

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5222/2009
5314/2009

In the matter between:

NICOLAAS JOHANNES BASSON

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA
LIMITED

Respondent

JUDGEMENT: RAMPAI J

DELIVERED ON: 10 FEBRUARY 2011

[1] *Brevitas causa* I refer to the parties as they were cited in the notice of motion. These are review proceedings. The respondent applies for the review of the taxation. The applicant has filed no papers in opposition of the application. The taxing officer abides.

[2] The applicant launched an urgent application on 21 October 2009 against the respondent to have the sale by public auction of a specified immovable property stayed to enable him to apply for the rescission of default judgment and the judicial attachment of the property. The public auction was

scheduled for 10:00 on the same day, Wednesday 21 October 2009.

- [3] Neither the first respondent nor the second respondent, the sheriff, opposed the aforesaid urgent application. By agreement between the applicant and the 1st respondent, the urgent application was granted but the costs thereof stood over for later adjudication. On the 11th March 2010 the costs were awarded to the 1st respondent. Henceforth I refer to the 1st respondent simply as the respondent.
- [4] Pursuant to the aforesaid costs order, a memorandum of fees and disbursements due to Messrs Matsepes Inc, the respondent's attorneys, was drawn up, served on 16 April 2010 and filed on 19 April 2010.
- [5] On 2 June 2010 the respondent's bill of costs was presented to Mr B. Mashinini, qua the taxing officer, for taxation. Attorney N A du Toit appeared for the respondent and Attorney E Visser for the applicant. The taxation of the consequent bill has given rise to the current review.

- [6] The bill of costs, as drawn up on behalf of the respondent, indicated that the sum of R16 260,70 was due to the respondent by the applicant in respect of fees earned and that the sum of R25 827,15 was similarly due in respect of disbursements incurred by the respondent's attorneys. Therefore the pre-tax total of the respondent's bill of costs was R42 087,85.
- [7] During the course of the process of taxation, some items though allowed, were nonetheless reduced but others were totally disallowed. There were only two fee items which fell under the latter category. However, those two items are not before me in this review. The rest of the items as regards both fees and disbursements fell under the former category. The *allocatur* was issued on the 29 June 2010. It showed that the sum of R4 060,50 in respect of fees was disallowed and of R12 452,95 in respect of the disbursements component of the bill was also disallowed. The respondent's claim of R42 087,85 was accordingly slashed by the sum of R16 513,45 to R26 574,40. When all was said and done the respondent's bill of costs was taxed and allowed in the sum of R29 776,22.

- [8] The respondent was aggrieved by the reduced sum of money so allocated. Consequently, the respondent called upon the taxing officer to state a case in terms of rule 48(1) for the decision of a judge. The respondent's notice to that effect was served and filed on the 19 July 2010. There were ten items complained off. I shall revert to them in due course.
- [9] The taxing master's response or stated case in terms of rule 48(2) was served and filed on 14 September 2010. The taxing officer mailed his written response to the parties by way of registered post. I assume, in the absence of the certificate of posting, that he did so on the 14 September 2010. I also assume that the parties received it within seven court days, in other words, before the 29 September 2010. Their rights to file written submissions expired on the 8 October 2010. The respondent did not submit any further written submissions or any fresh grounds of objections not previously advanced at the taxation. Likewise, the applicant submitted no such further submissions or fresh grounds.

[10] In the absence of such submissions, the taxing officer had no final report to frame in terms of rule 48(2). On the 13 October 2010 he advised the parties that he had nothing further to add to the stated case. He obviously considered the matter closed for submissions by the parties.

[11] The matter was subsequently allocated to my sister Radebe AJ, as she then was. I offered to take the matter over from her to enable her to finalise her reserved judgment before she left our division to take up her permanent seat on the KZN bench. We were privileged to have her on our bench which she graced with dignity. I am indebted to her for the ground-work she did before the take-over. I immensely valued her input.

[12] The respondent was a successful party in two applications instituted by the applicant. In those matters this court had awarded costs to the respondent against the applicant on the scale as between party and party (pap scale). The bill of costs was taxed. The respondent was not satisfied with the taxing officer's decremental adjustment of certain items of the bill. It applied for the review of the taxation on the

ground that no valid reason existed to justify the deductions made by the taxing officer. Besides that there were no numerous other grounds for me to advert to.

