

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 6032/2008

In the matter between:

ANTON HERBERT TAUTE NO

Applicant

and

GERT PETRUS JOHANNES HEYMANS

Respondent

DELIVERED:

27 August 2009

JUDGMENT

MOLEMELA, J

INTRODUCTION

[1] This is a review of taxation as contemplated in Rule 48(1) of the Uniform Rules of Court. The taxation arose from the following order that was made by agreement between both parties and made an order of court:

- “1. Die aansoek word uitgestel na die bestrede rol van hierdie hof op Donderdag 5 Februarie 2009.
2. Die respondent het geleentheid tot 19 Desember 2008 om ‘n aanvullende opponerende verklaring af te lewer.

3. Die applikant het geleentheid tot Vrydag, 23 Januarie 2009 om 'n aanvullende repliserende verklaring af te lewer.
4. Die respondent betaal die koste veroorsaak deur hierdie uitstel en aanvullende reëlins soos tussen prokureur-en-kliënt.”

[2] At the taxation of the applicant's bill of costs, the taxing master disallowed (taxed off) some amounts from the fees that were charged for various items. The applicant's attorney objected to the disallowance of those fees. The taxing master duly filed a stated case, after which both parties filed written submissions as contemplated in Rule 48(5).

[3] The details of the items of the bill of costs that were disputed are set out hereunder.

Item 3:

“Arranging, sorting and pagination of documents”. Fee charged: R125.00; Amount disallowed: R87.00; Taxing master's reason: The most cost-effective method of litigation should always be followed and thus a candidate attorney could have been requested to do it..

Item 8:

“Telephone consultation with client regarding trial date and a short discussion”; Fee charged: R50.00; Amount disallowed: R25.00 Reason: An average of 3 minutes was allowed since the duration of the discussion was not specified,. See **City Deep Ltd v Johannesburg City Council** 1973 (2) SA 109 (W) at 119 G. Also see High Court Rule dated 24/1/2000 that stipulates minimum charge of R20.00.

Item 9:

“Perusal of letter from client”; Fee charged: R25.00; Amount disallowed: R25.00; Reason: This item related to the main action and therefore did not amount to wasted costs.

Item 10:

“Response to the above letter received in item 9”: Fee charged: R50.00; Amount disallowed: R50.00; Reason: This item did not amount to wasted costs as it was in relation to the main action.

Item 11:

“A letter to an attorney Penzhorn in Pretoria that appears for Afgri and that also has an interest in this application”; Fee charged: R50.00; Amount disallowed: R50.00 plus disbursement of R8.00; Reason: Attorney Penzhorn was not a

party to this matter and Mr. Lubbe on behalf of applicant could not provide any evidence to the contrary.

Item 13:

“Perusal of the heads of argument by the advocate for the applicant”; Fee charged: R375.00; Amount disallowed: R375.00; Reason: This did not amount to wasted costs because it relates to the main action and can be used again.

Item 14:

“Copies for the respondent, the advocate and for the file”; Fee charged: R56.25; Amount disallowed: R56.25; Reason: This did not amount to wasted costs because it related to the main action.

Item 15:

“Drafting of filing notice”; Fee charged: R50.00; Amount disallowed: R50.00; Reason: This did not amount to wasted costs because it was in relation to the main action.

Item 16:

“Letter to attorney Penzhorn to report”; Fee charged: R50.00; Amount disallowed: R50.00 plus disbursement of R30.00

Reason: Attorney Penzhorn was not a party in this matter and no evidence could be provided to the contrary.

Item 17:

“Perusal of attorney Penzhorn’s response”. Fee charged: R25.00; Amount disallowed: R25.00; Reason: Attorney Penzhorn was not a party to the matter.

Item 19:

“Perusal of respondent’s heads of argument as well as practice notes”: Fee charged: R400.00; Amount disallowed: R400.00
Reason: This did not amount to wasted costs because it was in relation to the main action. See **Greenberg v Mortimer** 1979 (4) SA 642 (T).

