IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4992/2014

In the matter between:

WH VAN PLETZEN Applicant

and

TAXING MASTER OF THE HIGH COURT 1st Respondent

ROAD ACCIDENT FUND Defendant

FREE STATE SOCIETY OF ADVOCATES Amicus Curiae

JUDGMENT BY: MHLAMBI J,

DELIEVERY ON: 15 JANUARY 2021

REVIEW OF TAXATION

MHLAMBI, J

[1] This is a review of taxation as contemplated in Rule 49 (1) of the Uniform Rules of Court. The applicant was dissatisfied with the ruling of the taxing master for having disallowed certain items on the taxed bill of costs. On 28 May 2019, a notice of review was filed requiring the taxing master to file a stated case in terms of Rule 48 (3) of the Uniform Rules of Court.

[2] The taxing master duly filed a stated case on 25 June 2019 and the respondents filed written submissions in terms of Rule 48 (4) (a) on 16 July 2019. The Free State Bar made known its wish to be joined in the review proceedings and, on 25 September 2019, notified that all the parties had consented to its joinder in the proceedings. It filed its request to be joined as well as its submissions on 27 January 2020. The taxing master's report in terms of Rule 48 (5) (b) was filed on 22 May 2020. No further submissions were made by the parties.

[3] The items which were the cause of the dissatisfaction were set out as follows in the review notice:

"1. Item 167 where the taxing master disallowed one third of counsel's trial fee for 17 May 2017 despite counsel's fees been reasonable and in accordance with the current practise, fees structure and/or guidelines of the Free State Society of Advocates, which allows counsel to charge a standard day fee and charge separately for preparation.

2. Item 277 where the taxing master disallowed one third of counsel's trial fee for 29 August 2018, 31 August 2018 and 17 September 2018 despite counsel's fees been reasonable and in accordance with the current practise, fee structure and/or guidelines of the Free State Society of Advocates, which allows counsel to charge a standard day fee and charge separately for preparation.

3. Item 277 where the taxing master disallowed an amount of R 6 700.00 for "perusal of documents, drafting notice of intention to amend (4.35 hours)" despite counsel's fees being reasonable, being marked on the basis of actual time spent and not being excessive having regard to the complexity of the matter and the various medical experts involved.

4. Item 277 where the taxing master disallowed an amount of R 5 100.00 for "drafting heads of argument (8.75 hours)" despite counsel's fees being reasonable, being marked on the basis of actual *time spent and not being excessive having regard to the complexity of the matter and the various medical experts involved."*

[4] In his stated case, the taxing master averred that on the date of the taxation, items 167 and 277 (counsel's invoice) were objected to by Ms Letswalo based on their being excessive. In determining the reasonableness of the fees charged, he disallowed two thirds of the counsel's fee regarding items 167 and 277 and not one third as indicated on the plaintiff's notice of review dated 27 May 2019. His decision was informed by the case law, legal literature and the purpose of taxation as contained in Rule 70 (3) of High Court Rules to ensure that the parties were treated fairly when an order of costs was made. In his determination of the reasonableness of the counsel's fee, he took into consideration the seniority of the counsel, the hourly tariff charged by the counsel at the time the work was done, the actual time spent for doing the work e.g. the number of pages perused, drafted, settled, preparation and reasonable time of consultation etc. as well as the nature and complexity of the matter[1].

[1] Paragraphs 6 and 10 of the Taxing Master's stated case Notice

[5] The calculations of the amounts taxed off on the counsel's tax invoice are outlined as follows in the taxing master's stated case:

"vi) Appearance on 17/05/2017 during second day of merit trial, when merit trial was concluded and judgment reserved @ R 18 500.00 for 10 hours plus VAT of 14% = R 21 090.00, which I ruled during taxation that the two thirds of the first day fee should be disallowed. The two thirds was calculated as follows:

R 21 090 (including VAT) x 2= R 42 180.00

R 42 180/3= R 14 060.00

R 21 090.00 subtract R 14 060.00= R 7 030.00.

R 7 030.00 plus 14%= R 8 014.20, total disallowed and taxed off in terms of the two- thirds principle.

