

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 942/2015

Date heard: 28 March 2019

Date delivered: 4 June 2019

REPORTABLE

In the matter between:

**KENT WILLIAMS N.O**

In his capacity as *Curator ad Litem* to

**SIHLANGULE XOLISANI KWA**

**Applicant**

**And**

**THE TAXING MISTRESS OF THE HIGH COURT,**

**PORT ELIZABETH**

**Respondent**

In re:

**KENT WILLIAMS N.O**

In his capacity as *Curator ad Litem* to

**SIHLANGULE XOLISANI KWA**

**Plaintiff**

**And**

**ROAD ACCIDENT FUND**

**Defendant**

**ATTORNEYS ASSOCIATION**

**First *Amicus Curiae***

**EASTERN CAPE SOCIETY OF ADVOCATES**

**Second *Amicus Curiae***

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**JUDGMENT**

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**Goosen, J (Stretch J and Malusi J concurring):**

[1] This is a review of the taxation of a bill of costs taxed by the Taxing Mistress in Port Elizabeth. The taxation was conducted on 20 October 2017. Aggrieved by the Taxing Mistress' decision to tax off certain items on the Bill, viz a portion of counsel's fees and fees charged by expert witnesses, the plaintiff filed a notice of review of taxation on 16 January 2018. The notice called upon the Taxing Mistress to state a case in terms of Rule 48(3).

[2] The Taxing Mistress duly filed a stated case on 23 February 2018 and the matter was placed before a judge. The matter was then held in abeyance pending the finalisation of a similar matter which had been referred to a hearing before a Full Court<sup>1</sup>. Judgment in that matter was handed down on 31 July 2018. Subsequent thereto the taxation was placed before me. Having considered the Full Court judgment and the issues raised in this matter I considered that it was necessary to

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<sup>1</sup> Trollip v Taxing Mistress, High Court and Others 2018 (6) SA 292 (ECG)

refer the matter for argument in terms of Rule 48. I also considered it necessary to invite both the Attorneys' Association and the Bar to join as *amici curiae* in order to assist the court in its determination of the issues.

[3] It is not necessary to set out the process that followed. It suffices to record that all of the parties viz plaintiff, defendant, Taxing Mistress, Attorneys Association and the Eastern Cape Society of Advocates filed submissions. In the case of the Taxing Mistress these included evidence relating to bills of costs other than in the present matter. The parties were also in agreement that, given the importance of the issues raised in this matter, it would be appropriate to constitute a Full Bench to adjudicate the matter. Arrangements were therefor made and the matter came before this court on 28 March 2019.

[4] Before setting out the issues raised in this matter and the contentions of the parties it is necessary to record certain background as context. This was a damages claim for personal injuries arising from a motor vehicle collision. The civil trial roll in Port Elizabeth, like many other divisions, is dominated by claims against the Road Accident Fund. The Port Elizabeth civil roll is a "*running roll*". Matters are enrolled on the roll on a specified date. These number approximately six (6) per day.<sup>2</sup> When a trial commences it runs until conclusion. All other matters enrolled on the day (and subsequent days) wait to commence. Thus a trial set down to commence on, say, a Monday may only commence later in that week and occasionally only in the following week.<sup>3</sup> Since the civil roll has, until recently, comprised a single running roll counsel have been permitted to accept trial briefs in consecutive matters on the roll. Since

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<sup>2</sup> More recently the roll has been split into two separate rolls each accommodating  $\pm 5$  per day.

<sup>3</sup> The management of the trial roll has undergone certain important changes which have ensured that matters likely to settle (in which may be counted a large percentage of RAF matters) are settled prior to the trial date thus reducing (if not eliminating) the waiting time to commence trials.

the introduction of two separate rolls the normal “*double briefing*” rule in respect of the acceptance of briefs applies to the two separate rolls. The relevance of this context will become apparent hereunder.

[5] The central issue in this matter concerns the Taxing Mistress’ decision to disallow a portion of counsel’s fees for trial. The essential reason for so doing was that counsel had, on the same day, charged a full day trial fee in two other matters. Although the review of taxation was predicated also on the basis that the Taxing Mistress had disallowed fees charged by the plaintiff’s expert witnesses (in effect reserved day fees), this ground was effectively abandoned. It is for this reason unnecessary to address this aspect of the matter.