Item 20:

“Copy of item 19 for the advocate”; Fee charged: R20.00; Amount disallowed: R20.00; Reason: This did not amount to wasted costs because it was in relation to the main action. See **Van Heerden and Another v Tarr** 1959 (2) SA 328 (E).

Item 21:

“Consultation with advocate and client”; Fee charged: R120.00; Amount disallowed: R450.00; Reason: An amount of R500.00

per hour was allowed which is the normal tariff for a consultation was allowed together with a surcharge of 50%.

Item 23:

“Further discussions after discussion with advocate and client”;
 Fee charged: R600.00; Amount disallowed: R225.00; Reason:
 The duration of the discussion time was not specified, therefore a fee for a duration of 30 minutes was allowed, together with a 50% thereon, which added up to an amount of R375.00. An informal rule of practice was applied, which is to the effect that when there is no written agreement between the parties one takes into account the seniority of the attorney and allows the normal tariff plus a surcharge of 50% thereon.

Item 28:

“Telephone conversation with client”; Fee charged: R50.00;
 Amount disallowed: R25.00; Reason: Duration of discussion not specified, thus fee for three minutes’ discussion allowed. See **City Deep Ltd v Johannesburg City Council**, *supra*.

Item 32:

“Letter to client providing feedback”; Fee charged: R50.00;
 Amount disallowed: R50.00; Reason: In item 28 a charge for a

telephone call with client on the same day was allowed. A letter and a telephone call on the same day amounts to unnecessary duplication.

Item 34:

“Consultation with advocate”. Fee charged: R600.00; Amount disallowed: R524.00; Reason: A fee of R76.00, payable for candidate attorneys, was allowed since it was not at all necessary for the attorney to have personally delivered the court order. See **Liquidator for Benghiat Ltd v Liquidators of Sterling Trading Co** 1922 WLD 177 at 181.

Item 35:

“Drawing fee of the draft order”; Fee charged: R125.00; Amount disallowed: R75.00; Reason: According to the general tariffs, the drawing fee is R50.00 per page. The mere drafting of a court order does not warrant a fee of R125.00.

Item 36:

“Telephone conversation to attorney Penzhorn”; Fee charged: R50.00; Amount disallowed: R50.00; Reason: Attorney Penzhorn was not a party to this matter.

Item 38:

“Letter to attorney Penzhorn”; Fee charged: R50.00; Amount disallowed: R50.00 plus disbursement of R4.00; Reason: Attorney Penzhorn was not a party to this matter.

Item 42:

“Payment to the advocate for the drafting of the heads of argument”; Counsel’s fees: R6 000.00; Amount disallowed: R6 000.00; Reason: An advocate is not allowed to charge separately for drawing up heads of argument. According to the Advocates guidelines the drawing of heads of argument is included in the first day fee.

Item 43:

“VAT amount on item 42”; Disbursement charged: R840.00; Amount disallowed: R840.00; Reason: This is the VAT amount on item 42. As a result of item 42 taxed off, the amount claimed for VAT was also taxed off.

Item 44:

“Payment to advocate for appearance at the application”; Counsel’s fee charged: R18 000.00; Amount disallowed: R3000.00; Reason: The general tariff allowed for an advocate’s appearance in court is R15 000.00 per day

depending on experience. Therefore an amount of R15 000.00 was allowed and the balance of R3 000.00 was taxed off.

Item 45:

“VAT amount on item 44”. Disbursement charged: R2 520.00
Amount disallowed: R420.00 Reason: As a result of the adjustment of the advocates fees taxed off on item 44, an amount of R420.00 was also taxed off from the amount of VAT claimed.

Item 46:

“Disbursement amount in terms of a letter that was sent to the client with a copy of the court order”. Fee charged: R50.00 plus disbursement of R4.00 Amount disallowed: R2.00 Reason: The practice rules of the High Court allow between R1.85 and R2.00 per letter sent. No postages are allowed as it is an inclusive fee in the drawing of letters.

[5] **LAW APPLICABLE TO THE ISSUES**

5.1 **WASTED COSTS OCCASIONED BY A POSTPONEMENT**

In **Van Heerden and Another v Tarr**, *supra*, at 330 G wasted costs were defined as follows:

“I think the meaning to be given to the term 'wasted costs' emerges from the ordinary meaning of the words used. Costs are 'wasted' when the services which occasioned them are of no more use to the parties in the action.”

