Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **1115/2010**
Datum beskikbaar/Date available: **28/08/2015**

In the matter between:

ELECTRONIC PATIENT RECORDS (PTY) LTD Plaintiff/Applicant

and

THE MINISTER OF HEALTH, NORTHERN CAPE Defendant/Respondent

Coram: Erasmus, AJ

JUDGMENT : TAXATION ON REVIEW

ERASMUS, AJ

[1] This matter came before me as a review of a taxation of a bill of costs by the taxing master, under rule 48 of the Uniform Court Rules.

[2] The applicant herein was the plaintiff in the action and the respondent was the defendant. I shall refer to the parties as in the main action. The action between the plaintiff and the defendant was settled on 6 May 2013. The defendant was ordered to pay the plaintiff the amount of R3,250,000.00 and ordered to pay the taxed party and party costs of the plaintiff up and until and including 3 May 2013.

[3] As the application for review had not been lodged within the prescribed time period provided for in Rule 48(1), the plaintiff also applied for condonation. Adequate reasons for the non-compliance were provided and the plaintiff's non-compliance is condoned. There were numerous further delays, mostly due to administrative oversight and these were explained. I do not deem it necessary to deal with this aspect any further.

[4] The plaintiff required the taxing master of this court to state a case for the decision by a Judge in terms of the following items allocated on 14 April 2014:

> "*1. By disallowing the wasted travelling, accommodation and related fees of the instructing attorney, counsel and witnesses that were necessarily incurred to secure their attendance at the trial in Kimberley on 5 May 2013, and as a consequence, taxing of the entire fee and disbursement at item 274.*
>
> *2. By allowing only 11.5 hours out of the 54.25 hours billed by Adv van Riet SC that pertain to his attendances relating to the*

> *particulars of claim, trial particulars, settling of further pleadings, advice on evidence, trial preparation, consultations and advice on settlement and furthermore reducing senior counsel's hourly rate after 19 September 2012 from R2 600-00 p/h to R2 400-00 and, as a consequence, taxing of R155 142-00 of the disbursement at item 291.*"

[5] The issue now to be determined is whether the taxing master, in the exercise of his discretion, erred in disallowing these fees and disbursements.

[6] In respect of the objection to item 274, as set out in paragraph 3 *supra*, the taxing master stated:

6.1 The witnesses and attorney did not attend the hearing as all bookings were subsequently cancelled. No cancellation fee was asked or produced at taxation. The taxing master further stated that the applicant made use of a local set of attorneys and that it was therefore not necessary for travelling fees for the attorney. The witnesses were furthermore not declared necessary witnesses.

6.2 In respect of counsel's fees, he has no discretion to allow disbursements such as travelling expenses incurred in the engaging of services of counsel who does not practise locally or where a local counsel is not available. Counsel for the plaintiff in this instance never appeared in this court.

[7] In respect of the objection to item 291, as set out in paragraph 3 *supra*, the taxing master stated that it was the applicant's decision to employ an eminent senior counsel. The cost order was made by agreement between the parties and no mention was made of the status of the counsel. The losing party could not be burdened with these fees. The hourly fee of R2,400.00 which had been allowed on taxation, was a large fee. Counsel's fees in respect of consultations and drafting were allowed. The preparation fee was disallowed as the high fee of counsel of R2,400.00 per hour, is an all-inclusive fee.

[8] The taxing master derives his authority to tax bills of costs from rule 70(1)(a). The duties of the taxing master are to ensure that the party who was condemned to pay the costs does not pay excessive costs and that the successful party does not receive insufficient costs for the litigation in respect of which the cost order was granted.[1] The taxing master should allow all such fees and disbursements which appear to have been necessary or proper and should demand satisfactory proof that the services for which payment is demanded have actually been rendered.[2]

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[1] Rule 70(3); *Köhne v Union & National Insurance Co Ltd* 1968 (2) SA 499 (N) at 504B–C
[2] *Maasdorp & Smit v Sullivan* 1964 (4) SA 2 (E) at 2–3B

[9] In terms of rule 69(5) the taxation of advocates' fees as between party and party shall be effected by the taxing master in accordance with this rule and, where applicable, the tariff. Where the tariff does not apply, the taxing master shall allow such fees (not necessarily in excess thereof) as he considers reasonable.[3] The taxing master is entitled, in his discretion, to depart from any of the provisions of the tariff in extraordinary or exceptional circumstances, where strict adherence to those provisions would be inequitable.