Consequently, counsel was allowed an amount of R 13 075.80 as a refresher fee. I consider the above fee reasonable taking into account the nature, the complexity and the actual time spent by counsel on the matter.

viii) Trial fee for handling of matter on 29/08/2018 for 10 hours @ R 2 000.00 per hour= R 20 000.00, which I disallowed due to two thirds principle.

The two- third was calculated as follows:

R 20 000.00 multiply by 2 = R 40 000.00

R 40 000.00/3= R 13 333.33

R 20 000.00 subtract R 13 333.33= R 6 666.67.

R 6 666.67, disallowed and taxed off in terms of the two thirds principle.

ix) *Trial fee for handling of matter on 31/08/2018 for 10 hours @ R 2 000.00= R 20 000.00, which I disallowed due to two- thirds principle. The two-third was calculated as follows:*

R 20 000.00 multiply by 2 = R 40 000.00

R 40 000.00/ 3 = R 13 333.33

R 20 000.00 – R 13 333.33 = R 6 666.67

R 6 666.67, disallowed and taxed off in terms of the two- thirds principle.

x) *Trial fee for handling of matter on 17/09/2018 for 10 hours@ R 2 000.00 = R 20 000.00, which I disallowed due to two- thirds principle. The two-third was calculated as follows:*

R20 000.00 multiply by 2=R40 000.00

R40 000.00/3= R 13333.33

R 20 000.00 subtract R 13333.33=R 6 666.67

R 6 666.67, Disallowed and taxed off in terms of the two-thirds principle.

iv) *Perusal of documents, drafting notice of intention to amend on the 20/06/2018- 02/07/2018 for 4.35 hours @ R 2 000.00 per hour= R 8 700.00, which I disallowed an amount of R 6 700.00 and allowed perusal of 3 pages at 30 pages per hour=1 hour. The amount of R 2 000.00 was therefore allowed. A fee for drafting notice of intention to amend was disallowed as it was already charged for by the attorney in terms of item 211 of the bill of cost.*

xi) *Drafting heads of argument on the 21/09/2018 for 8.75 hours @ R 2 000.00= R 17 500.00, which I disallowed an amount of R 5 100.00 and allowed drafting of 31 pages @ 4 pages per hour=6.2 hours. Thus, 6.2 hours multiply by R 2 000.00 per hour= R 12 400.00 was allowed for drafting of heads of argument."*

[6] The applicant submitted that the trial fees of counsel were reasonable and in accordance with the current practice, fee structure and/or guidelines of the Free State Society of Advocates, which allowed counsel to charge a standard fee and charge separately for preparation and other work. The portion of counsel's fees in both items 167 and 277 for the dates 17 May 2017, 29 August 2018, 31 August 2018, and 17 September 2018 should not have been disallowed. The total time spent on perusal of documents, the drafting of a memorandum and the drafting of the intention to amend consisted of 12.85 hours. The total

number of pages perused by counsel was a minimum of 650 pages which would have taken 21.67 hours to peruse at 30 pages per hour.

[8] Relying on *Trollip v The Taxing Mistress of the High Court and three others*[2], the applicant submitted that counsel was entitled to be fairly compensated as a professional for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter. In the absence of evidence to the contrary, a taxing mater's starting point should be that advocates, as members of an honourable profession, render fees honestly and behave ethically. It takes time to refine and streamline heads of argument. The number of pages containing heads of argument may not reflect the time spent on their drafting as counsel has to be brief but comprehensive and avoid lengthy and verbose heads of argument. Counsel's fees should have been allowed in full for the perusal of the documents.

[9] The Society of Advocates joined, firstly, as its members had a direct interest in the applicant's objections to the rulings made by,

[2] Case number 6091/2018 ECD (Grahamstown) which was delivered on 31 July 2018.

and fees disallowed by the taxing master. Secondly, the criteria used by the taxing master to decide upon the advocates' reasonable remuneration in the given circumstances were, in the society's opinion, irrational and based on outdated taxing principles.