- [13] The court has the power to interfere and correct the taxing officer's ruling on various recognised grounds but also when it is satisfied that he or she was clearly wrong. To do so a court must be in the same or better position than the taxing officer to determine the point in issue.

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LIEBERUM NO AND ANOTHER 1968 (1) SA 473 (AD) at 478G – H per Potgieter.

- [14] Perhaps the most crucial questions I am called upon to resolve in this review, is whether the taxing officer erred in considering the two matters as ordinary and uncomplicated applications. The complexity of a matter is a relevant factor in assessing an attorney's disbursement, relative to the fee paid to an advocate, whether junior or senior counsel -

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LIEBERUM NO AND ANOTHER *supra* at 479A – D.

[15] The discretionary powers of the taxing officer to allow or disallow and the judicial powers of the court to oversee the taxation process by way of revisionary interventions were instructively outlined and contrasted in **PRELLER v JORDAAN AND ANOTHER** 1957 (3) SA 201 (O) at 203B – E. There are two instructive features in the judgment by Smith AJP. The one is that the taxation of the bill of cost is primarily the prerogative of the taxing officer. The other is that the scope of intervention by the courts is limited. An important segment of the taxing officer's discretion is that costs, which appear to the taxing officer to have been incurred by the claimant through overcaution, should be disallowed. The various ground on which the court can interfere with the discretion of the taxing officer are enumerated in the passage.

[16] The ostensible purpose of an award of costs was to recompense the successful litigant. This can be done in two ways. The one method is called a party and party scale. The “pap” scale is very formal, very rigid and very conservative. It is strictly limited to indemnifying the winner, not necessarily in full, but rather partially for costs incurred in

connection with the rendering of necessary services. Such necessary litigation services are circumscribed in the attorneys tariff – see rule 70 of the Uniform Rules. Decisions such as **DBM HUURMASJIENE v ADMINISTRATEUR, ORANJE VRYSTAAT** 1987 (4) SA 264 (O), **CITY DEEP LTD v JOHANNESBURG CITY COUNCIL** 1973 (2) SA 109 (W), **PRELLER v JORDAAN** *supra* and **LEGAL & GENERAL ASSURANCE SOCIETY v LIEBERUM NO** *supra* all deal with bills of costs where costs were awarded on the “pap” scale. This particular scale seeks not only to recompense the winner as far as possible but also to protect the loser from unscrupulous winners or sharp practices by some legal practitioners.

- [17] In contrast to the aforesaid method, the other method is called an attorney and client scale (aac scale). The “aac” scale is less formal, comparatively flexible and generous towards the winner. It recognises the deficit or discrepancy between what the winner can recover from the loser in a case where costs were awarded on the “pap” scale on the one hand and on the other hand what the winner has actually expended for the services rendered on which the

success was based.

[18] The “aac” scale covers not only necessary services but over and above that it extends to the sphere of liberal services, sometimes termed luxurious services, which though desirable are not regarded as necessary in terms of the “pap” scale. The “aac” scale is often used as a punitive rod to disentitle a loser who, had displayed some form of reprehensible conduct, of the protection which, as a general norm, is often afforded good losers. ([CAMBRIDGE PLAN AG v CAMBRIDGE DIET \(PTY\) LTD AND OTHERS](#) 1990 (2) SA 574 (T).)

[19] For more about “aac” scale see [PROTEA LIFE CO LTD v MICH QUINET FINANCIAL BROKERS & ANDERE](#) 2001 (2) SA 636 (O) and [BEN McDONALD INC. AND ANOTHER v RUDOLPH AND ANOTHER](#) 1997 (4) SA 252 (T). Lest we forget, the current review is about the “pap” scale. To that I shall shortly return.

[20] In the case of [VAN ROOYEN v COMMERCIAL UNION ASSURANCE CO \(SA\) LTD](#) 1983 (2) 465 (O) M T Steyn J made some apposite comments about the role-players in a

taxation matter as well as the process of taxation itself:

[21] At 468C – E he said the following about an attorney:

“The attorney is his client's master of costs, often deciding, either on his own or in conjunction with counsel, what steps to take, what evidence to obtain for and use in the litigation, evaluating the work and effort involved in the matter and what the charges therefor should be. If his client is the successful party he then has to see to it that the client be properly indemnified and has to draw his party and party bill of costs accordingly and have it properly taxed. As officer of the Court the attorney is enjoined to act responsibly and to draw his party and party bill of costs so as to include therein only what is permissible to recover from the party condemned in such costs.

