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

Review number: 4591/2014

In the matter of:

MICHAEL DANIEL PIETERSE N.O.	1st Applicant
ZOLA PIETERSE N.O.	2nd Applicant

and

PIERRE BOTHA	1st Respondent
DELENE BOTHA	2nd Respondent
MANGAUNG METROPOLITAN MUNICIPALITY	3rd Respondent

HEARD ON: 25 JUNE 2015

DELIVERED ON: 17 SEPTEMBER 2015

REVIEW OF TAXATION

MOCUMIE, J

[1] Lovius Block drafted a bill of costs in terms of an order of court that the applicant pays the respondents' costs on a party and party scale. On 23 February 2015 the bill was set down to be taxed by the Taxing Master of the Free State High court. The applicant was represented by Mrs Van Wyk of Lovius Block Attorneys and the respondent was represented by Mrs Van Blerck of Symington and de Kok Attorneys. The *allocatur* was signed on the same day. In terms of the *allocatur*, the Taxing Master, disallowed part of counsel's fees under item 8 and 11. Lovius Block was aggrieved and noted its objection in terms of Rule 48 (1) of the Uniform Rules (the Rules) to

review the decision. The matter was referred in terms of Rule 48 (6) (a)(iv) to open court for argument.[1]

[2] Item 11 states 'Betaal: Advokaat: 14 364, 00'.Whereas item 8 states 'Kennisgewing van Mosie en Funderende Beedigde Verklaring met aanhangsels en artikel 4(2) Kennisgewing (44bl): 2 068, 00.'
Directly translated item 8 is for perusal of affidavits and item1 is for counsel's fees costs.

[3] It is common cause that the taxing master exercised her discretion to fix the rate as she did. The enquiry is therefore whether to interfere with the exercise of that discretion.

[4] The issue for determination is whether the taxing master erred in disallowing fees for drafting of an affidavit by counsel. Flowing from that whether the taxing master exercised her discretion properly, and in that enquiry, what principles or norms permissibly inform a taxing master in so doing.

[5] Ordinarily the court will not interfere with the exercise of a taxing master's discretion unless it appears that (s)he has not exercised his or her discretion judicially and has exercised it improperly, for example, by disregarding factors which (s)he should properly have considered, or considering matters which it was improper for him or her to have considered; or (s)he had failed to bring his or her mind to bear on the question in issue; or [s]he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue. The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that [s]he was wrong must be

[1] Rule 48 of the Rules provides: 'Any party dissatisfied with the ruling of the Taxing Master as to any item which was objected to or disallowed mero motu by the Taxing Master, may within 15 days after the allocatur by the notice required by the Taxing Master to state a case for the decision of a Judge'

considerably more pronounced than would have sufficed had there been an ordinary right of appeal.[2]

[6] The court in *Aloes Executive Cars (Pty) Ltd and Another*[3] expressed the cardinal rule of costs with reference to counsel's fees as follows:

'It is not the function of counsel to draft affidavits. That work is normally done by attorneys. Hence the rule that only in very difficult and very complicated matters will it be reasonable to clothe counsel with the mantle of draftsman of affidavits. It may well be that some attorneys have through lack of skill or confidence and more frequently because they have other pressing business, relegated themselves to the status of carrier of briefs and that some counsel have for pecuniary reasons cast themselves in the role of draftsman, laboriously sifting evidence in consultation upon consultation and painstakingly compiling voluminous affidavits. This is, however, not the general practice of the professions and if some of their members act in that way they do so at their peril as far as costs are concerned. It is a luxury in which they cannot indulge at the expense of the unsuccessful litigant.'

[7] The test is stated in rule 70(3)[4]: having regard to the issues of fact or law involved in the case, was it reasonable and not over cautious for the attorney to brief counsel to settle affidavits filed on behalf of his clients?[5]

[8] Rule 70(3) prescribes that the object of the defeated adversary paying the successful litigant's costs is to provide a 'full indemnity' to the successful litigant. The tariff is deemed to do so even if common sense reveals the contrary *(Bowman NO v Avraamides & ano 1991 (1) SA 92 (W))*.[6]

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[2] *Visser v Gubb* 1981 (3) SA 753 (C) 754H-755C.See also *Legal and General Assurance Society Ltd v Lieberum, NO, and Another* 1968 (1) SA 473 (A) at 478G-H; *Maseka v Law Society of the Northern Provinces* (443/06) [2010] ZANWHC 13 (1 January 2010).

[3] *Aloes Executive Cars (Pty) Ltd and Another* 1990(1) SA 587 (T) at 589J-590A.

[4] Erasmus et al: Superior Court Practice, B1-421.

[5] *Solsons Properties (Pty) Ltd v Yorkshire Clothing Industries (Pty)Ltd* 1972(2) SA 203 (D) at 294F-205B.

