judicial manner. One of the considerations which might guide her is the tariff of recommended fees laid down by the Bar Council. The exercise of a proper discretion means that she should not follow those recommendations slavishly; nor should she depart from them for arbitrary reasons. The tariff is a tool to be referred to and used as a guide if she considers that it is appropriate to do so. Greenland AJ came to the conclusion that in this case she had no good reason to disregard the guidelines of the tariff, that her reduction of counsels' fees was not reasonable but arbitrary, and that it should be set aside on review. My opinion, however, is that there are insufficient grounds to justify Greenland AJ's interference with the exercise of her discretion. By reason of the volume of bills which she taxes in this Division, she is in a good position to judge the reasonableness of fees charged in relation to counsel's standing, the complexity of the matter, and the amount of time necessary to do the work. The fees she allowed for this work in these circumstances in fact fell within the parameters of the tariff. She allowed more than the recommended minimum and less than the recommended maximum. But she considered that a proper fee in this case was less than the fee charged by counsel. This was, on the face of it, not an arbitrary

exercise of her discretion, and I do not believe that she was shown to be clearly wrong. In my view, Greenland AJ was wrong in his conclusion that he should re-instate the fees charged by counsel in the bill. Mr De La Harpe took us through a number of individual items in the bill which reflect the fees charged by the plaintiff's counsel. That exercise does not persuade me that the taxing master was clearly wrong in any respect. The plaintiff's appeal on this ground must be dismissed.

The charges of expert witnesses

[11] The taxing master found, in favour of the defendant, that disbursements made to the expert witness Nobre (a psychologist) should be reduced because the witness was an intern and hence not qualified as a psychologist when the charges were made. Greenland AJ reversed this finding. The defendant appeals against that reversal. The taxing master also found, again in favour of the defendant, that no proper basis had been laid for the full amount of certain fees charged by another expert witness Meyer (also a psychologist). Greenland AJ refused to interfere with the taxing master's decision to tax off some of these fees. The plaintiff appeals against that decision.

[12] In my opinion Mr *Ford's* argument in support of the taxing master's ruling in each case must prevail. It is the same argument, based on the decision of *Taylor v Mackay Bros and McMahon Ltd* 1947 (4) SA 423 (N) 426. That case holds that the court reviewing the taxation of a bill of costs is confined to the facts which were before the taxing master at the time of taxation, and that new matter must be disregarded. This is not a case where the judge on review obtained further information from the taxing master in terms of rule 48(6)(a) (ii) and 48(6)(b). The argument by Mr *Ford* is that Greenland AJ's decision to reverse the taxing master's decision in respect of the Nobre item was based on subsequently obtained information placed before him that the witness was in fact not an intern and was in fact duly qualified. This information was not before the taxing master at the time of taxation. The judgment was hence grounded on new facts to which Greenland AJ should not have had

regard. In my opinion Mr *Ford*'s argument is sound on the law and on the facts. A proper reading of the papers, and in particular the taxing master's stated case, makes this clear.

[13] The same conclusion is to be reached in the case of the fees charged by Meyer. In this instance Mr *Ford* argued that Greenland AJ correctly held that he could not have regard to information in support of allowing the charges in question because that information was not before the taxing master when she made her decision. Once again, this argument is supported by the facts. The taxing master's decision on both issues must therefore stand.

Conclusions

[14] The result is that the defendant's appeal against Greenland AJ's decision in respect of counsels' fees must succeed, and so must the defendant's appeal against Greenland AJ's decision to allow the fees of the witness Ms Nobre in the increased amount. The plaintiff's appeal, which is against Greenland AJ's decision relating to the costs of two sets of attorneys and the consultation fees of Mr Meyer, is dismissed. The defendant is substantially successful in the appeal and cross-appeal. He is entitled to an order for the costs of the appeal and cross-appeal in his favour.

[15] There will be the following order

1.1 The appeal is allowed with costs

1.2 The order on review (an order that the result of the review is as set out and tabulated in the judgment) is altered, where necessary, to reflect

- 1 that the taxing master's decisions in respect of the amount of the fees charged by senior counsel are re-instated;
- 2 that junior counsel's entitlement is to half of the senior counsel's fee;

3. that the taxing master's decision in respect of the fees of the witness Nobre (item 1050) is re-instated.

2 The cross-appeal is dismissed with costs.

RJW JONES
Judge of the High Court
2 April 2010

CHETTY J I agree

D CHETTTY
Judge of the High Court

SANGONI J I agree

T. SANGONI
Judge of the High Court