[10] The Society submitted that the taxing master was satisfied that the counsel's hourly fees in the amount of R 1 850.00 should be allowed. Similarly, the day fee(court day) in the amount of R 18 500.00,[3]was considered as fair and reasonable by the taxing master and was allowed for counsel's appearance on 16 May 2017 which was the first day of the trial. Although the base fee is, in terms of the society's recommendations, the "hourly" fee, a day fee could not be calculated on the hours spent in court under normal circumstances. The normal hours of the court were in total 5,15 minutes per day. The counsel was briefed to represent the plaintiff in court on 17 May 2017 and was therefore entitled to a day fee which was the hourly fee of R 1 850.00 multiplied by 10. As he was briefed and reserved to appear on behalf of the plaintiff on that day, he was not allowed to accept a brief for another appearance in court or conduct consultations in

[3] Being the "base fee" multiplied by 10 as recommended by the Society to its members.

chambers on that day even if he anticipated that the matter would be postponed or settled. If he had done so, his conduct would have been regarded as unprofessional conduct which was punishable.

[11] It was submitted that the calculation of the fees allowed by the taxing master was for the most part incomprehensible. He did not disclose what the “actual time spent” by counsel on the matter was or what the significance of the “time spent” was, taking into consideration that counsel claimed payment of his day fee which was R 18 500.00 (excluding VAT). The Society assumed that the taxing master believed that the day fee claimed for the appearance on 17 May 2017 was based on 10 hours. The allowance of the one third of counsel’s first day fee was never the principle on which a refresher fee was calculated. The calculations concerning item 167 were erroneous as the amount of R 13 075.80 allowed by the taxing master as a refresher did not tally with a refresher fee of one- third or even two- thirds of the counsel’s day fee.

[12] The principle of the two-thirds rule was outdated and had not been applied consistently by advocates in any division of the high

court. The “first day trial fee” was not charged by counsel in this division of the high court for the past 20 years. Counsel charged per hour for preparation for trial, for consultation, advise on evidence, heads of argument and the like. The fees charged for days spent in court are considered as a “day fee” whether the matter proceeded to trial or only argued or is postponed or settled. The society supported the applicant’s written submissions to the taxing master’s stated case and the relief claimed.

[13] In his report in terms of section 48(5)(b) of the Rules, the master maintained that during taxation, two-thirds of the counsel’s fee was disallowed in respect of items 167 and 277 of the plaintiff’s bill of costs and not one-third as indicated in the plaintiff’s notice of review. This statement is not supported by the calculations. The calculations themselves are fraught with mistakes as shown below.

[14] Items 167 (*vi)* and 277 (viii), (ix) and (x) which related to the alleged two-thirds to be disallowed in terms of that principle, showed clearly that, instead of two-thirds, only one-third was disallowed and subtracted. The day fee was multiplied by 2 (probably in an endeavour to give effect to the alleged two-thirds

principle) and the total divided by 3 which resulted in the one-third of the bigger total but in essence a two-thirds of the day fee. Once this amount is deducted from the day fee, the amount disallowed is but a third of the day fee. It behoves to mention that in item 167(vi), the 14% VAT was deducted twice as the amount of R21 090.00 was inclusive of VAT.

[15] In item 277(xi), 6.2 hours (or 31 pages @ 4 pages per hour) were allowed for the drafting of the heads of argument @ R2000.00 per hour, giving a total of R12 400.00 The correct calculation on these

figures appears to be 7.75 hours which would give a total amount of R15 500.00.

[16] Rule 70 (3) of the Uniform Rules of court provides 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." The successful party must be given a full indemnity in respect of all costs reasonably incurred.[4]

[17] In *General Council of the Bar of South Africa v Geach and Others*[5], it was stated that in current practice, many advocates charge separately for their preparation, a first day fee on trial should not be markedly different from the refresher because they are compensating for the same work- the day in court. I find the following passage from *City of Cape Town v Arun Property Development (Pty) Ltd and another* [6]appropriate:

" [30] To reiterate, in matters of this nature I would expect the taxing master in considering the question of counsel's fees to adopt an approach along the following lines:

1. *Consider the nature and complexity of the mater: What did the matter involve? How voluminous were the papers? Were there difficult areas*

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[4] Kloot v Interplan Inc and Another 1994 (3) SA 236 SECLD at 239 H.

[5] 2013 (2) SA 52 (SCA)

[6] 2009 (5) SA 227 (C)

of law involved or was the claim of particular importance to the parties by virtue, for example, of the amount of money involved? Did it involve an unusual amount of time spent in court?

