

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3088/2021

A Quo: 2302/2014

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

LIFE ROSE PARK HOSPITAL

Applicant¹

and

TAXING MASTER OF THE HIGH COURT

First Respondent²

I.E. VAN REENEN

Second Respondent³

CORAM: OPPERMAN, J

HEARD ON: 21 October 2022

DELIVERED ON: 28 November 2022. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release

¹ Hereafter referred to as "Life Rosepark".

² "Taxing mistress". "Taxing master" is also used in the papers but will be regarded as reference to the "Taxing mistress".

³ Hereafter referred to as "Mrs. van Reenen".

to SAFLII on 28 November 2022. The date and time for hand-down is deemed to be 28 November 2022 at 15h00

JUDGMENT BY: OPPERMAN, J

SUMMARY: Rule 48 – Review – taxation – process – irregularities

JUDGMENT

[1] Taxation is a *judicial process* that must be honoured and applied in line with the Constitution of the Republic of South Africa, 1996. It is not a process in our justice system that may be revered less than any other and it is to be executed with the utmost commitment and professionalism. Taxation is a judicial hearing like any other.

Taxation has always been regarded as an integral part of the judicial process. The rights and obligations of the parties to a suit are not finally determined until the costs ordered by the court have been taxed. The only persons who can appear before a taxing master in a high court are accordingly persons who are permitted to practise in such courts.⁴

[2] Francis - Subbiah⁵ stated that:

While certainty about law is conducive to justice, judicial discretion plays a significant role in costs and taxation. However, it is not an unfettered discretion but one that is flexible within a guided structure. Irrespective of the court in which the taxation takes place, the function of taxing bills of costs requires the exercise of discretion in differing degrees, depending on the circumstances of the individual.

⁴ Cilliers, AC, *Law of Costs*, <https://www.mylexisnexis.co.za/Index.aspx>, Last Updated: October 2022 - SI 46 at 13.10.

⁵ *Taxation of Legal Costs in South Africa*, Juta & Company (Pty) Ltd, First Edition 2014, Corrected reprint 2015, ISBN: 978 0 70219 997 4 at “Preface” on page v.

[3] Justice Yvonne Mokgoro, former Justice of the Constitutional Court⁶ wrote that:⁷

Legal costs remain a contentious subject. In a number of ways, they determine a litigant's right of access to justice. For that reason, the courts have regularly cautioned against high legal costs. The Bill of Rights in the Constitution enshrines the right of all people to equality and all implicated rights. In addition, it affirms the basic democratic values of human dignity, equality, transparency, and protection and benefit of the law, anticipating the creation of a culture of human rights on which all legal relations will be based. Further, section 34 of the Constitution provides each person with the right to have any dispute resolved in a fair hearing before a court of law, impartial tribunal or forum. Notwithstanding this right, it will not materialise if legal costs remain unaffordable, thus placing legal services beyond the reach of most litigants and potential litigants.

Needless to say, based on the vast wealth gap that characterises South African society, the constitutional rights of equality and access to justice will forever elude the majority of litigants unless high legal costs, which courts have frequently warned against, are interrogated and rectified. That is the responsibility not only of the legal profession, but of the legal community as a whole. For that reason, reliable, accurate and shared information, published widely, is essential to stimulate discussion and debate, with a view to resolving the challenges and negative implications of high legal costs...

In South Africa, however, taxation of legal costs is a mechanism that may bridge the disparity between high costs and reasonable costs. Taxation is about the quantification of legal costs, which is at the heart of any costs issue.

Much of the knowledge and skills on taxation have been passed on by word of mouth and practice in courts. A good record of all aspects of the law of taxation essentially assists in eliminating uncertainty and ambiguity. Certainty of the law is preferred. Since hundreds of bills of costs are taxed every day in courts and

⁶ *Taxation of Legal Costs in South Africa, supra* at "Foreword" on pages vii to viii.

⁷ The quote is lengthy but it is worth every word.

numerous settlements are negotiated, awareness and knowledge will provide for informed application of discretion, which is essential for discussion, debate and solutions.