What *is* permissible is, to my mind, those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation.”

[22] At 468 E – G he said the following about a taxing officer:

“But even the most reasonable and capable of minds tend to subjectivity in evaluating own conduct and estimations. To curb such subjectivity the office of Taxing Master was called into being for the purpose of introducing an objective standard whereby to judge, from the outside as it were, the permissibility of the amounts sought to be recovered from the losing party. By virtue of his having in effect to make value judgments on the nature and amounts of the items in the bills of costs he has to tax, the Taxing Master must of necessity be vested with a discretion as to what he should allow or disallow. Being like the attorney an officer of the Court, the Taxing Master is enjoined to act responsibly in the performance of his duties and must consequently exercise his discretion judicially.”

[23] At 468G – 469B he said the following about taxation process.)

“In essence the process of taxation is a joint undertaking by attorney and Taxing Master, aimed at justice being properly done in the matter of costs and each making his contribution for that purpose. It is clearly for this reason that the learned authors of Nathan, Barnett and Brink's *Uniform Rules of Court* 2nd ed remarked at 422 that attorneys, as officers of the Court, have a "duty to assist the Taxing Master, where

possible, to steer his difficult course between the Scylla of liberality and the Charybdis of niggardliness.

But to evade the fangs of the monster on the one hand and the vortex of the whirlpool on the other, the Taxing Master should be properly appreciative of the role of the attorney and be ever mindful of the exigencies of the particular litigation the attorney was set to handle.

The process in fact requires of each that he place himself in the position of the other. By way of such mutual appreciation the proper balance needed for an equitable result can the (sic) more readily and speedily be attained.”

[24] At 469B – C he said the following about the court:

“But the Court remains the ultimate arbiter and it is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with

‘unless it is found that he has not exercised his discretion properly, as 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 considered others which it was improper for him to consider, or acted upon wrong principles or wrongly

interpreted rules of law, or gave a ruling which no reasonable man would have given’.

per SMIT AJP in *Preller v Jordaan and Another* 1957 (3) SA 201 (O) at 203C - E.”

[25] Having fleetingly given such instructive exposition of a few principles within the ambit of the main body of principles of the law of taxation, I now proceed to examine the various objections and their grounds, as well as the taxing officer’s various rulings and his reasons for making them.

[26] The first leg of the dispute concerns item 2 of the bill of costs. The item deals with the fee for the attorney’s perusal of the founding affidavit relative to application number 5222(2009). The fee claimed was R461.50, disallowed R301,75 and allowed R159,75.

The respondent’s ground of objection was that there was no valid reason why the taxing officer disallowed a portion of the fee as claimed.

The taxing officer’s response was that he decided to tax off the aforesaid amount because it was unnecessary for the

respondent's attorney to peruse the founding affidavit.

[27] The applicant filed no submissions at all. Usually a party in whose favour a bill was reduced would challenge an opponent's objection, request that the taxing officer's decision be upheld and pray that an aggrieved opponent be ordered to pay the costs of the review proceedings. In this instance, there was no input whatsoever from the beneficiary of the taxing officer's decision. The respondent's review application is therefore unopposed.

[28] The perusing of documents is provided for in par 1(a) section C of the attorney's tariff of fees under Rule 70. It makes provision for the perusing of a whole range of things such as, the summons, petition, **affidavit**, pleading, report, advocate's advice, advocate's drafts, important letter, notice or document. In any court application a founding affidavit is an important statement embodying as it does, the gravamen of the relief an applicant seeks against a respondent. An attorney cannot properly advise his respondent client and properly hold a meaningful initial consultation with his client unless he reads the very foundation of the relief sought

against his client, the respondent.

[29] It will be readily appreciated, therefore, that a fee for perusing an affidavit is expressly provided for in the particular paragraph of the aforesaid section of the tariff as a fee recoverable by the winner from the loser on the “pap” scale. The applicable tariff rate for the attorney perusing an affidavit is R35,500 per page. The founding affidavit is a 13 page document. The fee claimed is a correct product of an accurate mathematical multiplication.

