FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2826/2007

In the case between:-

GERT JACOBUS ABACORNIE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT BY: JORDAAN, J

HEARD ON: 12 FEBRUARY 2010

DELIVERED ON: 25 FEBRUARY 2010

APPLICATION FOR REVIEW OF TAXATION BROUGHT IN TERMS OF RULE 48 OF THE UNIFORM RULES OF COURT

[1] The applicant was the plaintiff in a claim for compensation for damages allegedly sustained in a motor vehicle accident. The trial was enrolled for hearing on the 3rd, 4th and 6th of February 2009. The trial was incidentally heard by me and proceeded on the 3rd and 4th of Februarie after which it was postponed to the 6th for continuance. The matter was however settled on the 5th

of February with the result that only an order in terms of a settlement was sought on the 6th. Counsel for applicant (plaintiff) with leave of the court returned to his place of residence in Cape Town and did not attend the granting of the order by consent on the 6th of February.

[2] For the sake of convenience I will refer to the applicant as plaintiff and the respondent as defendant.

[3] The plaintiff being the successful party submitted a bill of costs for taxation, which was duly held and taxed by the local taxing master. The taxing master disallowed various items in the bill of costs. This review is aimed at setting aside such disallowance in regard to some of those items.

[4] The taxing master submitted a stated case in terms of the aforesaid rule and both parties filed submissions in response thereto. In terms of rule 48(6) I invited the parties' attorneys to address me in chambers which was duly done on the 12th of February this year.

[5] The approach to be followed in matters of this kind as been repeatedly stated in various decisions. That approach is summarised in the decision in **CITY OF CAPE TOWN v ARUN PROPERTY DEVELOPMENT (PTY) LTD AND ANOTHER** 2009 (5) SA 227 (CPD) at page 232, paragraph [17] as follows:

> "[17] The taxing master has discretion to allow, reduce or reject items in a bill of costs. She must exercise this discretion judicially in the sense that she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, her decision will be subject to review. In addition, even where she has exercised her discretion properly, a court on review will be entitled to interfere where her decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances, or as to the practice of the court."

[6] I interpose to mention that I find the last sentence of the aforesaid portion of the judgment difficult to understand. If the taxing master's decision is based on a misinterpretation of the law or a misconception as to the facts and circumstances or

misconception as to the practice of the court, to my mind it cannot be said that the discretion was exercised properly on the basis of sound principles. That does not however affect the matter.

[7] In view of the vast number of items objected to which forms the subject of this review, I do not intent to deal with the items in numerical order but rather to first deal with those items that, according to my view, requires some comment. I proceed to deal with the various items.

[8] Items 41, 67, 79, 172, 247 and 518: These items all related to the writing out of a cheque to pay the various creditors. They were all disallowed by the taxing master on the basis that no provision is made for such an item in the tariffs. During argument, the representatives of the parties were however, *ad idem* that such an item might be covered by paragraph B3, which provides for the writing of letters etc. The tariffs however allow a fee per page consisting of 250 words. All of the aforesaid items were preceded by an item providing for a letter

to the said creditor accompanying the cheque. The parties were also in agreement that the covering letter could by no means consist of 250 words being a formal letter accompanying the cheque and also in agreement that the writing out of a cheque as such does not amount to nearly a full page. In view of rule 70(9) read with note 1 to the tariffs under heading B “drafting and drawing”, the drafting of the preceding item namely the accompanying letter taken together with the writing out of a cheque will not amount to more than 1 page and, since the preceding items pertaining to the letters were allowed in full, sufficient provision has been made for the attorneys fees by allowing the preceding items to each of the aforesaid items and the taxing master was therefore in effect not to be faulted for disallowing the aforesaid items.

[9] Items 61, 63 and 64: Item 61 related to a telefax to Dr Cilliers for the completion of the MMF1 form and the fee for that was allowed by the taxing master. Items 63 and 64 related to telephonic calls to the said medical practitioner to obtain the said completed form. Plaintiff’s representative was constrained

to concede that, in allowing item 61, sufficient provision has been made for fees for plaintiff's attorney in trying to obtain the said form, that items 63 and 64 did not really take the matter any further and can be regarded as attorney and client costs with the result that the taxing master cannot really be faulted in exercising his discretion in disallowing those items.

[10] Items 194 and 196: These items both related to the attorney's efforts in obtaining an MMF1 form from Dr Loubser and were both disallowed by the taxing master. On behalf of the defendant it was conceded that it would be reasonable to at least allow one of the items in an effort to obtain the said statutory medical form and that, in disallowing both items, the taxing master did not exercise his discretion properly. It was therefore conceded that item 196 should have been allowed.