The presentation and opposing of a bill of costs is regularly done by persons other than the litigation practitioners themselves. Accordingly, a significant lack of knowledge of civil procedure is evident in the taxation proceedings. Therefore, emphasis has been placed on civil procedure for the benefit of those who may find it challenging.

[4] This is an opposed application for review of a taxed bill of costs. The matter was referred to open court in terms of Rule 48(6)(iv). Mrs. van Reenen was the plaintiff in a claim against Life Rosepark and another *a quo*. The merits were finalized by way of a settlement agreement. It was agreed that Life Rosepark will be liable for 100% of the plaintiff's claims. The merits' bill of costs was previously taxed and paid.

[5] The costs relevant here are in regard to the *quantum* hearing and the court order of Boonzaaier, AJ dated 10 May 2021. The amount in issue is R385 850.68 (R198 594.05 and R185 065.13 in respect of Adams & Adams' bill of costs and R2 191.50 in respect of the bill of costs of Spangenberg Zietsman and Bloem.)⁸

[6] The total *allocatur* of 4 November 2021 as per the disputed taxed bill of costs amounts to R 1 363 305.34. Life Rosepark, in an alleged effort to curb interest and further costs and under protest, paid the besieged amount in total on 25 November 2021. Mrs. van Reenen opposes the application for review and maintains that the taxing mistress correctly taxed the bill of costs and the *allocatur* of R 1 363 305.34 should stand.

[7] The judicially unconventional processes that have been and is at the order of the day in some taxation hearings must cease. The least to be expected is that a proper and good record is kept of the proceedings and not notes made here and there. In many a Rule 48 - review the court is confronted with no record at all or one

⁸ Paragraphs 88 and 89 of the Heads of Argument of Counsel for Mrs. van Reenen.

that is of little value. The versions of the parties that attended the taxation becomes the often-disputed tone of the review. This is the case here.

[8] The scene is set in the Notice of Intention to Tax the Bill of Costs,⁹ the Bill of Costs,¹⁰ the Notice of Intention to Oppose Taxation,¹¹ Annexures to the Notice of Intention to Oppose Taxation served and filed on 28 October 2021,¹² the Taxed Bill of Costs,¹³ the Notice of Review of Taxation in terms of Rule 48,¹⁴ the Taxing Master's Stated Case in terms of Rule 48(3),¹⁵ Applicant's (Second Defendant's) Submissions in terms of Rule 48(5)(a),¹⁶ Annexures to the Applicant's (Second Defendant's) Submissions in terms of Rule 48(5)(a),¹⁷ Plaintiff's Response to Defendant's Notice of Review in terms of Rule 48 and the Taxing Master's further Stated Case in terms of Rule 48(3),¹⁸ the Taxing Master's Report in terms of Rule 48(5)(b),¹⁹ Applicant's (Second Defendant's) Reply to the Taxing Master's Submissions in terms of Rule 48(5)(b),²⁰ Plaintiff's Response to the Taxing Master's Report in terms of Rule 48(5)(c),²¹ the documents contained in the Bundle indexed on 5 October 2022: "INDEX: AFFIDAVIT (sic) (FILED IN PURSUANCE OF DIRECTIVE DATED 26 AUGUST 2022), Heads of Argument by the applicant in the review and the Heads of Argument by the second respondent in the review and oral arguments on 21 October 2022. The lack of a proper record of the taxation hearing itself causes the evidentiary value of the documents filed to be considered with caution and for what it is.

⁹ SUPPLEMENTARY INDEX: TAXATION BUNDLE at pages 1-3.

¹⁰ SUPPLEMENTARY INDEX: TAXATION BUNDLE at pages 4-55.

¹¹ SUPPLEMENTARY INDEX: TAXATION BUNDLE at pages 56-99.

¹² SUPPLEMENTARY INDEX: TAXATION BUNDLE at pages a-x.

¹³ SUPPLEMENTARY INDEX: TAXATION BUNDLE at pages 100-131.

