

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

Case No: 3093/2013

In the matter between:

CARL FREDERICK KAMPHERBEEK

Applicant

Versus

BLUCHER HAUMAN MELLET

1st Respondent

GRAND PALACE TRADING 217 (PTY LTD)

2nd Respondent

CORAM:

NAIDOO, J

JUDGMENT:

NAIDOO, J

DELIVERED ON:

2 OCTOBER 2014

REVIEW OF TAXATION

Naidoo J

- [1] This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court. The applicant (Kampherbeek), who was the 1st respondent in the main application, opposed the taxation of the (current) first respondent's (applicant in the main application) bill of costs, specifically items 19, 29 and 30 of the bill. I shall refer to the 1st respondent as "Mellet".

- [2] Kampherbeek and Mellet are equal shareholders in the second respondent. Mellet brought an application against Kampherbeek and 2nd respondent on 6 August 2013 containing various prayers for relief pertaining to the business of the 2nd respondent (the main application). A rule nisi was obtained granting the relief sought in that application, the pertinent order for the purposes of this matter being that Kampherbeek was ordered to furnish to Mellet, inter alia, all the records, financial statements and minutes of annual meetings and directors' meetings. Kampherbeek opposed the main application.
- [3] When the matter was enrolled for hearing on 31 October 2013, the Kampherbeek brought an application for the postponement of the matter in order to launch a counter application (the postponement application). The papers in the application for postponement were served on Mellet's attorneys late in the afternoon of 30 October 2013. That application was opposed and the Mellet filed his opposing papers on 31 October 2013. The application for postponement was granted, and the Kampherbeek was ordered to pay the wasted costs occasioned by the postponement, such costs to include the costs attendant upon the employment of two counsel.
- [4] The bill of costs and taxation referred to in paragraph [1] above arise from the main application and the application for postponement. The Kampherbeek filed the review application with the Registrar of this court on 2 January 2014, but it seems he served it on Mellet's attorneys only on 13 January 2014. Mellet opposed the application for Review of Taxation. I mention also that the Taxing Master prepared a Stated Case in terms of Uniform

Rule 48. Kampherbeek now applies for condonation for the late service of the application on respondent's attorneys. In my view, such prejudice as may have been suffered by Mellet, is minimal as all procedural steps were taken timeously by him in spite of receiving late service of the review application. Condonation is accordingly granted as prayed by the applicant

- [5] Before I deal with the Kampherbeek's objections detailed above, I pause to note that the taxing master has a discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that the taxing master must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. (**See City of Cape Town v Arun Property Development (Pty) Ltd** 2009(5) SA 227 (C) at 232 F-G, and **Erasmus: Superior Court Practice B1- 348 to 349**). The court is reluctant to interfere with the decisions of the taxing master upon matters in respect of which he is required to exercise a discretion entrusted to him. The general principles governing interference with the exercise of a taxing master's discretion have been stated as follows:

'The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of 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 he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.'

(Visser v Gubb 1981(3) SA 753 (C) 754H - 755C; and Erasmus above).

- [6] Item 19 of the Bill of Costs is Mellet's attorney's claim for attending upon the advocates for the purpose of settling and finalising the opposing affidavit in respect of the Kampherbeek's postponement application. He claimed an amount of R2556.00 for three hours (R852 per hour). The Taxing Master taxed off R852, effectively allowing an amount of R1704, representing two hours of consultation. Kampherbeek contends, in respect of this item, that it is a simple liquidation application where the papers are clear and that only one hour would have been sufficient to settle the affidavit. He points out that the application for postponement consists of 12 pages. He completely overlooked the fact that the opposing affidavit is 26 pages long, that it has a confirmatory affidavit of 2 pages and 4 pages of other annexures. The opposing affidavit therefore comprised 32 pages in total. The Taxing Master, in the stated case, asserts that as two counsel had to be consulted, he did not think 2 hours for the settling of the opposing affidavit was excessive. I am inclined to agree and I am of the view that he exercised his discretion correctly in taxing off one hour of consultation time, taking into account the length of the founding and opposing affidavits in this matter. The Taxing Master makes no mention of the length of the opposing affidavit, but on the basis of logic and common sense, it is apparent that more than one hour would have been required for the settling of that affidavit.