[11] Items 352, 495, 499 and 533; these items all pertained to a fee charged by plaintiff's attorney for the time spent and the expenses relating to his attendance at the advocate's chambers in Cape Town for consultations for which he had to travel from

his offices in Bellville on each occasion. The representatives of both parties were *ad idem* that travelling time and expenses are as a rule not allowed in this division, traditionally mainly because all the local attorneys are located within a short distance of court and the advocate's chambers. Defendant's representative however correctly conceded that such a blank and rigid rule of practice in effect limits and indeed ousts the taxing master's discretion as envisaged in item A11of the tariffs. It is evidently wrong for the taxing master to adopt a rigid approach and, without taking into account the circumstances of each case, refuse such an item as a matter of principle. He must decide whether it was reasonable for the plaintiff to use an attorney based in Bellville or not. If it was not unreasonable, he should have considered whether it is fair and reasonable to allow for the time and expense occasioned by travelling to the advocate. The parties were in agreement that, if such an item should be allowed, the tariff for travelling expenses amount to R2,50 per kilometer and the distance travelled, being 50km return trip, should amount to an expense of R125 per trip. They were also in agreement that the then applicable tariff for time spend amounted to R125,00 per quarter of an hour and that travelling time usually is allowed at a half of the aforesaid tariff. In view of the aforesaid it would have been reasonable to allow a total of one hour at a fee of R250,00 per consultation for the time spent on each occasion a necessary consultation with the advocate was attended.

[12] Items 366, 368: Both items consisted of telefaxes to the South African Police Services to obtain the inquest report which were disallowed by the taxing master as being follow-up on previous requests in this regard and being attorney and client items. Plaintiff's representative had to concede that the plaintiff is not entitled to all follow-up telefaxes or telephone calls and that, since items 362 and 363 in this regard were allowed, it cannot be said that the taxing master exercised his discretion improperly in disallowing the follow-up items. I agree.

[13] Items 369, 370 and 375: These items related to correspondence in regard to payment of accounts between the plaintiff's correspondent attorneys and plaintiff's representative

correctly conceded that it constitutes attorney and client costs and were correctly disallowed.

[14] Items 525 and 526: Item 525 related to a telephonic conversation with the local correspondants of plaintiff by the Cape Town attorney to discuss a tender made on behalf of the defendant. On behalf of the plaintiff it was correctly conceded that such a discussion was not strictly speaking necessary since the instructing attorney in Cape Town did not need to discuss the tender with the local attorneys and the item was therefore correctly disallowed.

[15] Item 526 related to a telephonic conversation with the advocate by plaintiff's attorney to discuss the same tender. The taxing master disallowed this item on the basis that it was not necessary to discuss the tender with the advocate. On behalf of the defendant it was correctly conceded that the advocate forms part of the plaintiff's legal team, he prepares for trial and is in the best position to advise the plaintiff and the plaintiff's attorney on the reasonableness or not of tender proposals. It

was conceded that the last mentioned item should have been allowed and I agree with that.

[16] Items 592 and 593: It was correctly conceded by the representative for plaintiff that, in view of the fact that item 591 has been allowed, these items consisted of follow-ups and were not strictly speaking necessary. These items were clearly attorney and client costs and correctly disallowed by the taxing master.

[17] Items 594, 595, 596, 597 and 598: These items relate to correspondence between the plaintiff's Cape Town attorney with the local correspondent in regard to the local attorneys account. It was correctly conceded on behalf of the plaintiff that these items relate to attorney and client costs and were correctly disallowed by the taxing master.

[18] Item 599: Both parties agreed that the taxing master is correct in holding that accounts are only perused at half of the normal tariff. However, the taxing master disallowed the whole item

instead of disallowing half of the fee which should have been done.

[19] Items 619 and 620: These items mainly refer to expenses in the form of advocate's fees. Plaintiff made use of the services of senior counsel who charged a fee R1 800,00 per hour and R18 000,00 per day. Counsel's tax invoice contains particulars of everything done on each occasion and the time spents on each occasion. It is only necessary to deal with those items which the taxing master either disallowed or only allowed part of the fees charged by counsel. Those items relate to the following:

13 March 2008: This item relates to counsel's advise on evidence for which he charged three hours in the total amount of R5 400,00. The taxing master regarded the time spent as too long and only allowed half an hour. Defendant's representative was bound to concede that the three hours charged by counsel were not unreasonable. The taxing master obviously did not have due regard to the complexity of the matter where various experts of different specialities were

involved as witnesses and where problems were experienced in obtaining evidence regarding the plaintiff's income in the informal business sphere. The drafting of an advise on evidence is not a formality but indeed a most important and complicated task. A properly drafted advice on evidence paves the way for an orderly and considered approach to litigation. I am convinced that to allow three hours would not have been unreasonable and to only allow half an hour is indicative of the fact that the taxing master did not have due regard to the aforesaid factors.

