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

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **3645/2022**

In the review of taxation between:

PJ JOUBERT Applicant

and

KRAMER WEIHMANN INC Respondent

Coram: JP DAFFUE J

Judgment delivered: 20 NOVEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14H30 on 20 NOVEMBER 2024.

Summary: Rule 48 of the Uniform Rules of Court provides that any party dissatisfied with the ruling of the taxing master in respect of a bill of costs presented to them for taxation may request the taxing master to state a case for decision of a judge on review. The plaintiff instituted action against the first defendant and four other defendants. The first defendant filed a composite application which included an exception to the particulars of claim, as well as an application in terms of rule 23(2) for the striking out of certain paragraphs in the particulars of claim and a further application in terms of rule 30 read with rule 30A for the striking out of the plaintiff's claim. The exception succeeded, but the two applications for striking out were dismissed. Thereupon the first defendant's bill of costs was presented for taxation. Numerous disputes were raised by the plaintiff. The taxing master taxed the bill of costs whereupon the dissatisfied plaintiff instituted proceedings in accordance with rule 48 for review of taxation.

Held that the taxing master was clearly wrong in considering that the successful party in the exception was entitled to fees and expenses relating to about 7 000 pages which

did not form part of the particulars of claim, but was discovered in accordance with rule 35 procedure. Consequently, the review court interfered with some of the rulings.

ORDER

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1. Items 5 to 14 of the bill of costs are disallowed and shall be taxed off.

2. Joubert, cited as the applicant in the papers (the respondent in the review application), shall pay the costs of Kramer Weihmann cited as the respondent (the applicant in the review application) in the amount of R1 000.

REVIEW OF TAXATION

Daffue J

Introduction

[1] This is a review of taxation contemplated in rule 48(1) of the Uniform Rules of Court. Having been dissatisfied with the ruling of the taxing master for allowing several items on the taxed bill of costs presented by Mr PJ Joubert (Joubert), Kramer Weihmann Inc (Kramer Weihmann) initiated proceedings in accordance with the aforesaid rule. Its notice was filed on 14 November 2023.[1]

[2] On 22 January 2024 and in response to the taxing master's stated case, Kramer Weihmann filed its submissions in terms of rule 48(5)(a).[2] Joubert did likewise.[3] The taxing master filed the required report in accordance with the provisions of rule 48(5)(b), whereupon the parties filed their further submissions in terms of rule 48(5)(c). The court is now called upon to adjudicate the review in accordance with rule 48(6)(a).

The parties and the relevant background to the litigation

[3] Kramer Weihmann is a personal liability company, conducting its practice of attorneys, notaries and conveyancers in Bloemfontein. It instituted action as plaintiff against Joubert as first defendant and four other defendants. The claim against Joubert is for alleged misappropriation of trust monies entrusted to Kramer Weihmann, but nothing more needs to be said in this regard.

[4] Joubert, an admitted attorney, notary and conveyancer, served as director of Kramer Weihmann until 3 March 2020. Bearing in mind the present dispute between Kramer Weihmann and Joubert, it is unnecessary to deal any further with the claims against second to fifth defendants and/or processes embarked upon by them in the litigation under case number 3645/2022.

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[1] Review record: p 49.
[2] *Ibid*: p 87.
[3] *Ibid*: p 150.

[5] Joubert filed a notice of intention to defend the main action whereupon he filed a composite application which included an exception to the particulars of claim, as well as an application in terms of rule 23(2) for the striking out of certain paragraphs in the particulars of claim and a further application in terms of rule 30 read with rule 30A for the striking out of the plaintiff's claim. I shall herein later deal again with this composite document, encapsulating the exception and the two applications for striking out. Kramer Weihmann opposed the composite application. Rantho AJ heard this opposed application on 27 January 2023 and handed down judgment on 13 June 2023.

[6] In order to put the matter in perspective, I quote the order of 13 June 2023 *verbatim:*[4]

'1. The applicant's first ground of exception against respondent's particulars of claim is dismissed.