[6] *Coetzee v Taxing Master, South Gauteng High Court and Another* (2010)/14197)[2012] ZAGPJHC 175;2013(1) SA 74 (GSJ)(19 September 2012)

[9] The import of s70 is succinctly set out as follows in *Coetzee, Jacobs Albertus and The Taxing Master*[7]*:*

1. *The tariff in Rule 70 is designed for and intended for the taxation of party and party costs.*
2. *The tariff in Rule 70 is not binding on any taxation of costs other than party and party costs.*
3. *The tariff in Rule 70 must be used as a guide in the taxation of:*
25.3.1 Penal costs ordered by a court to be paid by the defeated adversary, called 'costs on the attorney and client scale.'

[10] Rule 69 provides that '[S]ave where the court authorises fees consequent upon the employment of more than one advocate to be included in a party and party bill of costs, only fees as are consequent upon the employment of one advocate shall be allowed as between party and party. 'Under Rule 69(5) the taxing master has jurisdiction to determine not only the *quantum* of counsel's fees but also whether in the particular circumstances of the case counsel's fees should be allowed at all.[8]

[11] In the *City of Cape Town v Arun Property Development (Pty) Ltd and Another*[9] the court held that it would expect the taxing master, in considering the question of counsel's fees, to adopt an approach along the following lines:

'(a) Consider the nature and complexity of the matter.[10] What did the matter involve? How voluminous were the papers? Were there difficult areas 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?

(b) 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 on his ore oral adress to court?

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[7] Footnote 3 above.
[8] *Rosenburg v Prima Toy Holders (Pty)Ltd* 1972 3 SA 791 C at 794B.
[9] *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) at 237A-H.
[10] Kriek v Bayer Suid- Afrika (edms) bpk Kriek v Van Staden 1996 (1) All SA 543 (T)

(c) Consider counsel's fees: 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?

(d) 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 certainly can, amount to a reasonable basis for the taxation of counsels fees. If the taxing master is of the opinion that the time taken by counsel to perform a given task is reasonable on 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.

(e) 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 attendance, the fee for such attendances should be added to the fee for the ' refresher fee' charged. By way of example, if in 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 that an excessive amount of time was spent on items of preparation, she should disallow a fee for such excessive time.'

[12] As a general rule charges for consultation with counsel on an application are not allowed as between party and party unless the application involves complicated factual difficult legal issues.[12] This does not, however, mean that such charges can be allowed only where the application is complicated and involves difficult or legal issues: the question is always whether the costs were reasonably incurred and whether they were necessary or proper for the attainment of justice or for defeating the rights of the party whose costs are being taxed.[13] In respect of heads of argument and preparation, the modern trend is for counsel to charge a fee based on time actually expended, irrespective of whether briefed on appeal, application or trial[14]. That is why

[12] *Aloes* above.

[13] Erasmus Superior Court Practice B1-421.

[14] *See Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) where the Supreme Court of Appeal referred with approval to the modern trend accepted in *City of Cape Town* at 234F-I.

when considering a fee for counsel for drafting and consulting; a distinction should not be drawn between application proceedings and other proceedings.[15] In *Baars v Near East Rand Darts Association* [16] the court held that there was nothing in rule 70 (3) drawing such distinction, thereby limiting consultation with counsel in applications to exceptional circumstances and matters.[17]

[13] In her stated case the taxing master averred that she allowed counsel's fees on party and party scale in terms of Rule 70 in terms of which she can only allow an amount of R235 for every ten pages as per the ordinary attorney's scale. Not the advocate scale. She further allowed a fee for perusal of the affidavit; but not the drafting thereof. She, as a result, did not allow the full advocate fees. She submitted that, primarily she did not view the matter to be complex as it was a standard eviction application comprising mostly of annexures which would have been provided to counsel by the instructing attorney who was familiar with the matter. The attorney who dealt with the matter was a senior in his profession. She also took into consideration the fact that the matter was subsequently settled. These factors militated against payment of full counsel fees. She contended that in the exercise of her discretion, she assessed and considered all the relevant circumstances before her.

[14] In reply to the taxing master's stated case, Lovius Block argued that the application was complex. The applicants, as Trustees in a Trust, were their clients but now lived in the United States of America. Although the applicants had indeed signed a Power of Attorney to Lovius Block, as was common cause between the parties, that was to collect money and invest as the cessionary. There was however a dispute as to whether Lovius Block could institute the eviction application on their behalf. Consequently and despite having studied and dealt at length with the application and the relevant papers, Lovius Block had to bring in counsel to give his opinion on the matter.

[15] *R Francis*,219 para 20.7
[16] *Baars v Near East Rand Darts Association and Others* 1993 (3) SA 171 (W).
[17] *Footnote 8 above.*

When the Taxing Master considered the taxation of the bill of costs, she was not aware of the full facts. If she had, she would have considered the application to be complex which entitled counsel to his full fees.

[15] The respondent agreed with the taxing master and in addition submitted that the eviction application was not complicated. It was against only three respondents. The defence raised by the respondents was a standard contractual defence, ie lawful occupation. In applications of this nature the guideline on party and party costs is generally based on how many pages an affidavit comprise of; time spent by counsel on drawing up the opinion; whether the matter was unopposed and also as in this instance, whether the matter became settled before the issue raised was answered.