[30] In my respectful view the respondent’s attorney necessarily perused the founding affidavit. The need for an attorney to do so is recognised in the “pap” scale. The submission of the taxing officer that it was not necessary for the attorney to peruse such an important document was clearly wrong.

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LIEBERUM NO AND ANOTHER *supra* it follows therefore that the fees disallowed should have been allowed.

[31] In making this ruling I am fortified by two important facts. Firstly, the fact that the applicant does not oppose the

respondent's review application. Secondly, and this is very fundamental, the fact that the taxing officer allowed the attorney's claim for perusing the related notice of motion as legitimate fee. As I see it, the notice of motion and the founding affidavit are birds of the same feather. (See par 1(a) section C again.) There seems to be no sound reason in principle and in logic for distinguishing the one from the other. By allowing the fee claimed for the perusing of the notice of motion, the taxing officer was likewise obliged to allow the fee claimed for the perusing of the supporting affidavit.

[32] The failure of the taxing officer to appreciate the principle that there was no fundamental distinction between item 2 and item 1 to warrant differentiation of assessment was a misdirection so material that it vitiated his discretionary decision. He did not properly apply his mind to the item. In view of such misdirection I am disposed to interfere with his injudicious exercise of the discretion entrusted to him.

[33] As regards items 3, 13 and 14, the dispute was also about the perusing fees. The respondent's grounds of objection

were precisely the same as those raised in respect of item 2.

So were the taxing officer's reasons.

[34] Item 3 concerned the fee claimed for perusing annexures to the founding affidavit, viz item 2. Para 1(a), section C authorises a fee on a "pap" scale for the perusing of a **document**. The document is unspecified. In my view the perusing of annexures to a founding affidavit are some of the documents perfectly contemplated by the drafters of the rule. Therefore I find that the annexures perused in this instance were covered by the word, document, of the paragraph under consideration.

[35] Item 13 concerned the fee claimed for the perusing of the founding affidavit under the rescission application number 5413(2009). Compare item 2 *supra*. Item 14 concerned the fee claimed for the perusing of annexures to the founding affidavit (item 13). It therefore corresponds with item 3 *supra*.

[36] In the light of all these similarities between items 3, 13 and 14 on the one hand and item 2 on the other hand, I have

nothing further to add to the views, findings and rulings I have already expressed and made in connection with item 2. Such views, findings and conclusions apply *mutatis mutandis* to these further three items.

[37] The conference fee was also a disputed item. Item 27 concerned a fee claimed for the attorney's conference with an advocate in connection with the aforesaid rescission application. The fee claimed was R1 065,00, disallowed R532,50 and allowed R532,50.

The respondent's grounds of objection were:

"Item 27: Attorney spent 1½ hours at the advocates chambers which is reasonable amount of time considering the case and the volume of documents involved. There is no valid reason why 45 min of the said amount of time should be taxed off."

The taxing officer's reasons were as follows:

"2) Item 27

The taxing master allowed only 45 minutes on the consultation on the basis the purpose of the consultation should have taken

45 minutes for a party to party bill and the other 45 minutes should form part of attorney and client.”

[38] The attorney’s conference fee is regulated by para 5, section B. The tariff rate is R177,50 x time ÷ 15minutes. The taxing officer gave his reasons for reducing the fee claimed. The respondent had a right in terms of Rule 48(2) to submit further submissions following the taxing officer’s written response. However, the right was never exercised. Therefore the decision of the taxing officer remained unrebutted.

[39] On the deficient written material placed before me, the decision of the taxing officer based on his discretionary assessment that the alleged duration of the conference was unnecessarily long, is one which, on review, I cannot hold to be clearly wrong or based on no valid reason.

[40] In the circumstances no valid ground of objection has been established. That being the case, no interference with the exercise of the discretion by the taxing officer appears to be warranted in this connection.

[41] The disbursements expended by the attorney on behalf of the respondent was also in dispute. This brings me to item 32. Here the expense incurred related to the advocate's fee. The respondent declared no dispute in respect of an ancillary expense, item 33 – being value added tax on the amount paid to the advocate. The two items have to be considered together since any adjustment of item 32 necessarily affects item 33 as well.

[42] The disbursement claimed, in respect of item 32, was R5 700,00 disallowed R3 400 and allowed R2 300. As regards the related item 33, the disbursement claimed was R798,00 disallowed R476 and allowed R322. Therefore the disbursed total allowed was R2 622,00 and disallowed R3 876,00.