[6] In the ***Trollip***<sup>4</sup> matter the Full Court set out succinctly the test to be applied in a review of taxation as follows:

“[15] The intention of rule 70(3) is to ensure that the ultimate winner of a suit should not have the fruits of victory reduced by having to pay too high a proportion of his or her costs by way of an attorney and client bill. It has also been recognised, on the other hand, that the interests of the loser must be protected and that party should not be oppressed by having to pay an excessive amount of costs. In *Thusi v Minister of Home Affairs & Another and 71 Other Cases* Wallis J held that the indemnity principle is of general application in the field of costs, and that it has not become outdated. We agree. The touchstone is for expenditure to be allowed which has been reasonably and properly incurred.

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<sup>4</sup> *Supra* at paras [15] and [16]

[16] In *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* the court restated the test applicable when dealing with a review of taxation as follows:

'This case indicates, I think, that the Court was of the view that the test as formulated by POTGIETER JA in the Legal and General Assurance Society case *supra* and the statement that the Court will interfere with a ruling of a Taxing Master only if it is satisfied that he was clearly wrong, are merely two ways of saying the same thing. I think, with respect, that it is better to state the test to be that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him, since it indicates somewhat more clearly than does the formulation of the test by POTGIETER JA what the test actually involves, *viz* that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling.'

[7] This court must accordingly be satisfied that the Taxing Mistress was clearly wrong in the exercise of his/her discretion to allow or disallow a charge on a bill of costs. The ***Trollip*** matter concerned the question as to whether counsel's day fee for a trial that had settled or was postponed on that day ought to be reduced or discounted in the amount of other fees earned by counsel on that day. The court in ***Trollip*** found that such fees as are earned by counsel other than fees earned in respect of a court appearance on that day are not, as a general rule, to be taken into

account in the determination of the reasonableness of counsel's trial fee. The court's reasoning is set out as follows<sup>5</sup>:

"[24] While the fee allowed by the taxing master must be reasonable in the circumstances, counsel is also entitled to 'be fairly compensated as a professional man for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter'. If a matter is settled, withdrawn or postponed, the function of the taxing master is to determine a reasonable fee for counsel, taking into account the date when the case was settled or withdrawn or postponed. Quite apart from considering the complexity of the matter, the amount of work that was required to be done and how long before the date of trial the matter was settled, the principles applicable to compensation for counsel in the context of that profession must be considered .

[25] Van Dijkhorst J, in *Pretorius v Santam Bpk* explained the unique position of the advocate when a trial for which he had been briefed did not proceed:

'My bevinding [in I D Myburgh en M J Fourie NO v Guardian Nasionale Versekerings Maatskappy Bpk (TPA saak 23858/95 van 25 September 1998] was dat die ou gebruik dat advokate 'n eerste dag fooi of deel daarvan betaal word waar 'n verhoor betreklik kort voor die verhoordag deur die mat val, sy grondslag het in die feit dat advokate se beroep hoofsaaklik sentreer om verskynings in die Hof. Die etiese kode van

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<sup>5</sup> Trollip (*supra*) at par [24] to [28]

advokate verbied dubbel brevettering en dit kan gevolglik in die algemeen gesproke aanvaar word dat indien 'n saak kort voor verhoor deur die mat val, die advokaat waarskynlik geen ander brevet vir verskyning op die betrokke dag sal ontvang nie. Op 'n meevaller kan nie gereken word nie. Uiteraard het hy soms (en party advokate dikwels) pleitstukke en opiniewerk wat sy aandag verg, maar dit sou hy waarskynlik tog na-ure of oor naweke gedoen het. Die glyskaal het dus ten grondslag gehad die gedagte dat hoe nader aan die verhoordatum 'n saak deur die mat val hoe onwaarskynliker dit is dat 'n plaavervangende brevet ontvang sal word. Die situasie het nie verander nie en daar is gevolglik geen rede om te bevind dat die praktyk wat voortgeduur het sedert 1990 onredelik is nie. Na my mening was dit billik. Gevolglik het ek beslis dat die toelating van 'n eerste dag verhoorfooi redelik was.'<sup>6</sup>

