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: 3798/2016

In the matter between:

ALWYN ABRAHAM MYBURG N.O. Applicant
(ON BEHALF OF ALWYN MYBURG FAMILY TRUST)

and

MICHAEL ANTHONY RAFFERTY 1st Respondent

ALISCA RAFFERTY 2nd Respondent

TAXATION REVIEW

JUDGMENT BY: MBHELE, J

DELIVERED ON: 22 JUNE 2017

INTRODUCTION

[1] This is taxation review in terms of rule 48 of the uniform rules of this court. The applicant was dissatisfied with the ruling of the taxing master and requested the taxing master to state a case for a decision of a judge in chambers in terms of rule 48(1). The taxing master duly stated a case in terms of rule 48(2) in which she justified her decision.

Items subjected to review.

[2] The applicant filed a review on the basis that the following items were not objected to during the taxation. The grounds for filing a review by the applicant were the following:

- Items 1 & 2: Rule 70(9) to be applied.
- Items 9-12: The payers do not constitute 250 words.
- Item 13: Only 3 x 41 pages to be allowed. R 142.50 to be deducted.
- Item 19: Counsel's account appears to be unreasonable. Only 1 hour to be allowed for settlement of papers. R2000.00 to be taxed off.
- Items 30-32: Rule 70(9) to be applied, the pages do not constitute 250 words
- Items 33-36: The opponents cannot recover these costs from the applicant. Duplication of previous instructions to counsel.

Items 37-40: A fee is recovered for an attorney to attend to the matter. It is unclear who attended the matter as it appears that Mr Bloem (an Attorney at Spengenberg Zietsman and Bloem) acted on an in house basis. The attendance and disbursements appears to be a duplication.

[3] It is unclear how the disbursement for Mr Bloem is calculated. It was clear that the matter would be settled and he still charges a fee as per an advocate on an opposed basis. It also appears, that Mr Bloem was 'briefed' on the same day as the application. Only a fee for the time actually spent can be charged".

[4] The applicant did not file formal opposition to taxation. The applicant unsuccessfully applied for the postponement of taxation. The parties agreed to the applicant presenting oral argument during taxation. The matter stood down until 14h00 on the same day to allow the applicant time to prepare its argument.

[5] The question to be decided is whether the taxing mistress exercised her discretion properly and whether the applicant is entitled to take items that were not opposed during taxation on review.

BACKGROUND

[6] The applicant attributes its failure to properly object to some items during taxation to the sudden departure of its Candidate Attorney, Maritza Schoon, who was attending to the taxation under review.

[7] The background facts are as stated below. The applicant brought an application on urgent basis. The application was set down for hearing on 23 August 2016. On 22 August 2016 the parties entered into a settlement agreement. On the morning of the hearing, the applicant reneged on the settlement offer. This resulted in the appointment of Mr. Bloem, a senior Attorney at Spangenberg

Zietsman and Bloem Attorneys to argue the matter on behalf of the respondents. The parties settled the matter before the hearing and the respondents were awarded costs on attorney and client scale.

[8] The respondents' bill was taxed on 04 September 2016.

CONTENTIONS FOR THE TAXING MASTER'S RULING

[9] **Ad item 1 and 2.**

The taxing mistress indicated that the first respondent's attorneys had already reduced the number of pages in line with rule 70(1). She was satisfied with the number of folios asked owing to the size of the font which, in her view, was not large.

[10] **Ad item 9, 10, 11 and 12 of the bill of**

The taxing mistress respondent that the folios were counted by the parties and she was satisfied that the number of folios asked were reasonable.

[11] **Ad item 13**

The taxing mistress allowed a fee of R3.50 per page in line with rule 70 (5) for necessary photocopies.

[12] **AD item 19**

The taxing mistress indicated that she took into consideration the amount claimed and the actual time spent to prepare the papers by counsel. In her view, counsel would ordinarily be entitled to claim more than the R9000.00 allowed.

[13] **Ad items 30-32**

The taxing mistress contended that the number of copies that had to be served on the parties justified the folios allowed.

[14] **Ad item 33- 40**

The taxing mistress indicated that the withdrawal of settlement by the applicant occasioned these costs. The attorney handling the matter had to secure the services of a more experienced practitioner within the same firm, at short notice, as Counsel who prepared papers was no longer available to argue the matter because of the settlement reached the previous day. Mr. Bloem's fees were allowed based on the complexity of the matter. The day fee allowed, included preparation fee which, in her view, was necessary as this was an urgent application in which opposing papers were drafted by another Counsel who could no longer argue the matter.

APPLICABLE LEGAL PRINCIPLES

[15] Rule 48(2) provides as follows:

"The notice referred to in subrule (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 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".

[16] In **Daywine Properties (Pty) Ltd v Murphy and Another** 1991 (3) SA 216 (D) 218E-F the following was said:

"In my judgment there can be no escape from the clear meaning of the language used in Rule 48(1) and (2). If the party opposing the taxation fails to object when before the Taxing Master, he cannot thereafter invoke the review of taxation procedure provided by Rule 48 in a belated attempt to attack items which the Taxing Master allowed."

Rules 70(3) provides:

"(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 person or by other unusual expenses."

Rule 70(5) confers a discretion on the taxing master to depart from any of the provisions of the prescribed tariff in exceptional cases, where strict adherence to such provisions would be inequitable.

[17] Interference on review is justified where a reviewing court finds that the taxing master has not exercised his discretion properly, for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable person would have given. (See **Preller v Jordaan 1957 (3) SA 201 (O) at 203**)

APPLICATION OF THE LAW

[18] It is apparent from the papers before me that the applicant failed to file its opposition or properly place its objection before the taxing mistress. The applicant was properly notified of the taxation and the reasons advanced for its failure to formally object to taxation are without merit. The applicant was represented during taxation and argued its case orally before the taxing master.

[19] It is further apparent that the respondents had to brief a new attorney in haste after the applicant reneged from its settlement offer. I have taken into consideration that although the matter was finalised through settlement agreement between the parties, it was

necessary for the respondents to have counsel who had thoroughly prepared to argue the matter. There was no guarantee when Mr. Bloem was instructed that the matter would be settled.

[20] The court should be satisfied that the taxing master was clearly wrong before it interferes with his decision. I am satisfied that the taxing mistress exercised her discretion properly. I cannot find any merit in the objection raised to warrant interference by this court.

[21] In view of the above, I make the following order.

ORDER

[22] The application for review is dismissed.

NM MBHELE, J

On behalf of applicant:

Instructed by: Myburgh's Attorneys
Bloemfontein

On behalf of respondents:

Instructed by: Spangenberg Zietsman & Bloemfontein
Bloemfontein