In the case of **Protea Life Co Ltd v Mich Quenet Financial Brokers en Andere** 2001 (2) SA 636 (O) at 648 D – E it was held, with regards to wasted costs, that it must always be kept in mind that wasted costs do not relate only to work which has been wasted, but also to additional costs which have been incurred as a result of the actions of the party who was to blame.

5.2 **ATTORNEY AND CLIENT COSTS**

It is trite that a distinction is drawn between attorney and client costs taxed against one's own client and attorney and client costs payable by an opponent. It is clear that the attorney-and-client costs payable by an opponent are not as generous as in the case of attorney-and-own client costs. See **Ben McDonald Inc and Another v Rudolph**

and Another 1997 (4) SA 252 (T) at 257 G – 258 F where Van Dijkhorst J summarised them as follows:

“In cases where the losing party in litigation is to pay them to the successful party this means all reasonable costs incurred on behalf of the client although not strictly necessary or 'proper'. In practice this means that these costs are taxed according to the tariff, but generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on a party and party basis.” (my underlining)

This principle was confirmed in this Division in the unreported case of **Harris v Harris**, Case no. 3963/99 as well as the case of **Protea Life Co Ltd v Mich Quenet Financial Brokers en Andere**, *supra*, at 643 B – D.

5.3 **DISCRETION EXERCISED BY THE TAXING MASTER**

It is trite law that when a bill of costs is taxed, the taxing master exercises a discretion. This is equally applicable irrespective of the scale of costs applicable to the bill of costs concerned. For this reason, a court will not readily interfere with this discretion, except where such discretion

was not applied judiciously or where the decision of the taxing master was clearly wrong. See Harris v Harris, (*supra* at p. 5).

[6] **APPLICATION OF THE LAW TO THE ISSUES**

Item 3:

The respondent submitted that it is unreasonable to expect the arrangement, sorting and pagination of documents to be attended to by a candidate attorney as candidate attorneys do not always execute the task correctly and therefore need the supervision of an attorney. This submission would carry water if this item was considered in isolation. However, it must be taken into account that in item 6 the fee that has been allowed for the arrangement of the brief, i.e. R125.00 is the full fee chargeable by an attorney and not a candidate attorney, so the taxing master has thus already taken cognizance of an attorney's involvement in the matter. It would thus be unnecessary to expect an attorney (as opposed to a candidate attorney) to be involved each time the same documents are

arranged, sorted and paginated. The disallowance of part of the fee under this item is thus upheld.

[7] Item 8 and 28:

In the case of **City Deep Ltd v Johannesburg City Council**, *supra*, at 119 G the court had the following to say:

“A bill of costs must be a complete bill of the whole of the fees, charges and disbursements in respect of the particular business done. The business or action to which it relates should be specified item by item. Each item must be dated and should state its subject-matter precisely and not in vague and general terms. Each item must be charged specifically.”

My own view is that a party who fails to specify his/her bill of costs as afore-mentioned , does so at his/her own peril and cannot quarrel with the taxing master if part of the fee is taxed off, especially if the amount allowed was not arbitrary but benchmarked against the stipulations of a practice rule. The disallowance of the fees by the taxing master is accordingly upheld.

Items 9 and 10:

The applicant's submissions do not seem to be consonant with the stated case's averment that the letters referred to in these items, in fact, have to do with the main application and do not form part of the wasted costs. The taxing master's disallowance of the fees is accordingly upheld.

Items 13, 14, 15, 19 and 20:

I agree with the applicant's submission that the aforesaid items do not fall within the definition of wasted costs as laid out in the cases mentioned in paragraph 5.1. The heads of argument will obviously still be applicable when the main application is argued and therefore do not constitute services that are no longer of any use to the parties in the main action. The disallowance of the fees in these items is accordingly upheld.

Items 36 and 38:

As with items 9 and 10 above, the submissions of the applicant's attorney under these items do not detract from the

fact that the letters concerned had nothing to do with the postponement of the matter and are related only to the main application. The disallowance of the fees by the taxing master is therefore upheld.