¹⁴ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 1-16.

¹⁵ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 17-31.

¹⁶ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 32-65.

¹⁷ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages a-aa.

¹⁸ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 66-87.

¹⁹ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 88-102.

²⁰ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 103-114.

²¹ SUPPLEMENTARY INDEX: REVIEW OF TAXATION IN TERMS OF RULE 48 BUNDLE at pages 115-117.

[9] Allegations were swung around and unfortunate remarks made. I immediately stopped the mudslinging and denigration and identified issues to be addressed before the specific items objected to may be addressed. A Directive dated 26 August 2022 was issued:

Having considered the Notice of Review of Taxation in Terms of Rule 48²² and the other documents filed of record and having heard the legal practitioners for the applicant, the respondent and the Taxing Master in chambers on 15 August 2022;

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RULE 48 OF THE UNIFORM RULES OF COURT

- (1) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within 15 days after the allocatur by notice require the taxing master to state a case for the decision of a judge.
- (2) The notice referred to in sub-rule (1) must—
 - (a) identify each item or part of an item in respect of which the decision of the taxing master is sought to be reviewed;
 - (b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the taxing master;
 - (c) contain the grounds of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and
 - (d) contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating ground of such challenge, but not argument in support thereof.¹
- (3) The taxing master must—
 - (a) supply his or her stated case to each of the parties within 20 days after he or she has received a notice referred to in sub-rule (1); and
 - (b) set out any finding of fact in the stated case.²
- (4) Save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed or allowed, as the case may be, and which the dissatisfied party seeks to have allowed or disallowed respectively, is less than R100.
- (5)
 - (a) The parties to whom a copy of the stated case has been supplied, may within 15 days after receipt thereof make submissions in writing thereon including grounds of objection not raised at the taxation, in respect of any item or part of any item which was objected to before the taxing master or disallowed, *mero motu*, by the taxing master.
 - (b) The taxing master must within 20 days after receipt of the submissions referred to in paragraph (a), supply his or her report to each of the parties.
 - (c) The parties may within 10 days after receipt of the report by the taxing master, make further written submissions thereon to the taxing master, who shall forthwith lay the case together with the submissions before a judge.
- (6)
 - (a) The judge may—
 - (i) decide the matter upon the merits of the case and submissions so submitted;
 - (ii) require any further information from the taxing master;
 - (iii) if he or she deems it fit, hear the parties or their advocates or attorneys in his or her chambers; or
 - (iv) refer the case for decision to the court.
 - (b) Any further information to be supplied by the taxing master to the judge must also be supplied to the parties who may within 10 days after receipt thereof, make

IT IS ORDERED THAT:

1. The matter is referred to open court in terms of Rule 48(6)(iv) for hearing and adjudication on 14 October 2022 at 9h30.²³
2. The applicant in the Review must ensure that the court documents are properly bound and indexed.
3. The items listed from page 2 to page 15 of the Notice of Review of Taxation will be addressed after the issues *in limine* were disposed of.
4. The following issues *in limine* to be specifically addressed at this sitting:
 - i. "The Notice of Intention to tax a bill of costs obo Adams & Adams (Unsigned Notice) was dated 1 October 2021. The bill of costs was not accompanied by a signed certificate by the attorney of record in terms of Rule 70. The notice was not signed by the instructing attorney."²⁴
 - ii. "In terms of Rule 70 the process is, to serve the bill of costs, the defendant shall have 10 days to inspect the file and then a further 10 days to serve the notice of intention to oppose. No further 10 days was given for taxation date."²⁵
 - iii. "The Taxing Mistress informed the parties before the taxation formally commenced that she had seek the assistance of two Judges, namely Judge Daffue & Mavimbela. Judge Daffue agreed to assist the Taxing Mistress and they worked through the bill of costs and opposition together discussing their point of views in regard the matter. During the taxation process the Taxing

written submissions thereon to the taxing master, who shall forthwith lay such information together with any submissions of the parties thereon before the judge.