[26] There is a difference between the nature, structure and functioning of the advocates' profession and the attorneys' profession. As a result, a distinction is drawn between a trial fee which an advocate may charge when a trial is settled or postponed on or shortly before the trial date, and that which an attorney may charge. The settlement or postponement of a trial prejudices counsel if he or she is not properly compensated for having reserved that day for trial (not to mention the reservation of sufficient days to allow for the completion of the trial and potential delay on the running trial roll). An attorney however is able to do other work in the same circumstances. The difference between the two branches of the profession were explained by Blieden J in *Road Accident Fund v Le Roux*:

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<sup>6</sup> See the translation of this passage where it appears in the Trollip judgment at footnote 17

'The structure of the advocate's profession is such that the settlement of a trial and the loss of a first-day trial fee prejudices counsel, who runs a real risk of not being compensated for reserving a day for trial. An attorney, on the other hand, in the time set aside for the first day of the hearing, can do other lucrative work. . .'

[27] Counsel, when accepting a trial brief must make a number of decisions. He or she is obliged to consider the number of days which must be kept available for a particular trial. If a particular court has a running roll (as this court has) counsel is required to factor in that a trial may not commence on the day of set down. He or she also has to take into account that the trial may run for longer than expected. No other brief may properly be accepted for the days so reserved as this would constitute double-briefing. This all constitutes a loss of opportunity to earn fees from other work in consequence of the acceptance of the trial brief.

[28] Counsel's chamber work would have been performed at one time or another in any event, often after hours. If counsel performed chamber work on the day of a settled or postponed trial this does not compensate for, and should not be taken into account, in respect of the entitlement to a full day trial fee. The only possible compensation for loss of opportunity in respect of the first day of trial would be the fortunate retention of another brief for court work accepted subsequent to it becoming apparent that the trial would not proceed. In these circumstances, the fee charged for the first day of trial in the matter not proceeding would obviously have to be determined with reference to the

fees earned from the subsequent brief for court work on that same day – and of course be commensurate with the service rendered.”  
(emphasis added)

[8] The court went on, in the context of the issues raised in that matter, to deal with the judgments in ***General Council of the Bar of South Africa v Geach and Others***<sup>7</sup> citing both the majority judgment of Nugent JA and the minority judgment of Wallis JA in respect of circumstances in which a trial fee or fee for a brief may be charged. The court observed that:<sup>8</sup>

“[38] While the judgment of Wallis JA is the minority judgment, what has been quoted above is, for the most part, not inconsistent with the paragraph referred to in the judgment of Nugent JA. Indeed, it is a more detailed explanation of what Nugent JA had said. Neither judgment changes the position set out in Van Dijkhorst J’s judgment in Pretorius that an advocate is entitled to be compensated for his or her opportunity cost when a trial settles or is postponed and that, generally speaking, will be on the basis of a full day fee. If, however, he or she is lucky enough to be briefed to appear on that day in another matter, he or she may not charge a full day fee for the matter that did not proceed. This places in proper context Nugent JA’s statement to the effect that an advocate may charge a full day fee if he or she ‘has been left with no other income for the day’. We understand that by ‘no other income’ Nugent JA meant income derived from appearance work, and not chamber work, as this is consistent with the case law. We do not understand Nugent JA to place an onus on an advocate to prove that he

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<sup>7</sup> 2013 (2) SA 52 (SCA)

<sup>8</sup> Trollip (*supra*) at par [38]

or she has no other appearance work on the day in question: advocates being officers of the court, that can be assumed, in the absence of evidence pointing to the contrary. To the extent that Wallis JA's minority judgment is inconsistent with this, Nugent JA's majority judgment is to be preferred and followed." (emphasis added)

[9] As already indicated, **Trollip** concerned the question of fees charged other than in respect of appearance work. In the present matter, wholly different considerations apply.

[10] In her stated case the Taxing Mistress says that in preparation for the taxation she noted that counsel had charged a full day fee for 5 and 6 December 2016. She noted from the civil roll for those days that the counsel concerned had appeared in two other matters on 5 December 2016 and a further matter on 6 December 2016. The Taxing Mistress accordingly requested plaintiff's attorney to provide invoices in respect of those matters. In response to this plaintiff's attorney furnished a letter addressed to him by counsel concerned in which an explanation was provided.

[11] Counsel's explanation was that the present matter (**Kwa**) was set down for trial on 24 November 2016. The matter had stood down to 29 November 2016 and thereafter to 1 December 2016. The trial commenced on 5 December 2016 and proceeded to 6 December 2016. The fees charged were for an attendance fee on each of 24 and 29 November 2016 and 1 December; for preparation and a fee on trial on each of 5 and 6 December 2016.