[10] It is trite law that a Court should be very reluctant to interfere with the exercise of the taxing master's discretion except on certain well-known but limited grounds.[4]

[11] In respect of the first ground of review, i.e. the disallowance of the wasted travelling, accommodation and related costs of the instructing attorney, counsel and witnesses that were necessarily incurred to secure their attendance at the trial in Kimberley on 5 May 2013:

11.1 It is common cause that the Cape Town attorney, counsel and witnesses did not attend court in Kimberley. The taxing master stated that no

[3] *Stubbs v Johnson Brothers Properties CC* 2004 (1) SA 22 (N) at 27

[4] *Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk* 1993 (2) SA 144 (O) at 147D–G; *Le Chasseur Boere (Edms) Bpk v Maine Chance Farms (Pty) Ltd* 1978 (3) SA 358 (C) at 359G and *Preller v Jordaan* 1957 (3) SA 201 (O) at 203C-E

cancellation fee was asked and no proof of such disbursement was provided on taxation. In response to the taxing master's stated case, computer generated invoices in respect of air travel tickets for the Cape Town attorney, counsel and witnesses were attached. No proof of payment and/or cancellation fees was submitted. I find no grounds that the taxing master had erred and/or exercised his discretion in an unreasonable manner.

11.2 In respect of the disbursements of counsel, the taxing master stated that he had no discretion to allow disbursements such as travelling expenses for counsel who does not practise locally. The expenses claimed by the plaintiff in respect of the travel costs of counsel appear to me to be special or unusual expenses, as envisaged in Rule 70(3), which cannot be allowed.[5] I therefor find that the taxing master was correct in disallowing this expense.

[12] In respect of the second ground for review, i.e. the fees of counsel, I shall deal with the issues separately.

[5] *Windhoek Crushers (Pty) Ltd v Voigts en 'n ander* 1969(1) SA 574 (SWA) at 576E-F

12.1 The taxing master allowed an hourly fee of R2,400.00 per hour, instead of the R2,600.00 per hour claimed. The taxing master stated that he had already allowed a very high fee. I cannot find that the taxing master erred in the exercise of his discretion and/or that he exercised his discretion in an unreasonable manner.

12.2 In respect of the disallowance of certain fees charged, mostly in respect of preparation, it was alleged on behalf of the plaintiff that the taxing master exercised his discretion in an unreasonable manner by only allowing 11.5 of the 54.24 hours claimed to have been spent by counsel. It appears that the taxing master, in general, disallowed preparation fees and fees for reading of the papers. As was stated by Magid J in *Stubbs v Johnson Brothers Properties CC*:[6]

> "*Now, an advocate does not charge separately for his preparation. That, it is understood, is done before the trial starts. There is, accordingly, what might be termed a loading on the first day's fee (termed the fee on brief) with reduced fees being charged (and allowed on taxation) as refreshers on the second and further days of the trial. This system was described by I Jansen JA as 'fitting in trials' (Scott and Another v Poupard and Another1972 (1) SA 686 (A) at 691G).*"

[6] 2004 (1) SA 22 (N) at 27 and 28I-J

[13] I find no basis to interfere with the taxing master's exercise of his discretion and/or his method of computation of a reasonable fee for counsel.

WHEREFORE I MAKE THE FOLLOWING ORDER:

1. THE APPLICATION IS DISMISSED;

2. EACH PARTY IS TO PAY ITS OWN COSTS IN RESPECT OF THIS APPLICATION.

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SL ERASMUS
ACTING JUDGE