2. The applicant's second to seventh grounds of exception against respondent's particulars of claim are upheld.

3. The applicant's application for strike-out is refused.

4. The respondent is afforded leave to amend its particulars of claim within 10 (ten) days from the date of judgment.

5. The respondent is to pay the costs of this application on party and party scale.'

[7] The review application consists of 316 pages. It includes the documents referred to above as well as the parties' heads of argument presented to Rantho AJ, as well as the learned judge's judgment. Throughout the exception process Joubert is referred as the applicant and not as the excipient. Kramer Weihmann is referred to as the respondent. Kramer Weihmann is the applicant in this review application and Joubert the respondent as correctly indicated by the taxing master, but the parties are incorrectly cited as in the composite application. In order to avoid confusion, I shall refer to them as Joubert and Kramer Weihmann respectively.

Relevant authorities pertaining to review of taxation

[8] It is trite that the taxing master has a discretion to allow, reduce or reject items in a bill of costs, which discretion must be exercised judicially. Courts are reluctant to interfere with the decisions of the taxing master. I dealt with this issue in *Osho Agri*

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[4] *Ibid*: pp 183/4.

Investments (Pty) Ltd v Honey Attorneys and Another (Osho Agri).[5] I quote paragraph 13 of that judgment:

'[13] The taxing master has specialised knowledge of the technical details of taxation and a court should be reluctant to interfere with his/her discretion. This will only be done when compelling grounds have been proven. A full bench of the Cape Provincial Division consisting of eminent judges, such as, Herbstein, Van Winsen and Beyers, stated that a court cannot substitute its opinion for that of the taxing master and that it "will not interfere merely where it concludes that had it been seized of the enquiry to determine the amount to be allowed it would have been allowed more or less than that did the Taxing Officer."'

[9] The trite principles pertaining to review of taxation are also encapsulated in the following *dictum* of the court in *Visser v Gubb*:[6]

'The Court will not interfere with the exercise of such discretion unless it appears that the Taxing Master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The Court will also interfere where it is of opinion that the Taxing Master was clearly wrong but it will only do so if it is in the same position as, or a better position than, the Taxing Master to determine the point in issue. The Court must be of the view that the Taxing Master was clearly wrong, ie its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.' (the judgments relied upon by the court were omitted)

[10] In *Legal General Assurance Society Ltd v Lieberum NO and Another*[7] the court confirmed that the powers of the review court are wider than the recognised common law review powers in the following words:

'With these remarks I find myself in full agreement and I consider that the review referred to in Appellate Division Rule 9 (1) confers upon this Court the wider exercise of supervision envisaged by INNES, C.J., in this decision. The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in *Shidiack's* case but also when it <u>is clearly satisfied that he was wrong</u>. Of course, <u>the Court will interfere on this ground only</u>

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[5] (3088/2021) [2022] ZAFSHC 140 (6 June 2022); (the full bench decision referred to is *Bertish v Standard Bank of SA Ltd* 1956 (4) SA 9 (C) 13 D-E).

[6] 1981 (3) SA 753 (C) at 754H-755C; *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at p18.

[7] 1968 (1) SA 473 (A) at 478G; see also *Protea Life Co Ltd v Mich Quenet Financial Brokers en Andere* 2001 (2) SA 636 (O) at 642C-D.

when it is in the same or in a better position than the Taxing Master to determine the point in issue.' (emphasis added)

[11] Gorven J observed as follows in *Lander v O'Meara and Another*:[8]

'There is a so-called graft on the main principle relating to judicial interference with the decision of the taxing master. The court will substitute its own opinion for that of the taxing master when the matter is one in which the court is as well able to judge as the taxing master is.' (emphasis added)

I dealt with the same issue in *Osho Agri*[9] in the following words:

'According to *Kruger and Mostert* courts defer to specialised officials like taxing masters, but they are able to consider the reasons for decisions. The authors continued as follows: "Judges can assess whether the bill and supporting documents and the facts were properly weighed by the taxing master. They can also check the process of justification. In doing so judges do not reconsider the substantive question but assess the decision-making process. They will ask whether the taxing master's decision is reasonably supportable on the facts." In the same vein, the quantum of fees is a matter primarily for the discretion of the taxing master and a judge will interfere only in extreme cases and then reluctantly too. The experience of the co–author, Justice Kruger, a former judge and before that an advocate at the bar for many years, cannot be doubted. With reference to *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd and another* the authors proceeded: "However, a judge who worked as counsel for many years may be in a better position than the taxing master to assess the need for and reasonableness of counsel's consultations and drafting or settling of affidavits. Similarly, a judge who worked as an attorney for many years may be in a better position than the taxing master to assess the reasonableness or necessity of work done."'