[12] Counsel further explained his involvement in two other matters which were on the roll, viz the matter of **Louwskierter v RAF** and **Groenewald v RAF**. The **Louwskierter** matter was enrolled for trial on 25 November 2016. It had stood down for settlement discussions and a settlement was made an order of court on 5 December 2016. Counsel charged a day fee for preparation, settlement negotiations, attending court on 5 December 2016 and “*for the reservation of the day on the running roll*”. The **Groenewald** matter was set down for trial on 6 December 2016. The matter was settled and an order taken on that day. Counsel charged a day fee in respect of preparation, “*the reservation of the day on the running roll*” and attending court when the order was granted. In the letter addressed to the attorney explaining the charges raised, counsel states that:

“It will be clear from what I have set out above that a day fee is not in respect of a particular day. It includes preparation, attending on settlement negotiations, etc, as insisted upon by the Registrar. Moreover, there is a running roll in Port Elizabeth. I have to ensure my availability not only for the allocated trial date, but also for the ensuing days, in the event of the matter standing down or running and not being completed in one day. This is all taken into account when my accounts are drafted.”

[13] This matter concerns two fundamental questions. Firstly, whether the Taxing Mistress properly considered the question as to counsel’s fees raised in respect of other matters in the taxation of this matter. Secondly, it concerns the question

whether the Taxing Mistress properly exercised her discretion in taxing off a portion of counsel's fees, based on what was charged in relation to those other matters.

[14] Mr *Frost*, for the plaintiff, submitted that the Taxing Mistress ought to confine consideration of the reasonableness of the fee to factors relevant to the bill to be taxed and the work done in relation to that matter. What was charged in the other matters fell to be determined in the taxation of the relevant bills. To allow otherwise would, it was submitted, bring about prejudice to the plaintiff. Such prejudice would arise from the fact that the plaintiff as the successful party in the litigation would, to the extent that fees are taxed off as between party and party, be saddled with a more onerous attorney-client bill.

[15] The initial submissions (in the form of heads of argument) filed by the Bar as second *amici*, appeared to endorse the view that the Taxing Mistress is confined to considerations relevant to the reasonableness of the fee charged in respect of the particular matter. Other considerations such as whether the fee charged is permissible are matters of a disciplinary nature to be addressed by the Bar. Mr *de la Harpe*, who appeared for the second *amici* at the hearing, however, eschewed any reliance on the heads as filed. He took the stance that the Taxing Mistress is not only entitled to give consideration to what was charged by counsel in other matters, but is duty bound to do so when it appears that such other charges are relevant to determining what constitutes a reasonable fee in the circumstances of a particular matter.

[16] We have already referred to the principle, referred to in ***Trollip***, that there is no onus upon an advocate or attorney to justify his/her fee. As members of an honourable profession the Taxing Mistress will, as starting point, assume that they had acted honourably and in accordance with their ethical obligations in raising charges for work done. Yet, the authorities also make it clear that where there is evidence to the contrary the Taxing Mistress will take such evidence into account in the exercise of his/her discretion.

[17] We would go further to hold that it is incumbent upon a taxing master in giving effect to the purpose of taxation in terms of Rule 70, to solicit appropriate information relevant to the exercise of his/her discretion where it appears that such may exist. This is not to suggest that the taxing master is required to investigate matters without cause.

[18] It can, in our view, hardly be suggested that a Taxing Mistress who becomes aware of facts which are relevant to deciding what constitutes a reasonable fee, is precluded from taking these into account merely because such facts may relate to a disciplinary infraction by a practitioner. Nor can it be suggested that all that can be done is to refer the matter to the relevant professional body.

[19] The operation of the running roll outlined above is significant. As already indicated the practice in this Division is that counsel are not prohibited, in principle, from holding trial briefs in consecutive matters on the roll even if they are set down for the same day. It does not, of course, follow that counsel may raise a fee on trial for each such matter where the attendance on trial overlaps.