19 March 2008: The advocate charged a fee for four and a half hours for consultation with plaintiff and his wife in the presence of the attorney. Two and a half hours has been taxed off by the taxing master on the basis that most of the aspects covered on that occasion were already part of the advice on evidence on the 13th of March. It does appear from counsel's tax invoice that at least a large part of the said consultation consisted of the discussion of available evidence, the obtaining of evidence and other practical aspects that traditionally have to be done by

the attorney. I am not convinced that the taxing master has exercised his discretion improperly in this regard.

20 January 2009: On the said date counsel had a consultation with the attorney where various aspects pertaining to the preparation for trial have been discussed. Counsel marked a fee for three hours which was disallowed by the taxing master in *toto* on the basis that it amounts to attorney an client costs. Defendant’s representative conceded that it would have been reasonable to involve counsel in preparation and that, since two hours consultation in this regard have been allowed for the attorney, the same should have been allowed for counsel. I agree with that and am of the view that the taxing master did not exercise his discretion properly in this regard and that he should have allowed at least the same time for this consultation as has been allowed for the attorney.

27 January 2009: Counsel charged a fee for four hours for discussions with the attorney relating to practical arrangements for attending the trial as well as the preparatory work relating to

the trial as such. The total amount has been disallowed by the taxing master on a basis that it consisted of attorney and client costs. I am of the view that the taxing master was correct in not allowing this item as a separate item but am of the view that the said item, in as much as it consisted of preparatory work in connection with the trial, should have been taken into account when assessing the reasonableness of counsel's fee for the first day of the trial. That will be dealt with later.

28 January 2009: Here, counsel charged a fee for three hours for discussing a tender with the attorney and evaluating the tender. Defendant's representative pointed out that this item relates to item 526 where it was already conceded that it was reasonable to involve counsel. She however pointed out that, by that stage, both the attorney and counsel should have had clarity as to what a reasonable amount in regard to plaintiff's damages should be and that therefore, only one hour should have been allowed. I agree and am of the opinion that it would have been reasonable to allow one hour in this regard. The taxing master's view that settlement offers should not be

discussed with counsel is clearly not in line with reality. In practice the advocate prepares on the issue of quantum of damages and he is the person who has to convince the court and address the court as far as the quantum of damages is concerned. The taxing master should have had due regard to the practical necessity to involve counsel in those discussions and should have allowed at least one hour.

29 January 2009: Counsel charged six hours for consultation with the attorney and at least two expert witnesses. The taxing master disallowed two and a half hours, being of the view that the consultation was too long with "the one expert consulted". I already pointed out that the consultation involved both the neurosurgeon as well as the occupational therapist. It does however appear that the major part of the consultation consisted of preparatory work, which can be regarded as preparation for trial. In view of that, I cannot find that the taxing master has exercised his discretion improperly by disallowing part of the fees on that basis. The amount of time disallowed, being preparatory work, should however have been taken into

account when deciding on the first day fee that should have been allowed to counsel which I will deal with later on.

30 January 2009: Counsel charged two hours for what in essence amounted to preparatory discussions with the attorney for purposes of trial. This again has been correctly disallowed by the taxing master on a separate basis as charged but should have been taken into account when assessing the appropriate first day fee that should have been allowed for counsel. I deal with that later on.

1 February 2009: Counsel charged three hours in total for what again appears to be purely preparatory work for purposes of trial. I am of the view that the taxing master correctly disallowed these items on the basis that it should not have been allowed as a separate item but again should have been taken into account when assessing the proper first day fee.

2 February 2009: Counsel charged a day fee of R18 000,00 for the day. It was disallowed in *toto* by the taxing master. The

day consisted of flying from Cape Town to Bloemfontein, arranging accommodation and other preparatory work in regard to the trial. It however included the attendance of a rule 37 conference where both counsel attended as well as a further consultation with plaintiff and his wife. The representative of the defendant correctly conceded that at least two hours should have been allowed for the attendance of the rule 37 conference and the consultations with plaintiff and his whiff. I agree that the taxing master erred in disallowing the total amount and should have at least allowed two hours for the aforesaid. The rest consisted of preparation and as mentioned time spent travelling and making arrangements for accommodation which is clearly attorney and client costs. At least part of the day was taken up in further preparation, which the taxing master should have taken into account in assessing the appropriate first day fee with which I will deal later on.

