REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Case No: 3803/2019

(1)	REPORTABLE: **NO/YES**
(2)	OF INTEREST TO OTHER JUDGES: **NO/YES**
(3)	REVISED.
………………………	…………………………
DATE	SIGNATURE

In the matter between

SAVANHA CONSTRUCTION AND MAINTENANCE CC APPLICANT

AND

JOAN KIM PHILLIPS FIRST RESPONDENT

HIPPOPOOLS INVESTMENTS SHARE BLOCK

SCHEME LIMITED SECOND RESPONDENT

REVIEW JUDGMENT (TAXATION)

Kganyago J

[1] On 2nd December 2019 the applicant had presented its bill of costs and that of its correspondent attorneys before the Taxing Master for taxation. Both bills were drafted on attorney and own client scale. The respondents are dissatisfied with the rulings of the Taxing Master on certain items that he had allowed on applicant's and its correspondent's attorneys bill of costs. The applicant on the other hand is dissatisfied with the rulings of the Taxing Master on certain items that he had disallowed on its bill of costs. Both parties are seeking to review the rulings of the Taxing Master on the specific items that he had allowed and disallowed. Their review is brought in terms of Rule 48 of the Uniform Rules of Court (the Rules)

[2] On items 2,4 and 72, the respondents are alleging that the Taxing Master had allowed perusal of emails at R276.00 per page which is more than 4.5 times the High Court tariff for perusal at R59.00 per page. The respondents are further alleging that on other items for perusal of emails the Taxing Master had reduced and allowed the fee to R142.43 per page. On item 8 the respondents are alleging that the fee for drawing a letter was allowed at R276.00 per page, whilst other emails drawn the fee allowed was R142.43 per page.

[3] On items 2,12,18 and 72, the respondents are alleging that the Taxing Master had allowed the fee for perusal of emails and drawing of emails at the same rate of R142.43. On items 9,13 and 16 the respondents are alleging that the Taxing Master had allowed pre-litigation correspondence to counsel where the counsel's availability was only confirmed on item 22 and the brief was only send off to counsel in item 23 of the bill of costs.

[4] On items 15,18,52 and 66, the respondents are alleging that the Taxing Master had allowed perusal of documentation at a higher rate together with attorney client surcharge of 35% and 70% instead of 21.5% that was allowed on the other items. On item 18 the respondents are alleging that the Taxing Master had allowed a fee for perusal whilst it was a duplication of items 1,2,3,4,6,10,11 and 12. On item 20 the respondents are alleging that the Taxing Master had allowed a fee for both attorney and counsel for drafting of the same founding affidavit instead of allowing for drafting by attorney and settling by counsel.

[5] On items 26,27,32,36,41,43 and 63, the respondents are alleging that the Taxing Master had allowed a fee for drafting of a confirmatory affidavit and practice note at more than 3 times the High Court tariff, and on top of that allowed an attorney client surcharge of 202% whilst on the other items he allowed surcharge of 21,5% and 35%.

[6] On items 19 and 20 and item 7 of the correspondent bill of costs, the respondents are alleging that the Taxing Master had allowed a fee for copies whilst they are duplicates of item 19. On item 33 the respondents are alleging that the Taxing Master had allowed a fee for a candidate attorney to paginate the court file at a rate more than 3 times the High Court tariff and also allowed a surcharge of 204%. On items 39,40,35,56 and 67, the respondents are alleging that the Taxing Master had allowed a fee for the applicant who resides in Hoedspruit to appoint an attorney in Sandton.

[7] On item 47 the respondents are alleging that the Taxing Master had allowed a fee for perusal instead of re-perusal as the same documents have previously been perused. On item 51 the respondents are alleging that it is not clear

whether the Taxing Master had allowed 3 hours or deducted 2 hours. On item 65 the respondents are alleging that the Taxing Master had allowed a fee at more than double the tariff including waiting time whilst on the marked bill it looks as if the intention was to deduct 4 hours, but none was deducted.

[8] On item 69 the respondents are alleging that the Taxing Master had allowed counsel's pre-litigation costs of drawing a letter of demand, and also VAT on counsel's account whilst the applicant is a VAT vendor. On item 3 of the correspondent bill of costs, the respondents are alleging that the Taxing Master had allowed a fee at a whole hour rate and at the rate of 25% more than the tariff. On items 5 and 6 of the correspondent's bill of costs, the respondents are alleging that they are duplicates with item 4. On item 7 of the correspondent bill, the respondents are alleging that the Taxing Master had allowed a double tariff even though it was a duplication of item 19 and 29 of the applicant's bill of costs which fee was already allowed. With regard to VAT, the respondents are alleging that the Taxing Master has allowed it on the correspondent bill of costs despite the fact that the applicant is a VAT vendor.