(7) The judge or court deciding the matter may make such order as to costs of the case as he or she or it may deem fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge or court.
[R. 48 substituted by GN R849 of 2000.]

²³ The date was moved to 21 October 2022 to suit all the parties.

²⁴ Notice of Review of Taxation.

²⁵ Notice of Review of Taxation.

Mistress throughout her rulings made mention of Judge Daffue's opinions regarding the certain item and that she agreed thereto."²⁶

Is it the allegation that Judge Daffue's conduct was irregular and unethical and that the taxation rulings were those of the Judge and not the Taxing Mistress?

iv. The alleged personal attacks against each other during and after the taxation and conflict of interest in general, must be addressed. The allegations against Mr. Morne Scheepers of a conflict of interest must be addressed. What exactly are the allegations, wherein lies the conflict of interest and what are the consequence thereof?

v. The issue of hearsay as to the allegation of irregular handling of the taxation must be addressed.

vi. The case on review is allegedly different than the case during taxation.

"As per submission by the Taxing Master in Paragraph 16 Rule 48 makes it clear that a party can only take a ruling, that they are dissatisfied with, on review. Therefore, we agree with the submissions made by the Taxing Master pertaining to the items objected to. Items not ruled on can therefore not be taken on review."²⁷

"It is the Plaintiff's submission that the review does not indicate the reasons why the Defendant is dissatisfied with the rulings made by the taxing master, but is merely attempting to have the account retaxed be (sic) another person in an attempt to get a different outcome."

vii. The issue of the *dies non* and the late filing of papers must be addressed.

viii. The allegation of misinterpretation of the court order *a quo* must be explained.

²⁶ Notice of Review of Taxation.

²⁷ Plaintiff's Response to Taxing Master's Report at paragraphs 2 and 4.

ix. The issue of applicable Directives and Practise of this division *vis-a-vis* that of other divisions caused apparent confusion and allegations. What was this in relation to and how did this affect the taxation?

x. What is the total in the difference of the amount claimed after review and that allocated by the Taxing Master?

5. The parties must address the court on the costs aspect of this Review on the issues *in limine*.

6. The matter has been ongoing since November 2021 and unreasonable delays will not be tolerated. I requested the allocation of two days for this hearing but only one was forthcoming. The matter must thus be dealt with, with due diligence and care to maximise the use of time on the 14th of October 2022.

7. The parties must file their Heads of Argument on 5 and 7 October 2022 respectively before 12h00.

8. If any of the parties intent to adduce oral evidence the affidavits of said witnesses; properly commissioned, must be served on all the parties and the court not less than twenty (20) days after the date of this order.

[10] It must be reminded that: "The legal profession is a 'distinguished and venerable profession' and its members are officers of the court. As a result, 'absolute personal integrity and scrupulous honesty' are expected of them."²⁸

It followed that a taxing officer was entitled to take counsel's fee list at face value as constituting a record of the work that has been done. The honesty and professional ethics of counsel ought not to be lightly questioned.

[11] The allegations:

²⁸ *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) ([2012] ZASCA 175) at paragraph 87 and as quoted in *Trollip v Taxing Mistress, High Court and Others* 2018 (6) SA 292 (ECG) at [18] – [20] and [29].

1. At paragraph 169 of the affidavit of the costs consultant for Life Rosepark that attended the taxation proceedings; she highlighted the fact that Rule 70²⁹ of the

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RULE 70 OF THE UNIFORM RULES OF COURT