5 February 2009; The trial was set down and continued on the third and fourth of February and would have continued again on the 6th of February with the 5th not being a date on which the

trial would have continued. Counsel marked a fee for three hours for discussions regarding a further tender made by defendant which discussions were held with the plaintiff's attorney. The representative of the defendant conceded that it was reasonable to discuss the further tender and settlement proposals with counsel but argued that a large part of this item was in essense a preparation for the continuance of the trial the next day. She suggested that, at most, one hour should have been allowed. I agree that the taxing master should at least have allowed one hour in this regard.

6 February 2009: Plaintiff's counsel charged a day fee of R18 000,00 for the last day of the trial. On behalf of the plaintiff, it was correctly conceded that, in this division, counsel is not allowed a fee on a party and party basis for trial days reserved but not used, the only exception being a fee for the first day. Since the matter was settled the previous day and counsel for plaintiff did not attend court for purposes of obtaining an order of court in accordance with the settlement, the taxing master correctly disallowed this item.

THE BALANCE OF THE ADVOCATE'S FEES

[20] Certain of the items relating to the advocate's fees have been dealt with above. It is however necessary to deal with the remainder. In this regard it should be noted that counsel marked his daily fees at a flat rate of R18 000,00 per day and did not mark an escalated first day fee so as to allow for time spent in preparation. The advocate's consultation with the attorney on the 27th January 2009 (four hours) was disallowed in total. In essence, this consultation consisted of preparatory discussions relating to strategy at the trial. The same applies to the consultation with the attorney on the 30th January 2009 (two hours) that was disallowed. On the first of February 2009 the advocate spent approximately three hours in total in preparation for trial which were disallowed by the taxing master on the basis that it is included in the first day fee. The same applies to the remainder of time spent on the 2nd February 2009 (I have already found that two hours should have been allowed for the rule 37 conference and consultation with the plaintiff). The balance of time was partly spent in preparation and partly

making practical arrangements in regard to accommodation, copying of documents and travelling to Bloemfontein. According to the advocate's invoice the part that reasonably can be considered as preparatory work for purposes of trial appears to be in the vicinity of two hours. The total time spent by counsel in preparation therefore approximately amounts to eleven hours. In effect, the taxing master did not allow any amount for preparation because he, on the one hand held that preparation should be included in the first day fee but, on the other hand, only allowed the flat rate (also called refresher fee) as a first day fee. That was clearly a misdirection by the taxing master. He should have allowed a higher first day fee to provide for a reasonable remuneration for preparation, taking into account the complexity of the case, the volume of the matter and the level of counsel's fees. The case was rather complex and voluminous, taking into account the various expert witnesses involved. The traditional (outdated?) approach to allow one and a half times the refresher fee as a first day fee does not appear to be sufficient and fair compensation in the present circumstances and I would suggest that a substantially higher amount might be called for. That is however something to be left to the discretion of the taxing master. To allow only R18 000,00 for the first day was clearly a misdirection by the taxing master. He should have allowed a higher first day fee, taking into account the aforesaid.

[21] Item 358: This item relates to a consultation by the attorney held with counsel and involving the plaintiff and plaintiff's brother. This consultation was held on the 2nd April 2008 and the taxing master only allowed half an hour for the attorney whereas counsel's fees of one hour has been allowed. Since the attorney is not only entitled but most probably obliged to attend the whole consultation with counsel, the taxing master was clearly incorrect in disallowing part of his fees. If an hour was allowed for counsel then the same should have been allowed for the attorney.

[22] The remainder of the items objected to and which has not been dealt with by me thus far consist of the following items:

Item 3, 10, 11, 12, 42, 69, 71, 72, 98, 99, 114, 115, 117, 127, 163, 213, 214, 215, 216, 219, 220, 221, 222, 223, 224, 225, 340, 376, 406, 407, 496 and 534. I do not regard it necessary to deal with each of these items separately. Having regard to the taxing master's stated case as well as the representations made on behalf of the parties, I do not find any convincing reason to hold that the taxing master has not exercised his discretion properly in disallowing these items. The review regarding these items cannot succeed.

[23] In view of the aforesaid the review succeeds in part but is also partly unsuccessful. In view thereof I do not intend making any order as to costs and each party should bear its own costs relating to the review proceedings.

[24] In the result the following orders are made:

1. The review succeeds in part.
2. The allocator of the taxing master is set aside.
3. The matter is remitted to the taxing master to re-assess the account in accordance with this judgment.

A. F. JORDAAN, J

On behalf of the applicant:	Adv. H. M. Raubenheimer SC Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of the respondent:	Adv. C. Snyman Instructed by: Honey Inc BLOEMFONTEIN

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