[9] On items 1,3,5,7,9,10,11,12,13,15,16,17,18,21,22,24,26,27,28,29,31,34,35, 37,38,49,50,52,58,60,64,66,68 and 69 the applicant is alleging that the Taxing Master has erred in reducing its fee as there is no applicable tariff and the fee was reasonable on those items. On item 51 the applicant is alleging that the Taxing Master has erred in disallowing 4 hours that they actually spent in attending consultation. On item 61 the applicant is alleging that the Taxing Master erred in disallowing the 15 minutes that they have spent in attending consultation. On item 65 the applicant is alleging that the Taxing Master erred

in limiting them to 4 hours for attending court whilst the actual hours that they have spent attending court were 6 hours. On item 69 the applicant is alleging that the Taxing Master erred in reducing the counsel's rate from R2600.00 per hour to R2000.00 per hour whilst the counsel's rate accords with the current Bar Council's Guidelines and the counsel's seniority.

[10] The Taxing Master in his stated case to the respondents' review application has stated that he tried to be as reasonable as possible in taxing the bill, and has considered the nature of the costs order in question. On items 2,4 and 72 of the applicant's bill, he conceded that he had erred. On items 15,18,52 and 66 of the applicant's bill, he alleges that he had decided to allow the fee at that amount as on items 6,25,47 and 59 the applicant had used a party and party scale which was a lower fee. On item 52 he applied the tariff plus 35% as he believed it was exorbitant, and he does not remember using 21.5%.

[11] On item 18 of the applicant's bill, he admits that he should not have allowed item 18 and 6, and should have taxed off item 18. On item 33 he alleges that he found it reasonable considering the nature of the costs order. On item 51 of the applicant's bill, he alleges that he had allowed 3 hours. On item 65 of the applicant's bill, he alleges that he allowed the fee in full as he found it to be reasonable. On item 69 of the applicant's bill, he concedes that he had erred. On VAT he concedes that he had erred as sometimes back he was successfully reviewed on a similar issue.

[12] With regard to item 3 of the correspondent bill of costs, the Taxing Master alleges that he had allowed it as he found it to be fair and not exorbitant taking into account the nature of costs awarded. On item 5 and 6 of the correspondent bill of costs, the Taxing Master concedes that he had erred. On

VAT charged by the correspondent, he concedes that he had erred as sometimes back he was successfully reviewed on a similar issue.

[13] In his stated case to the applicant's review application, the Taxing Master alleges that he was aware that he was dealing with attorney and own client bill of costs and in the same spirit he understands that he had to be fair and reasonable in exercising his discretion. On items 1,3,5,7,10,11,12,13,15,16,17, 18,21,22,24,26,27,28,29,31,34,35,37,38,49,50,52,58,60,64,66,68 and 69 he stated that he had applied his mind properly when exercising his discretion. On item 51 he alleges that he found the 4 hours to be exorbitant and unreasonable. On item 61 he alleges that he found the amount charged on the bill to be unreasonable in his judgment. He concluded by stating that he understands that the nature of the costs awarded, however, he had to be reasonable in taxing each and every item. He further stated that he went through counsel's invoice and he believe that he has been reasonable.

[14] It is trite that a costs order is intended to indemnify the successful party to the extent that he/she is not out of pocket as a result of pursuing the litigation to its successful conclusion. The Taxing Master has to be satisfied that indeed the expenses claimed will not leave the successful party out of pocket.

[15] In **President of RSA v Gauteng Lions Rugby Union**[1] Kriegler J said:

[1] 2002 (2) SA 64 (CC) at 73C-D

"It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ case. This means:

> '*…that the court must be satisfied that the Taxing Master was clearly wrong before it will interfere with the ruling made by him…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 rulings"*

[16] The applicant's bill of costs was prepared on the scale as between attorney and own client. It is trite that in an attorney and own client scale, there is no specific tariff that is applicable and the Taxing Master will tax the bill on the basis that the fee is not unreasonable in all the circumstances. The successful party will be entitled to claim all the costs which he/she would not be able to claim under party and party scale and also under attorney and client scale. The successful party is indemnified to the fullest to the costs he/she was supposed to expend in that litigation.