2. *Consider the work done by counsel: How difficult or complex were the matters dealt with in the heads of argument? How long did counsel spend drafting heads of argument? How long did counsel spend considering the opponent's heads of argument and authorities? How long did counsel spend preparing his or her oral address to court?*

3. *Consider counsel's fee: Do they fall within the parameters familiar to the taxing master? Is it clear what is being charged for? Are all the charges covered by the costs award made?*

4. *Consider what is reasonable: In this regard the consideration that the litigant must not be out of pocket in respect of party and party fees charged by counsel must be taken into account together with the recognition that a reasonable rate coupled with reasonable time spent may not always, but certain can, amount to a reasonable basis for the taxation of counsel's fees. If the taxing master is of the opinion that the time taken by counsel to perform a given task is reasonable on a party and party basis and the rate at which he or she charged is reasonable, then the litigant should be entitled to an indemnity in respect of such charges.*

5. *Consider the totality of the fee for the matter: If the fee charged for the work done prior to the hearing is reasonable and the work done qualifies as party and party attendances, then the fee for such attendances should be added to the fee for the "refresher fee" charged. By way of example, if in this matter the taxing master determines that it was reasonable to spend 5 hours drafting or settling heads of argument, 5 hours reading and considering the respondent's heads of argument and authorities and 5 hours preparing for the oral argument, she would allow a fee on exception of the equivalent of 2 days and 15 hours. If she felt an excessive amount of time was spent on items of preparation, she should disallow a fee for such excessive time."*

[18] The Taxing master must strike a moderating balance which affords an innocent party adequate indemnification within reasonable bounds. This equitable balance should be struck correctly in the light of all the circumstances.[7]The court will not interfere with a ruling made by the Taxing Master merely because its view differs from his or hers, but only when it is satisfied that the Taxing Master's view differs so materially from its own that it should be held to vitiate the ruling.[8]Charges that are time-related are not

[7] President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another 2002 (2) SA 64 (CC) (220) (1)BCLR;[2002] ZACC 5) as quoted in Hennie de Beer Game LodgeCC v Waterbok Bosveld Plaas CC and Another 2010 (5) SA 124 (CC) para 7.

[8] Gauteng Lions, supra, in para 45.

decisive and an objective assessment of the features of the case is primary to determine the reasonableness of the fee for that work, to obviate the charging of exorbitant fees for slow and inefficient work.[9]

[19] The Taxing Master may not ignore evidence that may show that work that has been charged for has not been done, but that does not mean that there is a duty on practitioners to prove their claims. The taxing officer is entitled to take the 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.[10]

[20] In this case, the Taxing Master failed to present facts which would be supported by the legal authorities cited. Apart from the calculations which have been shown to be erroneous, there are no allegations of any untoward conduct by either attorney or counsel that the taxing master could impute to both legal representatives that could create the impression that counsel did not do the actual work as recorded. Neither is there any indication

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[9] Hennie de Beer Game Lodge, supra, in para 9.
[10] Trollip, supra.

that counsel did not carry out his brief in a proper manner, disqualifying him to his full fees. In the absence of any suggestion to that effect, there is no justification why counsel should not get his full fees for work done including the drafting of the documents. The taxing master failed to adduce facts to show that he properly exercised his discretion in this matter. It must be said that this was not due to any deliberate act on his part but due to the lack of authoritative guidelines on this matter.[11]

[21] In the result, I am of the view that the Taxing Master erred and was clearly wrong in disallowing the amounts as per items 167 and 277 of the allocator. I am therefore satisfied that his ruling should be interfered with.

ORDER

I make the following order:

1. The review of taxation succeeds.

[11] Pieterse N.O. and Another v Botha and Others (4591/2014) [2015] ZAFSHC 255 (17 September 2015); See also para 12 of the Taxing Master's stated case.

2. The taxation by the taxing master as reflected in his allocatur regarding items 167 and 277 is set aside.

3. In its stead, the taxing master is directed to reinstate counsel's full fees for work done as set out in items 167 and 277 presented by Bezuidenhouts Inc. Attorneys.

4. There is no order as to costs.

JJ MHLAMBI, J

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