[12] I shall deal with the taxing master's stated case, amplified by his report, and the parties' submissions under the next heading. Suffice to say that the greatest dispute between the parties centred around allowance of fees and expenses close to R500 000 relating to additional documents of about 7 000 pages not attached to the particulars of claim, but discovered in rule 35 proceedings.

Evaluation of the parties' contentions

[13] I reiterate that in addition to the exception, Joubert also applied for striking out of certain paragraphs of the particulars of claim in accordance with the provisions of rule 23(2) and for the striking out of Kramer Weihmann's claim as an irregular

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[8] 2011 (1) SA 204 (KZD) at para 17, the learned judge having relied on *Scott & Another v Poupard & Another* 1972 (1) SA 686 (A) at 689 F-G.

[9] *Loc cit* para 14; Kruger and Mostert, Taxation of Costs in the High and Lower Courts: A Practical Guide at pp 109 & 110; *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd and Another* 1990 (4) SA 587 (T) at 589B-C.

proceeding in accordance with rule 30 read with rule 30A. The first striking out application was aimed at alleged scandalous, vexatious or irrelevant allegations contained in the particulars of claim. In the second striking out application, Joubert alleged that Kramer Weihmann had failed to comply with rules 18(4) and 18(10). Rule 18(4) stipulates that every pleading shall contain a clear and concise statement of the material facts relied upon with sufficient particularity to enable the other party to respond meaningfully. Rule 18(10) stipulates that a party suing for damages must set out the claim in detail to enable the defendant reasonably to assess the quantum of the claim. In my view, none of the additional documents discovered could assist Joubert or the court to consider any non-compliance with the rules. Although the exception succeeded, Joubert's two applications for striking out have been considered and refused without granting a costs order in favour of Kramer Weihmann, the successful party. In fact, costs associated with those two applications were not pertinently and separately dealt with.[10]

[14] Rantho AJ made a costs order in favour of Joubert after having considered Joubert's contention that attorney and client costs should be awarded. The learned judge awarded 'the costs of <u>this application</u> on party and party scale' to Joubert. I emphasise the words 'this application'. It is possible that the learned judge did not appreciate the consequences of her award. As things turned out, the taxing master allowed costs in favour of Joubert which have a direct bearing on the two striking out applications because of the nature of the procedure undertaken. Initially, I held the view, as contended for by Kramer Weihmann, that the order should have been interpreted on the basis that Joubert was not entitled to all his costs, *ie* of the successful exception as well as the two unsuccessful two applications. Having reconsidered this aspect, I am not convinced that the taxing master is clearly wrong. If the order is properly interpreted in line with the conclusion pertaining to costs, there can be little doubt that insofar as Joubert succeeded on most of the grounds of exception, the learned judge concluded that he was entitled to the costs of the application and not only those costs relating to the exception. Put differently, if the learned judge intended to award costs in favour of Kramer Weihmann who achieved partial success, she could have structured her order appropriately to give effect to such intention.[11]

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[10] Review record: pp 182-184, paras 64-71 of the judgment read with paras 3&5 of the order.
[11] *Ibid*: pp 183-184, paras 68-71 of the judgment read with para 5 of the order.

[15] I must admit that I have never come across the procedure adopted by Joubert *in casu*. An exception is a pleading and subject to the rules relating to pleadings. Kramer Weihmann did not object to the procedure as far as I could ascertain and it is not my prerogative to criticize the procedure. Joubert's verbosity has not escaped my attention, but it is not necessary to say anything more in this regard, save to make it clear that the grounds on which an exception is founded must be stated clearly and concisely as particularly set out in Uniform Rule of Court 23(3). In this case the court was confronted with a composite application which included the exception, consisting of 60 pages, together with annexure 1 thereto, being the notice to remove the cause of complaint and of the intended applications to strike out. This notice consisted of a further 57 pages. Most of the allegations were duplicated. Such paper war really deserves some censure, but it is not the right forum to say anything more in this regard.