The respondent's objection and grounds were the same as before. The taxing officer's reasons were stated as follows:

“3) Item 32

There is valid reason why the R3 400-00 was taxed off. This

was a simple matter and did not require a Senior Council (sic). The amount of R2 300-00 allowed is reasonable for this type of the matter which is reasonable if the applicant could have used a Junior Council (sic).”

[43] Once again the respondent did not join issue with the taxing officer’s submission. There are very important aspects of the decision which I have to stress. The first was that the matter was an uncomplicated legal business. This seems to be reference to the application for the stay of the sale in execution or public auction, in common parlance of ordinary people. The second was that a junior instead of a senior counsel, could easily have done a good job in pretty much the same way as a senior counsel could. The third was that an amount allowed was representative of an average fee usually charged by junior advocates in this division in similar matters.

[44] In the absence of further contentions whereby these submissions of the taxing officer were challenged as unreasonable, such a decision should stand unless I should independently find a reason why it should not.

[44] The taxing officer routinely deals with the taxation of bills of costs. He is an experienced and senior officer of this division. On Tuesday the 1st February 2011, he began with a new vertical career move in the Supreme Court of Appeal. Certainly, such a move says something remarkable about the officer's experience, abilities and work-ethic as a whole. In the circumstances, I cannot substitute my decision for his in this regard. In my view it cannot be said he unreasonably exercised his discretion. It is remarkable to note that eventually there were no papers filed to oppose that particular application. Instead, the application for the stay of the public auction was granted by consent, save for the costs, which were initially reserved but ultimately awarded in favour of the applicant. This, in my view, materially fortifies the taxing officer's decision for disallowing a portion of the disbursements on the ground that the application was not a complex matter to warrant the briefing of a senior counsel -

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LIEBERUM NO AND ANOTHER *supra*. I would therefore uphold the decision of the taxing officer in respect of the two related items. Conversely the objection of the respondent is overruled.

[46] Also brought on review was item 36. The item was also about the question of perusing. The respondent sought to recover a fee for its attorney's perusal of an opposing affidavit by its own deponent. This item seemingly refers to the applicant's application for the rescission (case 5413(2009) of the default judgment which was granted in favour of the plaintiff, the current respondent, on 10 July 2009 (case 3066/2009)). The fee claimed was R710 disallowed R532 and R177,50 allowed. The applicable basic rate as per par 1(1) section C was R35,50 per page.

[47] The respondent's objection reads:

"Item 36: In this item 20 pages were perused by attorney (20 x R35.50 = R710.00). It is the attorney's responsibility to peruse these documents. There is no valid reason why R532.50 should be taxed off."

The taxing officer's written response in this regard was the same as it previously was in connection with item 2.

[48] Naturally, my reasoning and conclusion are the same as in

respect of item 2 above. All the same I am inclined to briefly comment about this sort of perusing because it is contextually different from the sort of perusing previously encountered in this judicial opinion. This item, unlike item 2, deals with a situation where a party's own attorney peruses a document drafted by the same party's own advocate. The taxing officer was deeply troubled by such a claim. He slashed the fee claimed by a huge amount which represented 75% of the fee claimed to signify his dissatisfaction.

[49] Apparently, the respondent's attorney consulted with the respondent's deponent. After the consultation the attorney briefed the advocate to prepare the opposing affidavit. The advocate subsequently sent a brief, with a revised draft of opposing affidavit, back to the attorney for his further action. The next further action taken by the attorney was to peruse the draft opposing affidavit as refined and finalised by the advocate. Having satisfied himself that the draft was in accordance with the respondent's instructions to him as well as in accordance with his brief to the advocate, the attorney forwarded the draft to the respondent's deponent. By the

look of things, the respondent's deponent was in Johannesburg at the time (vide undisputed item 37).

[50] The perusing of an advocate's draft(s) is a fee item expressly authorised by "pap" scale. Because the scale explicitly makes provision for it, it cannot be disallowed by the taxing officer on the grounds that the draft opposing affidavit was unnecessarily perused. It is always imperative for an attorney involved in any civil litigation to be cautious in all his dealings with the opposite side. In my view it would generally be unwise for an attorney to proceed or work on the wrong assumption that whatever an advocate has done must be correct. An attorney has to protect the interests of his client diligently. He cannot claim to have acted diligently if he can send to his client a document, as important as an opposing affidavit, which has been drafted by someone else for signing by his client without first having satisfied himself of the correctness of its contents.