- [7] Kampherbeek's objection to item 29 is that the fee of Mr Greyling is excessive, while conceding in his papers that Mr Greyling has twelve years' experience. Mellet, in his opposing papers, correctly points out that this makes Mr Greyling a Senior Junior. This, according to the Taxing Master, is but one factor that he took into account in allowing the fees that he did. In his fee note, counsel rendered a total fee, in respect of the main application, of R44 000.00, which included fees for drawing Heads of Argument, preparation for court and a day fee. The Taxing Master taxed off an amount of R8000.00, allowing a fee of R36 000.00 for the main application, being (according to Mellet's notation on the fee note) R18 000.00 for the day fee, and R9 000.00 each for Preparation and Heads of Argument. Kampherbeek erroneously alleged in his Taxation Review application that counsel did not prepare Heads of Argument. This is clearly incorrect as Heads which are 29 pages long, and signed by both counsel, were filed and served on 29 October 2013. Counsel's fee for the postponement application was R16 500.00, which comprised R12 000.00 for Preparation and R4 500.00 for settling the opposing affidavit. The Taxing Master (according to Mellet's notation on the fee note) taxed an amount of R3000.00 off the fee for preparation, thus allowing a total amount of R13 500.00 in respect of the postponement application. Kampherbeek proposes in his review application that the fees allowed to counsel should be a day fee of R18 000.00, R4000.00 for preparation and R1500. 00 for settling the opposing affidavit. He gives no reasons for proposing these amounts or any explanation justifying these amounts. It is clear that he agrees with the Taxing Master that a day fee of R18 000.00 is appropriate. Although the Taxing Master appears to be of the view that counsel is entitled to a preparation fee of R12 000.00, it seems that, in

exercising his discretion, he allowed R9 000.00. Mellet agrees with this. I cannot, in any event, fault the Taxing Master's exercise of his discretion with regard to the fees allowed for Mr Greyling.

- [8] Item 31 on the Bill of Costs reflects the fees charged the by junior counsel. Kampherbeek's complaint against these fees is that the junior counsel had only six months' experience and that it is absurd that he should be allowed half of the senior counsel's fee. Uniform Rule 69(2) provides:

"Where fees in respect of more than one advocate are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate shall not exceed one half of those allowed in respect of the first advocate".

The provisions of this sub rule are clear. Kampherbeek submits that the junior advocate should not be entitled to more than R10 000.00 in respect of wasted costs, and appears to base this submission on the experience (or lack thereof) of the junior counsel. I am of the view that such a submission cannot be sustained and endorse the averment of the Taxing Master that it matters not whether the junior counsel practised for one day or one year. Kampherbeek complains that the junior counsel did not specify on his fee note what work he specifically did. The papers filed in this matter and the fee note of the senior counsel, are a clear indication of the work that was done in this matter. Mellet's Practice Note (in the main application) was signed by the junior counsel, who also counter-signed the Heads of Argument in that application. Item 19 on the Bill of Costs makes it clear that both counsel were consulted by Mellet's attorney. In my view, it is

apparent that the junior counsel had done his fair share of the work that was required to be done. There is, therefore no merit in Kampherbeek's complaint regarding the lack of details in the junior counsel's fee note. It appears that the junior counsel rendered his fee note on the basis of the provisions of Uniform Rule 69(2), that he is entitled to no more than 50% of the senior's fee. I am of the view that the Taxing Master was correct in taxing an amount of R5 500.00 off the fee of the junior counsel to bring it within the parameters of the 50% prescribed in the sub rule.

- [9] In view of what I have said above, the application for review of the taxation cannot succeed, and I accordingly make the following order:

The application is dismissed with costs.

S. NAIDOO, J

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