[20] In this regard the authorities are clear. The underlying basis is that counsel may not charge a fee for work not done. Where one trial does not proceed because it has settled no work is performed on trial. In that event counsel may only charge a fee on trial if she/he is in fact “*prejudiced*” inasmuch as the opportunity to earn a trial fee is lost. There can, of course, be no such lost opportunity if counsel holds a second trial brief for the day in a successive matter and that matter proceeds. Should counsel charge a full trial fee in both matters it would, on the clear authority of **Geach**, constitute over-reaching. Such over-reaching necessarily renders the fee charged in each such matter unreasonable.

[21] It is in this context that the decision of the Taxing Mistress to call for information regarding the fees charged by counsel in the other matters must be viewed. In our view the Taxing Mistress was undoubtedly correct to do so.

[22] Wallis JA in the **Geach** matter<sup>9</sup> referred to the comparative advantages that practitioners enjoy when marking fees in the following terms:

“[132] Overreaching involves an abuse of the person's status as an advocate, to take advantage for personal gain of the person who is paying them. Advocates enjoy a considerable advantage in setting a fee. They know what standards are applicable to the charging of fees; they know what work has been done on the brief and what time and effort has gone into that work; they know in broad terms the fees charged by advocates of comparable seniority and ability for similar work. This creates what economists call information asymmetry between the advocate and the client and even the attorney, one of

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<sup>9</sup> Geach (*supra*) at par [132]

whose functions is to ensure that the advocate does not claim or be paid unreasonable fees. Where the attorney is ignorant of what constitutes a reasonable fee, or is unable or has no incentive to act as a check on counsel, which was probably the situation here because all concerned anticipated that the fees were to come out of the Fund, the advocate's advantage is magnified as the check built into the system is absent. For the advocate to take advantage of that situation, by marking a fee knowing that it is not a proper fee, but one that is unreasonable and improperly marked under the rules, is an abuse of the advocate's position and amounts to overreaching. It is innately dishonest behaviour."

[23] The point bears emphasis. It is that the usual check upon what may constitute a reasonable fee charged by counsel is the instructing attorney whose responsibility lies to his/her client. This addresses the argument for prejudice advanced by the plaintiff in these proceedings. The responsibility of the plaintiff's attorney to ensure that the fees raised by counsel are fees to which counsel is entitled and that such fees are reasonable is not confined to what may be allowed as between party and party. It extends also to what may encumber a client on an attorney-client basis. Where necessary it is incumbent upon the attorney to raise objection thereto in accordance with long-established procedures adopted by the Bar to regulate such matters. Apart from this primary check on the reasonableness of fees there is also the check which arises at taxation in terms of Rule 70. At this stage the Taxing Mistress, as we have indicated, is under a duty to ensure that the fees charged are reasonable.

[24] It is appropriate to make a further comment upon the operation of the running roll. The explanation of the fees charged by counsel appears to suggest that a fee on trial for reservation of the day on the trial roll may be charged whenever the matter settles after the trial date. This is not so. A fee on trial in the event that the matter settles may only be charged on the basis described in the **Geach** matter.

[25] As indicated in the **Trollip** judgment the acceptance of a brief on the running roll requires the advocate to give consideration to the possibility that the matter may not commence on the allocated date and that it may run for longer than anticipated. The acceptance of a brief on trial in these circumstances necessarily means that the trial fee may be earned not on the day allocated for the trial but on a subsequent day. If the matter settles either on the allocated date or thereafter, the entitlement to a trial fee will depend upon whether the advocate has, as the authorities put it, lost the opportunity to earn the fee. Where the day has been “*reserved*” it necessarily follows that no other appearance work has been or can be conducted on that date. In the event that other appearance work is performed the advocate is not entitled to charge the trial fee on the basis merely that the day has been reserved.

[26] We turn now to the question whether the Taxing Mistress properly exercised her discretion to disallow certain fees. The plaintiff seeks the setting aside of the decision of the Taxing Mistress in respect of items 1, 5, 7, 9, 11, 12, 13, 20, 21, 24 and 26 of Counsel’s fee note and that the said items be included in the allocatur alternatively be referred back to the Taxing Mistress to be taxed *de novo*. All of these items on counsel’s fee note were included in the total disbursement to counsel at item 873 of the Bill.