[51] Accordingly the fee disallowed was, in my respectful view, disallowed for a clearly wrong reason. The taxing officer wrongly disregarded factors or principles which were proper

for him to consider - **PRELLER v JORDAAN** *supra*. The material misdirection justifies interference by the ultimate arbiter. Therefore I am inclined to reverse the decision of the taxing officer.

[52] Item 72 concerned the disbursement incurred by the respondent in connection with the advocate's fees. The disbursement claimed was R16 800,00 disallowed R7 200,00 and allowed R9 600,00. Although not in dispute, item 73 was causally connected with item 72 in that it also concerned an amount disbursed as 14% value added tax on the advocate's fees. The amount expended in this way and claimed was R2 352,00 of which R1 344 was disallowed leaving R1 008,00 balance which was allowed as value added tax on the capital expended.

[53] The respondent's grounds of objections were stated as follows:

“3.8 Item 72:

The advocates fees are divided as follows:

i) drafting heads of argument, including research – 4

hours : R 4 800.00;

- ii) Opposed application argued including preparation : R12 000.00;

These above amounts charged by S.C. Adv. Daffue are very reasonable and can be linked to the fees of junior counsel.

There is no valid reason why the amount of R7 200.00 should be taxed off.”

[54] The taxing officer’s response was the same as that which he gave in respect of item 32. I suppose my reasoning and conclusions are likewise the same. However, I hasten to add two things peculiar to this item. Firstly, it is a salient principle of the law of taxation that over-caution should not be sanctioned by the taxing officer in any circumstances – **PRELLER v JORDAAN** *supra*. Secondly, it has to be borne in mind that as for the respondent, the stakes were not really high. The matter concerned a straight forward application by a bond defaulter to have a default judgment rescinded. Even if the application was granted, in favour of the applicant (originally the defendant) as indeed it was, it did not signal the end of the road for the respondent’s summons.

[55] Although the sum of the disallowed disbursements totalled R7 200,00 the taxing officer in the exercise of his discretion considered the surplus of R9 600,00 to be an approximate equitable, and reasonable amount the respondent would have disbursed had the respondent bank used the services of a junior instead of a senior counsel. Moreover, I need to comment that, in the perking order of advocates, between a junior counsel and a senior counsel, there is a rank: a senior junior. The respondent overlooked those two ranks.

[56] Of course a litigant has the right to engage the services of any counsel of his choice, irrespective of such counsel's professional status, to do any matter, for him, however, simple the matter may be but such a decision has consequences. One of the consequences thereof, which must be readily appreciated, is that if the costs are awarded in favour of such litigant he might, in certain circumstances, not be able to recover fully the amount disbursed in the form of advocate's fee. This is the protection which the "pap" scale affords the loser. That is precisely what has happened here.

[57] In these circumstances, I am not persuaded that the taxing officer mindlessly exercised his discretion in disallowing, as he did, the disbursements in question. It cannot be seriously argued with conviction that he disallowed the portion of the disbursement for no valid reason. I am not persuaded that he acted upon wrong principles or wrongly gave a ruling which no reasonable taxing officer would have given – **PRELLER v JORDAAN** *supra*. In my view, the decision he made in this regard made a whole lot of sense to me. The respondent's objection is accordingly over-ruled. The ruling by the taxing officer is upheld.

[58] Also in dispute was item 77 which was about attorney's fees in respect of letters written. The fee claimed was R1 846,00, disallowed R380,50 and allowed R1 455,50.

[59] The respondent's grounds of objections were:

“3.9 Item 77:

Seven (7) letters were already subtracted from the total amount of letters written ($7 \times R35.50 = R248.50$). This is a very reasonable gesture from our attorney.

There is no valid reason why a further R390,50 should be

taxed off.”

The taxing officer’s written response was:

“6) Item 77

26 letters over a period of 6 months is too much, the taxing master was lenient towards the applicant in this regard. Strictly the taxing master allows 1 letter per month which means only 6 letters would have been allowed if the taxing master was not flexible on this item. The taxing master allowed 15 letters and that is very reasonable for period of six months.”