[16] Although not on all fours with the facts *in casu*, Heher J dealt with the procedure as follows in *Jowell v Bramwell-Jones and Others*[12]:

'Seen in that light, the filing of a notice of exception, which contains as an alternative an application to set pleadings aside under the provisions of Rule 18(2) read with Rule 30, does not constitute the taking of a further step within the meaning of Rule 30(2). Such an excipient is concerned merely to make full use of the remedies which the Rules provide for an attack on a defective pleading. The inclusion of the alternative is quite opposed to an inference that the excipient intends to pursue the cause despite the irregularity. In my opinion, therefore, the procedure adopted by the fourth defendant did not preclude reliance upon Rule 30(1).'

[17] In order to consider an exception, the court must accept all allegations of fact pleaded by the party as true and correct. It may not have regard to any other extraneous facts or documents as clearly pronounced in *Pretorius and Another v Transport Pension Fund and Another (Pretorius).*[13] The Constitutional Court also made the same point in *Baliso v Firstrand Bank Ltd t/a Wesbank,*[14] stating the following:

'Where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it.'

More recently, in *Naidoo and Another v Dube Tradeport Corporation and Others (Dube)*[15] the Supreme Court of Appeal dealt with the issue as follows:

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[12] 1998 (1) SA 836 (W) at 904F-H.
[13] 2019 (2) SA 37 (CC) para 15.
[14] 2017 (1) SA 292 (CC) para 33.
[15] 2022 (3) SA 390 (SCA) para 18.

'With respect, the High Court erred. This being an exception stage, the factual averments by Sagadava must have been accepted as correct, unless they are manifestly false, which fact is not apparent from the pleadings. The High Court should not have gone beyond the allegations. It could well be that, at the trial, the allegations turn out to be false. But for the purposes of the exception, their truthfulness should have been accepted.'

[18] Prior to embarking on a process of considering the specific items in dispute in the bill of costs, the following remarks are apposite. The first and most crucial aspect to be considered in this review application is the taxing master's interpretation of Rantho AJ's judgment, his conclusion that the additional 7 000 pages of documents were relevant in the exception proceedings and that all fees and expenses relating thereto should be allowed on taxation. An excipient who alleges that the plaintiff's particulars of claim does not disclose a cause of action must establish that upon any construction of the particulars of claim no cause of action is disclosed. No further documents, not attached to the particulars of claim and no extraneous facts, should be considered.

[19] The taxing master emphasised paragraph 55 of Rantho AJ's judgment in support of his allowance of numerous items in the bill of costs. I quote this paragraph:

'[55] In response to the applicant's [Joubert] contentions as set out above, the respondent's [Kramer Weihmann] view is that the allegations of misconduct and culpable omissions on the applicant should be read together with what annexure "POC1" to its particulars of claim reveals, together with the 7,000 pages that have been provided to him.' (emphasis added)

[20] It must be borne in mind that the reference to 7000 pages came from Kramer Weihmann's legal team who contended that these documents should have been read with POC1, attached to the particulars of claim. Rantho AJ specifically did not accept this contention. I quote the next two paragraphs of her judgment:[16]

'[56] The court held in *First National Bank of Southern Africa Ltd v Perry NO and others* that an exception sets out why the excipient says that the facts pleaded by a respondent are insufficient. Only if the facts pleaded by a respondent could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account.

[16] Review record: pp179&180.

[57] I am in agreement with the applicant that paragraphs 17 and 18 of the respondent's particulars of claim lack the necessary averments to sustain a cause of action. In the circumstances, the sixth ground of exception should also succeed.' (emphasis added)

[21] The learned judge's conclusion in paragraph 56 and 57 followed upon her earlier *dicta* in paragraphs 24 and 25 which read as follows:[17]

'[24] The respondent also submitted that the report and the documents provided under Rule 35(12) and (14)) to the applicant dealt with very specific instances in clarification of the period in question. I do not agree with the respondent on this point because the particulars of claim should be a starting point to enable the applicant to reply thereto. Where a pleading does not comply with the provisions of Rule 18, the other party is entitled to either invoke Rule 23 or 30 and/or 30A to address the cause(s) of complaint against offending allegations.