[27] In *City of Cape Town v Arun Property Development (Pty) Ltd and Another*<sup>10</sup> it was stated that:

"[22] This is a convenient juncture at which to reiterate a point of clarification: While the language of some of the cases may suggest that it is wrong or improper for counsel to charge separately for drafting heads of argument and preparation, this is not the case. What is being conveyed is that it is not correct to tax a party and party bill on that basis. The modern trend - if I may call it that - of charging a fee based on time actually expended is both acceptable and in the interest of transparency. It is likely to result in fees that are less troubling than those referred to in, for example, *Ocean Commodities*. In *Price Waterhouse* at para 15 the prevalence of this practice was acknowledged without adverse comment, thus:

'We were also informed that it is the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related and insofar as appeals are concerned, for counsel to charge separately for preparation, heads of argument and time in court.'"

[28] In her stated case the Taxing Mistress avers that she adopted the approach of assessing a globular fee for preparation and attendance at trial. This, it is averred, accords with well-established practice and authority. These authorities are clear. At taxation of a party and party bill in respect of counsel's fees, the taxing master is required to consider and determine a globular amount to be allowed to counsel as a reasonable fee for the first day of trial. In doing so the taxing master will take

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<sup>10</sup> 2009 (5) SA 227 (C) at par [22]

cognisance, *inter alia*, of such individually itemized fees related to the preparation of the matter; the fee charged for the day's attendance; the nature and complexity of the matter and the experience and standing of counsel to determine a reasonable fee. Where the trial proceeds into a second or subsequent day, the taxing master will assess the reasonableness of such second or subsequent day fee.

[29] It is apposite to pause here briefly to clarify terms since, despite the authorities referred to, there remained (at least in the submissions of some parties) some confusion as to the concepts of a day fee or fee on brief or trial fee. There is no magic in the terms. They mean no more than the fee charged for attendance for the day on trial, that is the reasonable charge levied by counsel to attend to the conduct of a trial matter in court.<sup>11</sup> Such a fee on brief or trial fee or day fee is wholly different to a "*first day trial fee*" and is not to be confused therewith. A "*first day fee*" includes fees for preparation, for consultations, advices on evidence, heads of argument and the like. As noted in the ***Arun*** matter the practice has developed that Advocates now rarely charge a "first day fee" and refresher for subsequent days. Preparation is individually specified as costs in addition to the attendance fee or trial fee.

[30] We highlight these distinctions because in plaintiff's submissions (possibly mirroring counsel's fee note) the trial fee charged per day was referred to as a first day fee (including reference to preparation). What is, however, clear from the fee note and the submissions of the Taxing Mistress is that this was a day fee *simpliciter*, excluding preparation.

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<sup>11</sup> In the case of opposed application proceedings the "opposed application" fee or fee on brief will equally be the fee on attendance.

## **The contested items**

### **Item 1: Fees for advice on evidence**

[31] Counsel raised a fee on 4 October 2016 for “*perusing the entire brief, including all medico-legal reports obtained to date, as well as other quantum documentation, researching quantum and drafting advice on evidence.*” For this counsel charged for five hours at R2000.00 per hour. The Taxing Mistress allowed the sum of R2000.00 for the advice on evidence and deferred four hours as an item of preparation to be considered when determining a globular fee on trial.

[32] It was submitted that the matter was one of considerable complexity and that the time spent was reasonable. Since a fee for advice on evidence is one allowable as between party and party<sup>12</sup>, the Taxing Mistress ought to have allowed the full fee charged.

[33] The Taxing Mistress’ rationale for the approach was based on the fact that perusal and consideration of the entire brief, including all expert reports, is necessarily a charge relating to trial preparation. In our view, the Taxing Mistress cannot be faulted in this approach. The fact that more time might have been allowed for the drafting of advice is not a basis to interfere with the Taxing Mistress’ discretion. She did not disallow the entire charge. She took into consideration four hours spent thereon as part of necessary pre-trial preparation.

### **Items 5, 7, 11, 12, 13, 20 and 21**

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<sup>12</sup> See *Stuart-Lamb v Stuart-Lamb* 1997 (3) SA 140 (E)

[34] In respect of each of these items the Taxing Mistress “*stood over*” or deferred consideration of the fees charged to determination of the globular or composite fee to be allowed as a first day fee.

[35] The stance adopted by the plaintiff was that these items, which relate to perusal of reports and documentation (including a joint minute prepared by the industrial psychologists and an actuarial report relating thereto), concern necessary preparation subsequent to the advice on evidence. It was submitted that given the complexity of the matter, it cannot have been expected of counsel to proceed to trial without such preparation.

