

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 940/2009

In the matter between:

M M F MABASO

Applicant

and

THE ROAD ACCIDENT FUND

Respondent

CORAM:

KUBUSHI, AJ

DELIVERED ON:

22 SEPTEMBER 2011

KUBUSHI, AJ

- [1] This is a review of taxation in terms of rule 48 (1) of the Uniform Rules of Court. *Brevitatis causa* the applicant will be referred to as the plaintiff and the respondent as the defendant. The review arose from a bill of costs enrolled for taxation by the plaintiff in accordance with an order of the court granted in her favour. At the taxation of the bill, the defendant opposed some of the items on the bill as a result of which the taxing master disallowed some of the items in full and reduced others.

[2] The defendant was not satisfied with the taxing master's decision and applied for a review of the taxation. The taxing master, in terms of rule 48 (3), duly supplied his stated case to both parties. In response thereto, the plaintiff filed his written submissions in terms of rule 48 (5) (a). The taxing master did not supply the parties with a report as required by rule 48 (5) (b).

[3] The bill of costs emanated from the cost order granted against the defendant by the court on 6 August 2010. The plaintiff issued summons against the defendant for payment of damages for personal body injuries sustained in a motor vehicle accident. The defendant defended the summons. By agreement between the parties the matter was settled and the settlement agreement was made an order of court.

[4] The order of the court granted on the 6 August 2010, reads as follows:

“ IT IS ORDERED THAT: (By agreement)

1. The defendant is to pay 100% of the plaintiff's proven or agreed damages.
2. The defendant is to pay plaintiff's taxed costs as between party and party and the qualifying expenses (the amount of such expenses to be fixed by the Taxing Master) of such witnesses as it may consent to, and failing such consents as may be ordered by the above Honourable Court, subject to the following conditions:
 - (a) The plaintiff shall serve the Notice of Taxation on the defendant's attorney of record; and
 - (b) The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs."

[5] It is trite law that when a bill of cost is taxed, the taxing master exercises a discretion. The purview of this discretion was set out in **PRELLER v JORDAAN AND ANOTHER** 1957 (3) SA 201 at 203C – E as follows:

"It is clear that a discretion is given to the Taxing Master to award such costs etc. ". . . as appear to him to have been necessary and proper . . ." . . . Since the discretion is vested in the Taxing Master, the reviewing Court will not interfere with his decisions 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.”

[6] The defendant objected to the following items on the plaintiff's bill of costs: items 11 (g), 11 (h), 11 (j), 14, 15, 16, 49, 50, 51, 52, 53, 54 and 62 of the bill of costs of Podbielski Mhlambi Ingelyf; and items 70, 71, 73 and 74 of the bill of costs of Honey Prokureurs. The objection was that all these items related to *quantum* and since *quantum* had not been settled the plaintiff was not entitled thereto. The defendant raised the same reasons in its written submission. The taxing master agreed with the defendant and disallowed the items.

[7] The plaintiff in her application for review did not agree with the taxing master's decision and argued that the items were mistakenly taxed off. She contended that in terms of the court order the defendant was liable for her taxed party and

party costs including the qualifying fees of her expert witnesses, up to and including the 6 August 2010. According to the plaintiff if the court had intended the taxed party and party costs to be in respect of the merits only, it should have been so stated. The taxing master in his stated case contended that he taxed off these items because they could only be claimed once the *quantum* has been settled.

- [8] I agree with the taxing master that these items could not be claimed at this stage. My view is that they can only be claimed once the court order has been complied with in the following manner: firstly, the *quantum* must be settled, either proven or agreed upon; secondly, the defendant has to consent to the witnesses or failing such consent the court must make the necessary order; and lastly, the amount of such expenses must be fixed by the taxing master. The court order is explicit on these issues.

- [9] There is no indication on the record that as at the date of the taxation of the bill of costs, the damages had been proven or agreed upon, or that the defendant had consented to the witnesses or that the court had granted an order in respect of

the witnesses, nor had the taxing master fixed the qualifying expenses for the witnesses. In the circumstances, in my view, the taxing master was correct in disallowing these items. The plaintiff is not entitled thereto until the court order has been complied with.