- (1) (a) 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 so to do.
- (b) The provisions relating to taxation existing prior to the promulgation of this sub-rule shall continue to apply to any work done or to be done pursuant to a mandate accepted by a practitioner prior to such date.
- (2) 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 properly to determine any matter arising from such taxation.
- (3) With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.
- (3A) Value added tax may be added to all costs, fees, disbursements and tariffs in respect of which value added tax is chargeable.
- [Inserted by GNR.406 of 1992 and substituted by GNR.798 of 1997.]
- (3B) (a) 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—
- (i) afford the party liable to pay costs at the time therein stated, and for a period often (10) days thereafter, by prior arrangement, during normal business hours and on any one or more such days, the opportunity to inspect such documents or notes pertaining to any item on the bill of costs; and
- (ii) require the party to whom notice is given, to deliver to the party giving the notice within ten (10) days after the expiry of the period in subparagraph (i), a written notice of opposition, specifying the items on the bill of costs objected to, and a brief summary of the reason for such objection.
- (b) For the purposes of this sub-rule, the days from 16 December to 15 January, both inclusive, must not be counted in the time allowed for inspecting documents or notes pertaining to any item on a bill of costs or the giving of a written notice to oppose.
- [Sub-r. (3B) inserted by r. 2(a) of GNR.90 of 12 February 2010 and substituted by GNR.107 of 7 February 2020.]
- (3C) No taxation shall be set down in the days from 16 December to 15 January, both inclusive, except—
- (a) where the period for delivery of the notice to oppose has expired, before the commencement of the period 16 December and 15 January, both dates inclusive, and no notice of intention to oppose has been delivered;
- (b) where the party liable to pay the costs, has consented in writing to the taxation in his or her absence; or
- (c) for the taxation of writ and post-writ bills.
- [Sub-r. (3C) inserted by GNR.107 of 7 February 2020.]
- (4) The taxing master shall not proceed with the taxation of any bill of costs unless he or she is satisfied that the party liable to pay the costs has received—
- (a) due notice in terms of sub-rule (3B); and

(b) not less than 10 days' notice of the date, time and place of such taxation and that he or 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 or her absence;
- (ii) if the party liable to pay the 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 the notice to oppose in terms of sub-rule (3B)(a)(ii), the taxation may proceed in their absence.

[Sub-r. (4) substituted by r. 2(b) of GNR.90 of 12 February 2010, by GNR.1055 of 29 September 2017 and by GNR.107 of 7 February 2020.]

- (5) (a) The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.
(b) In computing the fee to be allowed in respect of items 1, 2, 3, 6, 7 and 8 of Section A; 1, 2 and 6 of Section B and 2, 3, 4 and 7 of Section C, the taxing master shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute and any other factors which he considers relevant.
- (5A) (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 the 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 the making of 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 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 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 chambers at his or her discretion.
[Inserted by GN 1723 of 1998]
- (6) (a) In order to diminish as far as possible, the costs arising from the copying of documents to accompany the briefs of advocates, the taxing master shall not allow the costs of any unnecessary duplication in briefs.
(b) Fees may be allowed by the taxing master in his discretion as between party and party for the copying of any document which, in his view, was reasonably required for any proceedings.
- (7) Fees for copying shall be disallowed to the extent by which such fees could reasonably have been reduced by the use of printed forms in respect of bonds, credit agreements or other documents.
- (8) 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.
- (9) Save for the forms set out in the First Schedule to these Rules, a page shall contain at least 250 words and four figures shall be counted as a word.
[Substituted by GNR.1557 of 1996.]
- (10) The costs taxed and allowed in terms of the tariff for acts performed after the date of commencement of the rules published by Government Notice R.210 of 10 February 1989 shall be increased by an amount equal to 70 per cent of the total amount of

Uniform Rules of the court allows for a signed certificate to be presented as proof of work done. She does indeed acknowledge that the taxing mistress has a discretion on this issue in terms of the Rules and they apparently did not object thereto during the taxation. Counsel for Mrs. van Reenen attached a certificate dated 14 October 2022 to their heads of argument. It was pointed out that other divisions demand this certificate in their directives. The applicant in the instance complained that the issue was not even attended to; it was not considered. *This was declared as symptomatic of the fact that the taxing mistress did not apply her mind to the discretion and execute her duty to ensure that the costs claimed carry veracity. The certificate was crucial in the instance because the costs consultant that attended on behalf of Mrs. van Reenen was not the attorney of record.*