[36] The submission, however, loses sight of the fact that the Taxing Mistress did not ignore or disallow such preparation. What the Taxing Mistress did was to take all of these items of specified preparation into consideration of the globular fee to allow for the first day of trial. In doing so the Taxing Mistress acted in accordance with established authority. There is accordingly no room to interfere with the Taxing Mistress’ discretion on account of the approach adopted by her. We shall deal hereunder with the exercise of the discretion in regard to the globular fee allowed.

#### **Items 9 and 24**

[37] Item 9 on counsel’s fee note related to a charge for the drafting of a further Rule 37 minute in an amount of R1000.00. Item 24 concerns a charge for perusal of the report of the reporting *curatrix ad litem* (in an application for the appointment of a *curator ad litem* to the plaintiff). This charge was raised on 1 December 2016.

[38] The Taxing Mistress taxed off item 9 (i.e. disallowed it), on the basis that the task was one that the attorney could have performed. In respect of item 24 the Taxing Mistress deferred consideration of the item in the form of half an hour's preparation for trial together with the other deferred items.

[39] In the submissions advanced on behalf of the Taxing Mistress, Mr *Petersen* conceded that the Taxing Mistress ought to have allowed the equivalent of the tariff charge that the attorney could have raised for item 9. It was also conceded that, in respect of item 24, this was not strictly an item related to trial preparation and that it, therefore, ought to have been allowed. It was however submitted that the effect is minimal.

[40] As indicated in the Taxing Mistress' submissions she could have allowed an amount of R 263.00 for item 9, which would have equated to the amount allowed on item 804 of the Bill of costs. She points out, however, that when the item was disallowed the plaintiff's attorney did not object thereto.

[41] It was submitted that insofar as the two items ought to have been allowed this court should consider that the Taxing Mistress had generously allowed certain attendance fees on the days that the trial had stood down whereas these items could, properly, have been disallowed. When this is taken into consideration this court will not interfere with the exercise of the discretion of the Taxing Mistress. In our view, notwithstanding the concessions made, the overall effect upon the allocatur is not such as would vitiate the Taxing Mistress' ruling.<sup>13</sup>

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<sup>13</sup> See *Oceana Commodities Incorporated and Others v Standard Bank of South Africa Ltd and Others* 1984 (SA) 15 (A) at 19 E-G

## Items 26 and 27

[42] The Taxing Mistress' decision to disallow these items in full is what lies at the heart of this matter. The items in counsel's fee note relate to a full day fee on each of 5 and 6 December. The Taxing Mistress disallowed the full day fees on the basis that counsel had charged a full day fee in the **Louwskierter** and **Groenewald** matters on 5 and 6 December respectively.

[43] The Taxing Mistress submitted that in determining the amount to be allowed as a "*composite*" fee she took into consideration the individually itemised preparation (the so-called deferred items set out above) and the fact that counsel had charged a full day fee for each day in the other two matters. She also took into consideration the nature of the matter and its complexity as well as the standing of counsel and determined that a composite fee of R 20 500.00 (excluding VAT) be allowed for the preparation and presentation of the case on 5 and 6 December 2016.

[44] The amount of R 20 500.00 is the amount allowed in respect of three charges, namely:

- R17 500.00, which is the total of "*deferred*" items relating to itemised preparation;
- R20 000.00, which is the day fee, apparently inclusive of preparation for 5 December 2016; and
- R20 000.00, which is a further day fee, again inclusive of preparation, heads of argument and argument for 6 December 2016.

[45] The Taxing Mistress states that she took into consideration the fact that evidence was led on 5 December for approximately 45 minutes and that there were

two earlier attendances on that day. She took into account that on 6 December proceedings lasted for one hour 35 minutes.

[46] It was argued by Mr *Petersen*, on behalf of the Taxing Mistress that the R20 500.00 was determined on the basis of allowing approximately three hours for the presentation of the case (i.e. R6000.00) on 5 and 6 December 2016 and allowing the balance (R14 500.00) for the itemized preparation.