Determination

[17] The test to determine whether the taxing master exercised her discretion is an objective one. i.e. to consider what exactly counsel did and isolate that. Then the court, exercising its judicial discretion must look at the documents that the taxing master considered to determine if this is the run of the mill type of case? In other words, look at the papers (in this instance, the application for eviction and annexures appended) and decide whether the application was indeed simple, difficult or complex.

[18] I have gone through the application for eviction in issue in this case and came across the following which is relevant in this case. One of the parties in this case is Ms Pieterse, well known as Zola Budd, the bare footed runner of the Free State in the early 80's. It is common knowledge that the application drew a lot of public interest as it was in the media. The family's home was at stake and could be lost to them forever. The application was thus of serious importance to the Pieterse family. Just from this background information, the application was not a simple run of the mill eviction case.

[19] From the above objective facts, although the attorneys were granted Power of Attorney to collect money and invest as cessionary on behalf of the Pieterse

Family Trust, there was a dispute as to whether they could institute the eviction application on their behalf as they were outside South Africa at the particular time. Behind the scenes protracted negotiations had failed; the only option open was to lodge an eviction application which was clearly difficult and complex although on the face of it, it seemed not to be the case.

[20] The taxing master's main contention why she disallowed part of counsel's fees is because, primarily, she did not view the matter to be complex as it was a standard eviction application comprising mostly of annexures which would have been provided to counsel by the instructing attorney who was familiar with the matter. She also took into consideration two factors: the attorney who dealt with the matter closely was a senior attorney in his profession; and the matter was subsequently settled before it could be heard or counsel could argue.

[21] On these reasons alone ,it is clear that she made an assumption not based on the facts of the case but her own subjective sense of what usually happened in cases of this nature; her own personal view on what is complex and not. Nowhere in her stated case did she refer to any circumstances peculiar to this case that she took into account. Nowhere has she stated what she took into consideration, i.e apart from the three referred to already, and to what extent she took such into consideration and why she dismissed same as not permitting her to allow additional costs. There are guidelines which are set by each Bar Council for the determination of the fees for its members according to their seniority. These guidelines which are readily available from the Free State Bar Council must serve as a basis as well.

[22] It is important that taxing masters must always remember that factors enumerated in *City of Cape Town* are not a *numerus classus,* yet they form the basis from which to proceed. There may be other factors that the taxing master may consider such as, very relevant in this case, the importance of the matter to the parties. But it must be apparent and on record what the taxing master took into consideration and what she did not. Importantly, that she

weighed up all the factors properly. In that way exercised her discretion judicially, as set out in Rule 69 read with 70 of the Rules of Practice.

[23] Having said that, had the taxing master gone deeper into the matter, even called the parties before her where she was not sure as the Rules allow to do, she would certainly have come to the conclusion that the attorney was not over cautious. That the intervention of counsel of such senior status as Advocate Reinders, at an early stage was necessary to ensure that the matter was dealt with in the best interests of the family concerned.; particularly as they were not in the country to do so themselves. The fact that the instructing attorney is experienced in the profession does not detract from the fact that he ,correctly so , deemed the matter complicated enough and in the best interests of his clients to seek the opinion of counsel and even brief counsel to draft the papers; contrary to normal practice. I must hasten to say, although 'It is not the function of counsel to draft affidavits; that work is normally done by attorneys; there is no authority that an attorney cannot brief counsel to draft papers in appropriate circumstances. In this case the seniority or experience of the attorney dealing with the matter within the profession, as in this case, should have rather indicated that the matter was in actual fact complex or at least not an ordinary application. Not the opposite as the taxing master found. As a matter of practice senior counsel is generally briefed to research the matter in dispute for his or her opinion and to prepare the papers so as to argue effectively on behalf of the client.

[24] Having said that, 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 he recorded. Neither is there any indication that counsel did not carry out his brief to the teeth and was thus not entitled 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 drafting of the affidavits. Not on attorney scale but on counsel scale and in line with the guidelines of the Bar Council of this Division. I find that the taxing master has not adduced facts upon which I could find that she properly exercised her

discretion in this matter. I must add not due to any deliberate act on her part but due to lack of authoritative guidelines on this matter. This case qualifies as one which the court can interfere with.

[25] What is the proper order to make as to costs? In this case, the applicant has succeeded on the only issue on review; however I am satisfied that due to lack of authoritative decisions on it, it is not just and equitable for the respondents to bear the costs. There will, therefore, be no order as to costs.

[26] In the result, the following order is granted.

ORDER

1. The review of taxation succeeds.
2. The taxation by the taxing master as reflected in her *allocatur* regarding items 8 and 11 is set aside.
3. The taxing master is directed to reinstate counsel's full fees for work done as set out in items 8 and 11 presented by Lovius Block Attorneys.
4. There is no order as to costs.

B.C. MOCUMIE, J

On behalf of the applicant: Mrs SS Van Wyck
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of the respondents: Mrs L Van Blerk
Instructed by:
Symington & De Kok
BLOEMFONTEIN