2. Although Life Rosepark did not take the issue further during this hearing of the review, they maintained in their critique of the taxing mistress that the notice of intention to tax was served on 1 October 2021 with the intended taxation date of 1 November 2021. It is alleged that the period that was to be provided was firstly, 10 days to inspect in terms of Rule 70(3B)(a)(i) and a further 10-day period thereafter to compile a written notice of objection as per Rule 70(3B)(a)(ii). In addition, had the taxing mistress the obligation to ascertain that the Rule 70(4)(a) – notice in terms of Rule 70(3B) was provided. This was apparently not done; *legislatively prescribed processes were not adhered to*. Counsel for Mrs. van Reenen indicated that the applicant was provided with the necessary opportunity as is the practice in the Free State Division of the High Court.

3. The taxation was set down for 1 November 2021 but as result of the belated voting day, rescheduled to 4 November 2021. During the taxation the representative of Life Rosepark highlighted the notice of intention to oppose the taxation and that it contained all of the noted objections to the items of the intended bill of costs. She continued to read out the content of the notice to oppose but the taxing mistress

such costs, for acts performed after the date of commencement of the rules published by Government Notice R.2410 of 30 September 1991 shall be increased by an amount equal to 100 per cent of the total amount of such costs and for acts performed after 1 July 1993 only the Tariff of fees of attorneys in rule 70, published by Government Notice R.974 of 1 June 1993, shall apply.
[Substituted by GNR.210 of 1989, by GNR.2410 of 1991, by GNR.974 of 1993 and by GNR.1557 of 1996.]

directed her to stop. The justification for this was explained to be that the notice of intention to oppose was placed before the taxing mistress and she could identify the objected items. From the affidavit filed by the costs consultant it seems as if she took offence hereto in that *she was not granted the opportunity to state her case.*³⁰ *The audi alteram partem rule was negated.*

4. It is the case for the applicant that during engagement in the taxation the taxing mistress notified the parties that she attended to judge(s) of the Bloemfontein division to assist her with the approach to the taxation. She specifically referred to a certain judge by name and his remarks on the items of the bill of costs and the objections registered thereto during the course of the taxation. At paragraphs 23 to 25 of her statement the costs consultant made it clear that she does not have difficulty with the notion that the bill of costs and the opposition was discussed with the judge(s) since it forms part of the public record. The conundrum lies in the conduct of the taxing mistress in that it became apparent to the parties that “she did not individually and with her own discretion arrive at the rulings to the various objections presented by the applicant in writing and orally.” This aspect was cemented by the repeated recordals by the taxing mistress and before her ruling that an item will be allowed resultant to the “opinion of the judge.” The objection is not against the judge but the fact that the taxing mistress relied on a presiding judge to arrive at a conclusion. This skews the entire decision-making power of the taxing mistress and brings into question whether her discretion was applied judicially. *It was the decisions of a judge that was merely transplanted onto the proceedings. This, without him having heard the arguments of the parties and attending the proceedings.*

5. The issue of a conflict of interest does not lie as a ground for review but was apparently a “discussion” during taxation of the information possessed by Morne Scheepers Costs Consultants, insofar as Mrs. Meyer is a representative of his office and attended the consultation. Mr. Scheeper’s office also acted for the first respondent in the matter at some stage. The issue is important and it does not make sense why it would be raised if Life Rosepark does not want to rely on the aspect in

³⁰ Paragraph 15.3 of her affidavit.

the review. This is however suggestive of the *recalcitrant atmosphere that apparently prevailed during the taxation hearing*.

6. The taxing mistress alleged that the grounds for review are based on hearsay. Again, the *unbecoming bickering of the participants to the taxation* comes to the fore. Life Rosepark maintains that this “manifest in the form of further grounds of objections to the items and other aspects that impacts on the alleged irregular outcome of the taxation.”³¹ This is the allegation stated by the taxing mistress.³²

3.