[47] The Taxing Mistress filed further submissions by way of supplementing the report filed in terms of Rule 48. In those submissions she states that she did not allow a day fee in respect of counsel's fees because counsel had charged a day fee in other matters. She only allowed a fee for time spent on the matter. This averment, together with the averments detailing the time for which counsel was engaged indicate the basis upon which the determination was made. It is in this context that the Taxing Mistress took the view that, but for the fact that counsel had charged full fees on 5 and 6 December 2016, she would have allowed the R20 000.00 charged on each of those days.

[48] Mr *Petersen* is accordingly correct when he argues that insofar as the amount allowed for the itemised preparation is concerned, there is no substantial discrepancy between the amount allowed and the amount claimed such as would vitiate the Taxing Mistress' ruling in the exercise of her discretion.

[49] It should be emphasized that, contrary to the understanding of the defendant's counsel, the appearance fees charged for the different matters were not apportioned. The Taxing Mistress considered that a time-based allocation would fairly compensate counsel for work done. In our view this approach cannot be faulted. It

appears to be reasonable and rational and to meet the requirement of fairness envisaged by Rule 70.

[50] We should, of course, not be understood to endorse an entitlement to charge fees on a time-spent basis in addition to day fees where more than one appearance occurs on the same day. Such endorsement would run contrary to established authority discussed above. We confine ourselves to a finding that in the circumstances presented in this taxation, where the Taxing Mistress was aware that full fees had been charged in relation to other matters, the use of time spent as a measure was neither arbitrary nor irrational.

[51] It follows from this that we are not persuaded that there is any basis to interfere with the exercise of the Taxing Mistress' discretion in this matter.

[52] At the hearing of the matter an affidavit was handed up indicating that the advocate concerned had paid back the day fee in each of the **Louwskiet** and **Groenewald** matters, retaining only an appearance fee of R2 000.00 for the attendances at court in those matters. We did not understand it to be suggested that this would entitle the court to interfere with the exercise of the Taxing Mistress' discretion in this matter. That would plainly not be correct since this court is called upon to determine whether at the time that the taxation occurred the Taxing Mistress properly exercised her discretion.

[53] There is one final aspect which warrants attention. As will be gleaned from the circumstances giving rise to this matter a very important issue lay at the centre of the dispute viz the propriety of counsel charging more than one full day trial fee on any one day and whether that circumstance may be taken into account at taxation in

which that might occur. Equally important was the question of the fact that this might occur in relation to matters in which the unsuccessful party is the Road Accident Fund, which fulfils an important public purpose utilizing public funds in compensating victims of road accident collisions. It was not necessary to address this latter aspect, however, since the basis upon which the Taxing Mistress exercises her discretion does not alter depending upon the identity of the unsuccessful party.

[54] In her further submissions the Taxing Mistress drew attention to the fact that the problem brought to the fore in this matter appears not to be isolated. The Taxing Mistress stated that there were to her knowledge other counsel who had been briefed on trial in Road Accident Fund matters, in more than one matter per day. It appears that these advocates, who were not identified, may have charged more than one day fee or trial fee in circumstances similar to the present case.

[55] The Eastern Cape Society of Advocates, as second *amici*, consequently sought an order that the Taxing Mistress be directed to furnish the Society with the details of each of those matters referred to in par [30] of her further submissions. The Taxing Mistress did not object to such an order. We consider that it is a matter of grave importance that the Bar should, with expedition, investigate these and any other instances where warranted.

[56] Finally, there is the question of costs. Costs are infrequently granted in matters of this nature. The *amici* were engaged in the matter at the instance of the court. In our view they should bear their own costs. The plaintiff was unsuccessful in the review, having also abandoned a substantive challenge to the Taxing Mistress' decision shortly before the hearing. Ordinarily that would justify a costs order against the plaintiff. This matter, however, clearly raised an issue of considerable importance

regarding the duties of the Taxing Mistress. In our view it would be appropriate to order that each party bear their own costs.

[57] In the result the following order will issue:

1. The review of taxation is dismissed.
2. The Taxing Mistress is directed to furnish the Eastern Cape Society of Advocates with all relevant information relating to the fees charged by Advocates in the cases detailed in par [30] of her further submissions.
3. Each party is to bear its own costs in the review.

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**G. G. GOOSEN**

**JUDGE OF THE HIGH COURT**

**Stretch J**

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**I. T. STRETCH**

**JUDGE OF THE HIGH COURT**

**Malusi J**

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**T. MALUSI**

**JUDGE OF THE HIGH COURT**

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