[17] In **Aircraft Completions Centre (pty) Ltd v Rossouw and Others**[2] Stegmann J said:

"In terms of Rule 70 (5) (a), it is the Taxing Master to decide whether 'extraordinary or exceptional' circumstances are or are not present, whether they have or have not affected the costs incurred by the costs creditor, and whether strict adherence to the tariff would or would not

[2] 2004 (1) SA 123 (W) at para 92

be equitable. When a Judge has made a specific finding that the party ordered to pay costs (the costs debtor) has conducted his case in a manner deserving of the court's censure by means of a special order for costs to be taxed as between attorney and client, it is generally a strong indicator to the Taxing Master that in the Judge's view the costs debtor has conducted his case in such a way as to likely to have costs the costs creditor to incur costs that ought to have been unnecessary and that may not be recoverable on a taxation as between party and party. Such finding by the Judge would therefore often lead the Taxing Master to conclude that the case is indeed an extraordinary or exceptional one for the purposes of Rule 70 (5) (a), and that a consideration of the bill of costs will show that strict adherence to the tariff would be inequitable. If the Taxing Master finds that the case is an exceptional or extraordinary one, and that strict adherence to the tariff would be inequitable, his finding will both require and justify the application of the intermediate basis of taxation in the generous manner contemplated by Nel. In such a case, the Taxing Master must address his mind to the question of the extent to which the extraordinary or exceptional nature of the case caused the costs creditor reasonably to incur extra costs that are not recoverable on a taxation as between party and party. He will allow those extra costs and will tax them off only to the extent that there would otherwise be injustice to the costs debtor."

[18] In taxing an attorney and own client bill, the Taxing Master has discretion to allow all such fees and expenses that appears to be reasonable for the proper

attainment of justice or for defending the rights of any party. Usually when a client instructs an attorney, they will have an agreement in relation to the fees payable to the attorney. The parties will either agree on an hourly rate or globular amount. Except where a contingency fee agreement is applicable, generally the fee agreed upon is not dependable on the outcome of the case. Whether the client is successful or not will still be liable to pay his/her attorney as per the agreement. If he/she is successful in his claim or defence, he/she will be entitled to costs on party and party scale unless the court in exceptional circumstances award a punitive costs order against the unsuccessful party.

[19] In the case at hand the court has awarded a punitive costs order of attorney and own client against the respondents. The applicant is therefore entitled to claim even the costs which it would not have claimed under party and pay scale or under attorney and client scale. However, that will not be free for all where the applicant will inflate its costs. The Taxing Master is still having a discretion to determine whether the costs are not unreasonable, and would allow costs to the extent that there would not be any injustice to the unsuccessful party.

[20] The applicant's attorneys had a fee agreement with the applicant in terms of which their fees were to be charged on an hourly rate of R2400.00 standard rate and R2600.00 higher rate for directors; R1600.00 standard rate and R1800.00 higher rate for associates and; R1100.00 standard rate and R1300.00 high rate for candidate attorneys.

[21] The applicant's attorneys opted to draft their bill of costs on the standard rate for directors and candidate attorneys. Since the costs awarded to the applicant is on attorney and own client scale, the applicant is entitled to all the costs it was liable to pay its attorneys Truter and Jones as per the fee agreement to the extent that they are not unreasonable. The mere fact that there is a fee agreement between the applicant and its attorneys which regulate how the fees are payable, is not a bar to the Taxing Master to exercise his discretion and determine whether the fees claimed are not unreasonable.

[22] The Taxing Master in his stated case has stated that he had taxed off the items on the applicant's bill of costs as he found them to be exorbitant and unreasonable. Rule 48 (3) (b) requires the Taxing Master in his stated case to set out any finding of fact. The Taxing Master in his stated case has failed to state any finding of fact. The applicant's bill was based on the agreement they had with Truter Jones, and its validity was not challenged. For the Taxing Master to deviate from the agreement the parties had, there must be sound reasons and those reasons must clearly appear in the stated case. It is not sufficient to merely state that they are exorbitant and unreasonable. He must lay out the basis for arriving at that conclusion. That decision must not just be a thumb suck, it must be based on facts. It is also not for this court to second guess why the Taxing Master had arrived at such a decision.

[23] Usually factors that will assist the Taxing Master in exercising his discretion when taxing an attorney and own client bill are the seniority of the attorney

concerned, complexity of the matter, speciality in that field, the duration of the matter, etc and the list is endless. The Taxing Master's stated case is not helpful as it did not set out the finding of facts and the approach which he had followed in taxing off the items concerned on the applicant's bill of costs. In my view, in taxing off the items on the applicant's bill of costs, the Taxing Master did not exercise his discretion properly, and therefore his rulings were clearly wrong.

[24] Turning to the items which the Taxing Master has allowed and which the respondents are seeking them to be reviewed. The Taxing Master in his stated case has conceded that on items 2,4,18,72 and VAT of the applicant's bill, he had erred. He has also conceded that on items 5,6 and VAT of the applicant's correspondent attorneys (DDKK) bill of costs he had erred. With that concession, there will therefore be no need for me take any issues on these items any further.