[10] The defendant also objected to items 77 and 79 of Honey Prokureurs bill of costs. Item 77 was in respect of the attendance at the court during the settlement negotiations and item 79 was as regards the attendance at the court, waiting for the judge to grant the order. The defendant objected to these items on the basis that firstly, some of the time during the settlement negotiations was attorney and client and secondly, that waiting time at the court was an attorney and client cost and must therefore be taxed off. The defendant raised the same issues in its written submissions. The taxing master agreed with the defendant and taxed off a portion of these items.

[11] The plaintiff was not satisfied with the taxing master's decision to tax off a portion of these items. Her argument was that the parties' attorneys spent from 9h30 to 13h00, in

respect of the settlement negotiations and from 14h00 to 15h15 waiting for the judge to have the settlement made an order of court and therefore the plaintiff was entitled to the full costs on these items.

[12] Item 77 was stated as follows in the bill of costs:

“Bywoning Hof en skikkingsonderhandeling (3 ure 30 min)”.

In the notice of opposing the taxation, the defendant stated the following:

“Tydsduur word in dispuut geplaas. Gedeelte is prokureur en klient”

The plaintiff was not satisfied with the decision of the taxing master and in her application for review stated the following:

‘Beide die partye se prokureurs was vanaf 9h30 – 13h00 aanwesig en besig met skikkingsonderhandelinge by die hof en is die eiseres derhalwe op n party en party skaal gerigtig op die voormelde item in totaliteit en bestaan daar derhalwe hoegenaamd geen basis waarop n gedeelte daarvan afgetakseer kon word nie en is die bedrag van R426.00 derhalwe foutiewelik by hierdie item afgetakseer.

In his stated case, the taxing master stated the following:

‘Although there were settlement negotiations not all the time was for the negotiation some of the time was used for consultation

and therefore is attorney and client. So I decided to tax off part of the time for attorney and client.'

[13] The tariffs do not specifically provide for a fee for settlement negotiations. Rule 70 of the Uniform Rules of Court which provides for costs on a party and party scale, provides in item A-6 for any other conference which the taxing master may consider necessary. In my view settlement negotiations would also fall in this item.

[14] In this instance, the taxing master considered and found only a portion of the costs to be necessary and disallowed a portion which he considered not to be necessary. His reasoning being that 'not all the time was for the negotiation, some of the time was used for consultation'. The plaintiff's dissatisfaction on the other hand stems from the fact that 'both party's attorneys were present and busy at the court with the settlement negotiations from 9h30 to 13h00.' I consequently had to determine whether in the taxation of a bill of costs a fee for settlement negotiations is taxable in full in a party and party bill or whether a portion thereof, in

respect of consultation with client, is taxable in an attorney and client bill.

[15] Despite a diligent search I could not find any case where an issue similar to the one in this instance had *per se* been decided. The only case I found was where a court was called upon to decide whether a fee for a consultation to discuss and consider with a client a proposal for settlement emanating from the other side was properly taxable in a party and party bill or not. That court held that the taxing master acted on a correct principle in allowing this fee. The issue decided in that case, in my view, did not differ substantially from the issue in this instance. See **GOLDSCHMIDT AND ANOTHER v FOLB AND ANOTHER** 1974 (3) SA 778 (TPD).

[16] My view is that since a fee for settlement negotiations is allowable under item A-6 it must be taxable in full in a party and party bill. In a settlement negotiation an initiator will put an offer or proposal on the table to start the process of negotiations. The other party would then discuss the proposal with his or her attorney and *vice versa* until

settlement is reached. The settlement negotiations could be started either by a consultation with own client or by a proposal emanating from the other side. Either way there will always be a need for the attorney to consult with his or her client before a final settlement can be reached.