Item 21:

I disagree with the respondent's submission that the principle laid out in the **Ben McDonald Inc and Another v Rudolph and Another**, *supra*, is that one can only depart from the tariff in an attorney and own client taxation or in a taxation against one's own client. This contention is negated at page 257 I – J of that judgment by the following statement:

"In practice this means that these costs are taxed according to the tariff, but generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on a party and party basis."

It is quite clear that even in ordinary attorney-and-client costs (as opposed to attorney-and-own client), the taxing master still has a discretion. In my view the taxing master exercised her

discretion judiciously and there is therefore no reason for me to tamper with it. The taxing master's allowance of the party and party plus a surcharge of 50% thereon is therefore upheld.

Item 23:

This item is upheld on the same grounds as mentioned in respect of item 21.

Item 32:

I agree with the applicant's submission that there is nothing wrong with keeping their clients posted of development in matters that they are handling on behalf. I do not consider it overly-cautious for a practitioner to confirm the telephonic discussion in writing. This, in my view, does not constitute duplication and the disallowance of the sum of R50.00 is thus set aside.

Item 34:

This item should not be considered in isolation but in conjunction with item 21, for which the taxing master allowed a

fee. I agree with the respondent's submission that a fee chargeable to a candidate attorney was adequate. There was no longer any need for any further elaborate discussion as the fee for that had already been allowed under item 21. The taxing master's disallowance of part of the fee charged, is thus upheld.

Item 35:

The taxing master's disallowance of part of the fee is upheld on the ground that the drafting of the order in accordance with the parties' agreement was administrative in nature and that the normal tariff of R50.00 per page is adequate.

Item 42 and 43:

I am astounded by the applicant's attorney's alleged ignorance of the **Free State Bar Association's Guidelines** for fees. This ignorance will unfortunately not come to his aide in any way as there are authorities which support the proposition that heads of argument should not be charged for separately. See **J D Van Niekerk en Genote Ing v Administrateur, Transvaal** 1994 (1)

SA 595 (A). Also see **Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others** 1984 (3) SA 15 (A) at 19 C – D and 20 E. In this regard, the dicta of Van Dijkhorst J in the case of **Ben McDonald Inc and Another v Rudolph and Another**, *supra*, at p. 258 F – G are apposite:

“There is a perception, possibly true, that attorney and client costs taxed on the basis of 2.2 above do not adequately indemnify the successful party. If this is so the blame should be placed either on the Taxing Master (should he or she tax too stringently) or on the legal representatives (should they charge exorbitant fees). In the former case the remedy is a review. In the latter case the forum is the professional body.”

Perhaps it is high time that the applicant’s attorneys fully acquainted themselves with all the operations of the Free State Bar Association. Certainly, no fault is attributable to the taxing master regarding this item. Her disallowance of part of counsel’s fees in this matter is therefore upheld.

Item 44:

In her stated case, the taxing master merely stated that the general tariff allowed for an advocate's appearance in court is R15 000.00 per day, depending on experience. Nothing more is said about the experience of counsel concerned. Crucially, the taxing master does not contend that a fee of R18 000.00 is not justifiable for the advocate in question. I therefore cannot conclude that the taxing master exercised her discretion judiciously when she taxed off the amount of R3 000.00. Moreover, the very **Free State Bar Association Guidelines** do recognise that the fees charged by counsel, may vary depending on counsel's experience, the complexity of the matter etc. These guidelines do not stipulate a maximum fee that can be charged by counsel. Quite clearly then the taxing master misdirected herself with regards to this item and her disallowance of the amount of R3 000.00 is hereby set aside.

Item 46:

I agree with the taxing master that there was no longer any urgency warranting a fax. After all, the client had already been

advised of the postponement telephonically. The disallowance of the disbursement is therefore upheld.

[8] RULING

Items 32 and 44 are accordingly referred back to the taxing master to be dealt with in accordance with this judgment. No order is made as to the costs of the review, as both parties were partially successful.

M.B. MOLEMELA, J

MBM/sp