[25] On items 15,18,52 and 66, the Taxing Master has stated that the applicant had decided to charge items 6,25,47 and 59 on party and party scale as per the tariffs. Based on the fact that the party and party tariff is a lower scale, he decided not interfere with them considering the court order. He has further stated that on item 52 he applied the tariff plus 35% as he believed it was exorbitant, and does not remember using 21.5% on any of the items.

[26] On items 15,18,52 and 66, the test used by the Taxing Master is confusing and not the correct test for taxing an attorney and own client bill. It does not appear whether the Taxing Master had determined whether the fee charged by the applicant was not unreasonable and by allowing them will not cause injustice to the respondents, but used his discretion on the basis that he

believed they were exorbitant. The test is not whether he believed them to be exorbitant, but whether the fees charged were not unreasonable. By arriving at the conclusion whether they are reasonable or not must be based on facts and not what he believed in. The basis of the Taxing Master to allow similar items on different tariffs does not make sense at all, and that in itself shows that he did not exercise his discretion properly.

[27] On item 33 the Taxing Master was called upon to give reasons why he allowed the candidate attorney to paginate at the rate which is more than 3 times the high court tariff. The Taxing Master in his stated case has merely stated that he found the fee to be reasonable considering the nature of the costs. He does not give the basis upon which he arrived at that conclusion. He was supposed to state the facts which made him to have arrived at that conclusion. Failure to do so shows that he did not apply his discretion properly.

[28] On item 51 the respondents are alleging that it is not clear whether the Taxing Master has allowed 3 hours or 2 hours. The applicant's attorneys on the other hand alleges that their notes shows that they have consulted with the applicant for 4 hours and 3 minutes. The Taxing Master in his stated case has stated that he had allowed 3 hours. The Taxing Master did provide facts that made him to come to the conclusion that 3 hours was the reasonable time which the applicant's attorneys have spent in consultation. It is not for this court to speculate what would have made the Taxing Master to arrive at the conclusion that 3 hours was the reasonable time. Those facts which the Taxing Master has used in applying his discretion must be clearly set out in his stated case.

[29] On item 65 the respondents are alleging that it seems that the intention of the Taxing Master was to deduct 4 hours whilst in actual fact he did not deduct anything. The applicant's attorneys on the other hand alleges that they have attended court for more than 6 hours. The Taxing Master in his stated case has stated that nothing was deducted as he found it to be fair and reasonable. However, on perusal of the bill itself, it shows that the Taxing Master has allowed 4 hours and not 6 hours that was claimed by the applicant. It seems that the manner in which the Taxing Master has taxed the bill is even confusing him as he could not tell whether he allowed the fee as it stand. Even if he had allowed the fee as it stand, he was supposed to state the facts which made him to arrive at that conclusion in his stated case, but has failed to do so.

[30] On item 69 of the applicant's bill, even though the Taxing Master has conceded that he had erred, it is in the public interest that it be dealt with. The applicant's attorneys are stating that the counsel's rate of R2600.00 per hour accords with the current Bar Council's Guidelines and counsel's seniority. If indeed the Bar Council has guidelines is far as the tariffs are concerned, that in itself will prevent competition. A party who seeks the services of a counsel must be able to shop around comparing rates and not be limited by rates that have been fixed. The issue of the Bar Council's guidelines in relation to counsel's fees should not be a determining factor as to what is reasonable. Seniority and other relevant factors are the ones which should be taken into consideration in determining whether the counsel's fee is not unreasonable.

[31] The Taxing Master's stated case did not comply with Rule 48(3)(b) and was therefore of no assistance to the court. The Taxing Master has failed to set

out the approach which he had followed in Taxing the bill except to say that he found the fees that he had allowed to be reasonable, and those he disallowed to be unreasonable, without setting out the facts which he relied on in arriving at that conclusion. Without those facts been set out, it is difficult for this court to determine whether the Taxing Master has exercised his discretion properly. I am therefore satisfied that the Taxing Master's rulings were clearly wrong and needs to be interfered with. Both parties have successfully challenged the rulings made by the Taxing Master which affect almost the entire bill. It will therefore, be fair to both parties if the entire allocation by the Taxing Master is set aside.

[32] In the result the following order is made:

32.1 The review by both applicant and respondents is upheld.

32.2 The Taxing Master's allocation is set aside in its entirety.

32.3 The matter is referred back to taxed afresh before another Taxing Master.

32.4 There is no order as to costs.

MF KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

DATE DELIVERED: 13TH MAY 2020