[60] The relevant taxation rule is paragraph 3, section B which prescribes a basic rate of R35,50 per letter written. The rule required the respondent to collectively state the number of letters and the total fee claimed without giving the fine details of each individual letter, such as: the date, the sender, addressee and the subject-matter thereof. I am satisfied that the item was compliant with the rule.

[61] The taxation rule is unambiguous, simple and straight forward. The applicant had an automatic right to inspect,

before taxation, the respondent's file not only for the purpose of checking out the number of the alleged letters but also of verifying the importance of each letter in order to ascertain its relevance to the case. At times such an inspection might bring to light some helpful grounds for the disallowance of the fee claimed. For instance, some of the letters might be proven to fall outside the ambit of "pap" scale. Several letters from an attorney to client might have gone astray as a result of an incorrect address.

- [62] The communication break up might be caused by a client's change of his address without informing his attorney about it in good time. Such a break might prompt an attorney to write several letters in an attempt to re-establish contact with his client. An attorney may write several letters to an unco-operative witness whose evidence might be needed in support of the attorney's client. An attorney may exchange a number of letters with a tracing agent in a bid to track down an important but missing witness. Fees relating to all such letters, for examples, would be recoverable on "aac" scale but not "pap" scale.

[63] In the instant case there is no indication that the applicant exercised his right to inspect the alleged 26 letters. This is the one thing. The other thing is that the taxing officer is not empowered by virtue of his discretion to formulate his own internal rules. The taxing officer's strict formula of one letter per month boils down to an unauthorised reformulation of the rule. The formula can readily lead to absurd consequences. Imagine the dilemma of an attorney who, after writing one important letter on the 1st day of a month, receives two extremely urgent and important letters the very next day. In such a scenario, it would certainly be unfair and unreasonable to expect an attorney to wait for one month in respect of one urgent letter and for two months in respect of the other urgent letter before he could reply.

[64] Therefore, it would be unreasonable to disallow an attorney's fees claimed in respect of the relevant two letters on the grounds that the attorney had already exceeded the monthly limit. It follows from the above that there may well be conceivable practical exigencies dictating the writing of many letters in one month or even one week. It seems to me incorrect to disallow an attorney's fee in respect of letters

written purely on the basis that the number of such letters exceeded the taxing officer's own expectations. Whether to allow or to disallow the fee in this connection, the substance and not the number of the correspondence should be a decisive factor. Both the substance and number can only be established through physical inspection of each and every letter written.

- [65] In a case where the taxing officer suspects that the attorney concerned was engaged in sharp practices, (s)he can *mero motu* have the taxation adjourned or even postponed in order to satisfy herself or himself that the number of the letters is not inflated; that the subject-matter of each letter was indeed relevant and that the letter was necessarily written. It is not the taxing officer's case that he inspected the respondent's files to verify that 15 and not 26 letters were written. In my view, there was a genuine need to do so, before a decision was taken to substantially slash the correspondence. The taxing officer has to responsibly play a participative and yet flexible role during the course of taxation - **VAN ROOYEN v COMMERCIAL UNION ASSURANCE CO (SA) LTD** *supra*.

[66] A rigid formula such as the one used in connection with this item is fundamentally arbitrary. Arbitrariness can never produce equitable, fair and reasonable result. In this case there was no evidence, although it is incumbent for a taxing officer to ensure that the safeguards against sharp practice are implemented, that the attorney was involved in a sharp practice. However, safeguards against sharp practices must be enforced – **McDONALD INC AND ANOTHER v RUDOLPH AND ANOTHER** 1997 (4) SA 252 (T) at 256H – J.

[67] It will be recalled that the bill of costs covered two applications. The particular item apparently related to the sum of the letters written in those two files taken together as one for the purposes of taxation. Therefore, on average, more or less 12 letters could have been allocated to each file. Therefore, the total of 24 letters (12 letters per file), over a period of 6 months was not disturbingly excessive in my view. I would therefore sustain the respondent's objection that there was no valid reason for disallowing anything from the fee claimed. Something more than the formula applied

by the taxing officer was required to justify the disallowance. Since no inspection was held, either by the applicant or the taxing officer, nothing untoward was established as regards the correspondence in question to justify the reduction of the fee claimed. The objection is sustained and the ruling is set aside. The taxing officer misapplied the rule.