It is important to note that Mrs Koen who brings this Application of review in terms of Rule 48 on instruction of Whalley van der Lith Attorneys was not present during the taxation. She drafted the Notice to Oppose the Taxation and schooled Mrs Hattingh in what she wanted Mrs Hattingh to present during taxation. Mrs Hattingh on her turn then conveyed the instructions of Mrs Koen to Mrs Van Greunen as to what they want her to present during the taxation.

Mrs Koen bears no direct knowledge or evidence on what arguments were before me during taxation as well as how I made my rulings. Mrs Koen bases her Review of Taxation on hearsay information from Mrs Hattingh who found her information from Mrs van Greunen. *I was informed by both Mrs Hattingh and van Greunen that they advised Mrs Koen, in their view, not to take this matter on review.* (Accentuation added) The last remark shows that irregular discussions took place between the taxing mistress and others. It also shows that a proper record of the proceedings to which could have been referred before the review was launched, would have rescued the case from many of the issues.

7. The parties during the hearing of the review wanted for the issues of the case on review that differs from the case during taxation to stand over. The point is taken but the costs consultant of Life Rosepark maintained that: “174.3... I accept that certain of the earlier objections have been adapted. From the body of case law, I

³¹ Paragraph 173.2 of the affidavit of the costs consultant for Life Rosepark.
³² Paragraph 3 of the Stated Case in terms of Rule 48(3).

understand that this is allowed.” At 174.4 she declared that: “Where there are any items that have not been objected to, I accept that such item, if ruled upon by the taxing mistress, cannot form part of the review.” This shows fault to be attributed to Life Rosepark.

8. On the issue of the *dies non* and late filing of papers by the taxing mistress the costs consultant accepts the explanation of the taxing mistress but points out that: “175.2 From the facts of the matter, it is evident that the taxing mistress filed her stated case only in January 2022. This whilst the rules direct that such stated case was to be filed within a prescribed time period.” Rules 48 and 70 do not allow for the suspension of *dies* for the exchange process. *Again, the allegation to non-compliance to the Rules of Court.* Counsel for Mrs. van Reenen pointed to the fact that *dies non* is applicable.³³

9. Life Rosepark maintains the misinterpretation of the court order is a crucial mistake by the taxing mistress. The issue was appropriately addressed in the heads of argument for Mrs. van Reenen at paragraphs 75 to 82; for now. It might become relevant when the items are taxed or reviewed. The parties agreed during the hearing to have this issue stand over for when the items are specifically dealt with.

10. Paragraph 4 of the stated case of the taxing mistress poured fuel on the fire of irregularities. The Free State Division does not have relevant Practice Directives. Life Rosepark maintained that it speaks to the issue of the certificate and that it creates legal uncertainty. Practise Directives do not overrule any statute, common law or Uniform Rules of the Court. By stating that the Free State “bangs their own drum” the taxing mistress emphasised the *legislatively rogue manner in which taxations are apparently approached in the Free State by her.*

4.

Furthermore, it is important to note with regards to Mrs Koen’s general notes and introduction of the Application for the Review of taxation, that each court has their own practice directives specially in terms of taxations. *The Free State High Court*

³³ Paragraphs 67 to 74 of their Heads of Argument.

bangs their own drum and is by no means bound by the practice directives of the Gauteng High Court.

[12] Justice must be seen to be done.³⁴ Presiding officers and legal practitioners must conduct themselves with the utmost honour and not swing allegations around just to later not, in some instances, rely upon it. All the participants to the taxation in the instance overstepped the boundaries of the proper administration of justice with their inuendo's and allegations. This scenario is not novel and tempers do flare up in taxation hearings³⁵ but it is crucial that professionalism and respect for the administration of justice should prevail. The parties have gone too far and the matter does not epitomize and represent just process. Taxation proceedings must be honoured for what it is.

[13] I cannot put it better than what was stated by Plasket, J (Smith, J and Lowe, J concurring) in *Trollip v Taxing Mistress, High Court and Others* 2018 (6) SA 292 (ECG):

The test on a review of taxation is:

[13] AC Cilliers in *Law of Costs* states that taxation of costs 'has always been regarded as an integral part of the judicial process' and that the rights and obligations of parties to litigation 'are not finally determined until the costs ordered by the court have been taxed'. Apart from this, taxation also ensures

³⁴ *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) at paragraph [48]:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and the ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any relevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial."