- [17] A consultation between an attorney and his or her client, whether as initiating the process or throughout the process of negotiations is cardinal and such a consultation, to my mind, forms part of the settlement negotiations and must not be viewed as a separate process. Fees incurred during this consultation process, to my mind, can therefore not be attributed to attorney and client costs. As stated in **GOLDSCHMIDT** *supra* at 781H an attorney will indeed be failing in his or her duty to his or her client if he or she did not consult with his or her client on a proposal for settlement. My view is that this is so irrespective of whether there was a settlement proposal from the other side or the settlement negotiations were initiated by the party entitled to the costs. An assiduous attorney would not finalise settlement negotiations without having consulted with client.

[18] In the circumstances, I find therefore that the taxing master acted on a wrong principle in disallowing a portion of this item. These were party and party costs and were necessary for the conduct of litigation and should have been allowed in full. See BEN McDONALD INC AND ANOTHER v RUDOLPH AND ANOTHER 1997 (4) SA 252 (TPD) at 257H.

[19] In respect of item 79 the taxing master allowed only a fee for attendance to obtain the order from the judge and taxed off an amount for waiting time which he contended was an attorney and client cost.

[20] A fee for waiting is allowed in terms of item A-11 of the tariff of fees of attorneys as provided for in rule 70 of the Uniform Rules of Court. The said item provides that rates of remuneration in items 1 - 9 (of the tariff of fees of attorneys) do not include time spent travelling or waiting and the taxing master may, in respect of time necessarily so spent, allow such additional remuneration as he or she in his or her discretion considers fair and reasonable, but not exceeding

R177,50 per quarter or part thereof in the case of an attorney and R54,00 for a candidate attorney.

[21] In terms of this item, once the taxing master is satisfied that time was necessarily spent in waiting he or she must apply his or her mind to the *quantum* of the fee to be allowed therefor which would necessarily involve also a consideration of the duration of the period necessarily spent waiting. The first enquiry is therefore whether it was necessary for the attorney to be present at the court and to wait. If the taxing master remains not persuaded that it was necessary for the attorney to wait at all, he or she would not only be justified but would be obliged to disallow any fee for time spent by the attorney waiting. See **LINTON & CO v ASSISTANT TAXING MASTER** 1972 (2) SA 550 at 552A – D.

[22] To my mind, the taxing master, in this instance, misdirected himself by concluding that the time spent by an attorney waiting for the judge was an attorney and client cost. It is patently clear that item A-11 falls within the tariff set out for party and party costs.

[23] What was required of the taxing master was to first enquire whether or not it was necessary for the attorney to wait for the judge. This he did not do, but instead misdirected himself by following a wrong principle. The taxing master could only disallow these costs if after the enquiry he could not be persuaded that it was indeed necessary for the attorney to wait. The plaintiff's contention was that the parties' attorneys spent from 14h00 to 15h15 waiting for the judge to have the settlement made an order of court. My view is that, in the current circumstances, it was necessary for the attorney to be present at the court and to wait for the judge. The attorney could not have known how soon the judge would be available and had therefore to wait all that time until the judge was available to grant the order. I conclude therefore that the taxing master was wrong to disallow this item.

[24] The next step that must follow would be to determine the *quantum* of the fee to be allowed which would necessarily involve also a consideration of the duration of the period necessarily spent waiting. In terms of item A -11 the taxing master may, in respect of time necessarily so spent, allow

such additional remuneration as he or she in his or her discretion considers fair and reasonable, but not exceeding R177,50 per quarter or part thereof in the case of an attorney. I therefore, find it necessary to set aside the taxing master's ruling in respect of item 79 and to remit the matter back to him to determine the *quantum* of the fee to be allowed.

[25] Accordingly, I grant the following order:

- 25.1 The plaintiff's review application fails in respect of items 11 (g), 11 (h), 11 (j), 14, 15, 16, 49, 50, 51, 52, 53, 54 and 62 of the bill of costs of Podbielski Mhlambi Ingelyf; and items 70, 71, 73 and 74 of the bill of costs of Honey Prokureurs.
- 25.2 The plaintiff's review application in respect of item 77 succeeds.
- 25.3 The plaintiff's review application succeeds in respect of item 79. This item is referred back to the taxing master to deal therewith in accordance with this judgment.
- 25.4 No order as to costs of the review is granted.

E. M. KUBUSHI, AJ

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