[68] The last objection concerned item 79. Firstly, it was about the fees for the necessary telephone calls. The fee claimed was R1 135.00, disallowed R350.00 and allowed R785. Secondly, it was also about the related disbursement. The disbursement claimed was R73.15, disallowed R21.95 and allowed R51.00.

[69] The respondent's objection was stated and follows:

“3.10 Item 79:

As a good gesture, our attorney already subtracted 4 Telephone calls from the total amount of calls from the total amount of calls made (4 x R49.34 = R197.39).

It is unreasonable that a further R350.00 should be taxed off.”

[70] The taxing officer's written response was:

"7) Item 79

The telephone calls if not specified are allowed 3 minute a call and it is within the discretion of the taxing master especially when they are not specified. If you take 11.80 times 3 minutes call multiply by 19 calls it gives you R672.60 which means that actually R462.40 was supposed to be taxed and only R350.00 was taxed off. The applicant did not specify telephone calls and the taxing master was reasonable by taxing off R350-00 whereas he could have taxed off R462.40."

[71] Paragraph 3, section D reads:

- "3. Necessary telephones calls: The actual cost thereof plus,
per quarter of an hour or part thereof:-
- | | |
|-----------------------------|----------|
| (a) by an attorney | R 213,00 |
| (b) by a candidate attorney | R 65,00" |

The respondent description of the item contains some unsatisfactory aspects. The most glaring of them all is that necessary telephone calls and necessary consultations were lamentably lumped together and thrown into the same pot. It is impermissible to brew the two together. Necessary

consultation is a professional service taxable in terms of par 1, section A. When a fee is claimed for holding consultation, the consultation should be adequately detailed or described so that an objective assessment can be made to determine whether it was necessary or not. See for instance the undisputed items 5 and 15 of the respondent's bill of costs.

[72] The question which immediately arises here is what other unspecified consultations did the respondent's attorney purportedly hold in terms of paragraph 3, section D with unidentified individuals collectively described as "alle belanghebbendes"? Of the 23 telephone calls made, how many of them were consultative in kind (par 1, section A) and how many were non-consultative but purely necessary telephone calls as envisaged in par 3, section D? There are more questions than answers. The uncertainty creates a huge scope for guesswork. Obviously, the taxing officer cannot guess whether a telephone call was necessary or not unless its precise details are specified. In my view a claim for fees and disbursements as itemised here was not sufficiently and meaningfully particularised. The particulars of the outgoing calls sent or made have to be specified in a

bill of costs. In this case they were not.

[73] Unless otherwise agreed with the loser, every telephone transaction has to be individualised by means of: a number dialled, a date, duration of the call and the actual cost thereof and actually vouched before any mathematical calculation of the fee can be done. The basic rate is $X/15 \times R177,50$ where X equals time measured in minutes. Since each telephone call can be vouched by the service provider, the exact number of the calls and their details can be readily verified. There was virtually no real proof that 23, or rather 19 calls were made and that together they endured for 96 minutes. The persons called were not identified let alone the purpose of any of those numerous calls.

[74] The required actual details were amiss. The claim was not actualised. The ball was in the respondent's court, as the claimant, to furnish or exhibit proof of actual cost and duration of each call. It was never done. Therefore it could not be said that the alleged calls, whatever their accurate number, were necessary telephone calls. The taxing officer was, in my view, generous even to allow any amount at all.

[75] In these circumstances it cannot be persuasively contended that the taxing officer did not properly apply his mind to the particular item. The respondent's objection was, in my view, rightly overruled. Accordingly, the taxing officer's decision to reduce the fee and the related disbursements claimed on the grounds that the item was not specified is sustained. The discretion was judiciously exercised. No interference is warranted. In the light of this conclusion I deem it unnecessary to deal with the differing calculation methods employed by the respondent, on the one hand, and the taxing officer on the other. However, I have to say, with respect, that both methods appeared to be at odds with the basic formula as laid down in par 3, section D.

[76] Accordingly, I make the following order:

76.1 The respondent's review application succeeds in respect of items 2, 3, 13, 14, 36 and 77.

76.2 The respondent's review application fails in respects of items 27, 32, 72 and 79.

76.3 The applicant is directed to contribute R400 plus 14% VAT thereon towards the respondent's costs of review.

76.4 The taxing officer is directed to adjust the *allocator* accordingly.

M. H. RAMPAL, J

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