³⁵ *Smith v MEC for Health, Mpumalanga* 2021 (6) SA 53 (ML).

that 'the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of the litigation which resulted in the order for costs'.

[14] These purposes are captured in rule 70(3) which reads as follows: 'With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[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 and 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.

[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.'

The discretion of the taxing master is:

[17] Cilliers in *Law of Costs* said the following of the discretion vested in a taxing master:

'The discretion vested in the taxing master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words reasonable and *in the opinion of the taxing master* that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. *The discretion to decide what costs have been necessarily or properly incurred is given to the taxing master and not to the court.* It is now a well-established rule that in regard to *quantum*, both as to the qualifying fees for medical expert witnesses, other expert witnesses, and counsel's fees, the decision of the taxing master is a discretionary one. (Accentuation added)

The taxing master has a discretion to allow, reduce or reject items in a bill of costs. *This discretion must be exercised judicially in the sense that he or she must act reasonably, justly and on the basis of sound principles with due*

regard to all the circumstances of the case. Where the discretion is not so exercised, the decision will be subject to review. (*City of Cape Town v Arun Property Development (Pty) Ltd* 2009 (5) SA 226 (C) [at] 232.) In addition, even where the discretion has been exercised properly, a court on review will be entitled to interfere where the decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances, or as to the practice of the court.

The taxing master's discretion is wide, but not unfettered. In exercising it the taxing master must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned. The discretion is not properly exercised if such facts or circumstances are ignored or misconstrued.' (Accentuation added)

[18] A taxing master is required to approach the task of taxing a bill of costs with an open mind. In *Botha v Themistocleous* the court held that a taxing master's function is not limited to merely fixing fees on the assumption that work that has been charged for has in fact been done: he or she should not 'close his [or her] eyes and ears to evidence' that may show that work alleged to have been done had not been done. We would add, however, that this would normally only arise if a dispute is squarely raised in a taxation or where good reason exists to suspect that the services claimed for have not been performed. In circumstances such as these, the taxing master is under a duty to afford the affected party an opportunity to deal with any disputed questions of fact. (Accentuation added)

[19] As a taxing master must have a full picture before him or her, in order to determine just remuneration for work done, he or she may have to determine disputes of fact. In *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd)* the following was said of this function:

'In the light of this discussion of the authorities, I am of the opinion that the Taxing Master has the power, and in some instances (rare though they may

be) the duty, to hear oral evidence on disputed questions of fact arising out of the taxation before him. It follows, in my view, that in the occasional instance in which the Taxing Master hears oral evidence, it must be taken to be his duty to keep a record of that evidence, and of his findings of fact based upon the evidence. Therefore, when the Taxing Master is required in terms of Rule 48(1) to state a case in respect of a matter in which he has heard evidence, he will not be expected to rely entirely on his memory, and the record kept by him will assist him in drawing up the stated case.' (Accentuation added)

[21] It is the duty of the taxing master to ensure that the expenditure claimed was reasonably incurred and is a reasonable fee. It is in this context that his or her discretion is to be exercised with due regard to the purpose for which taxation is intended. (Accentuation added)

[14] The inappropriate remarks and conduct of the parties contaminated the administration of justice. The irregularities committed and alleged are just too grave and material to let it slide. The whole of the taxation hearing and the findings of the taxing mistress must be set aside. No order will be made as to costs as it is not clear without a record what and who exactly caused the proceedings to derail.

[15] ORDER

1. The whole of the taxation hearing and the *allocatur* of costs of 4 November 2021 are reviewed and set aside.
2. The matter is referred back to the Taxing Master of the High Court: Free State, Bloemfontein for taxation anew and before a different taxing master/taxing mistress than the taxing mistress that presided in the 4 November 2021 taxation.
3. There is no order as to costs.

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