[25] The principle that a court is obliged to take pleadings as they stand for the purpose of determining whether an exception to them should be upheld is limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not oblige a court to satisfy itself by accepting facts which are manifestly and so divorced from reality that they cannot possibly be proved. If the facts pleaded by a respondent could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, an exception should succeed.' (footnotes omitted)

The learned judge's *dicta* in the aforesaid four paragraphs dispel the taxing master's contention contained in the stated case and his report which found favour with Joubert.

[22] It is apposite to quote the dictum in *First National Bank of Southern Africa Ltd v Perry NO*[18] relied upon by Rantho AJ:

'[6] The matter was decided as on exception. This has two relevant consequences. The excipients have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it: *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988(2) SA 493(A) at 500 E-F. Then, the plaintiff, FNB, is confined to the facts alleged in the particulars of claim, apart from any further facts which the parties agreed at the trial might be taken into account.'

[23] It should immediately be clear that items 5 to 14 of the bill of costs deal exclusively with discovery which has absolutely nothing to do with the exception process. In order to decide whether any of the exceptions should succeed, the learned

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[17] *Ibid*: pp 167&168.

[18] [2001] 3 All SA 331 (A) para 6; see also *Pretorius* and *Dube* quoted *supra*.

judge was bound to accept the allegations of fact pleaded by Kramer Weihmann as true and correct and could not have regard to any other extraneous facts or documents. She complied with the trite principles.

[24] I intend to refer to the specific items in the bill of costs objected to and the contentions in respect thereof in the sequence presented by Kramer Weihmann and shall adjudicate the parties' contentions pertaining to the relevant issues in dispute.

Items 5 to 14 of the bill of costs

[25] These fees and expenses relate to rule 35 procedure, the costs in obtaining copies of the discovered documents as well as the perusal of these documents. Kramer Weihmann is of the view that these items should have been disallowed as it had nothing to do with either the exception, or the applications to strike out. The taxing master recorded Joubert's submission that on receipt of the 7 292 pages, including 1 436 pages of statements, 'the exception was filed and that forms a very significant part of [the] matter'. Also, 'it was absolutely necessary to have produced that in order to see whether the particulars of claim is not excipiable or not'.[19] This contention is totally wrong, bearing in mind the authorities referred to above and Kramer Weihmann's contention in this review that the only document that should have been considered during exception was the specific pleading against which the exception was filed. I perused Joubert's heads of argument presented to Rantho AJ and could not find any reference to any of the 7 000 pages discovered. Even if that was the case, the learned judge would be fully entitled to ignore contentions in that regard.

[26] The taxing master made a material mistake in submitting that Rantho AJ stated, with reference to paragraph 55 of the judgment, that a reading of these extra papers were necessary.[20] The learned judge did not state that it was necessary to obtain the further documents, ie the additional 7 000 pages. The reliance on paragraph 55 of the judgment is totally wrong. Unfortunately, the taxing master did not properly consider the judgment in context and the aforesaid four paragraphs in particular. No doubt, the learned judge considered adjudication of the exception in line with the authorities

[19] Review record: p79.

[20] *Ibid*: p14 of the stated case on p80 of the record, a mistake which was repeated in his report on pp 274&275 of the review record.

quoted above. In any event, the additional 7 000 pages were not required in order to consider and/or adjudicate the applications for striking out.

[27] I am satisfied that the fees and expenses referred to in the aforesaid items were not reasonably incurred by Joubert in relation to the specific matter. Although the taxing master's discretion is wide, it is not unfettered. The taxing master must properly consider and assess all relevant facts and circumstances relating to a particular item in the bill of costs. Furthermore, a court on review will be entitled to interfere where the decision is based on the application of a wrong principle or where a material error of law was committed as again recently confirmed in the full Court in the Eastern Cape in *Trollip v Taxing Mistress of the High Court and Others*.[21] In conclusion, I am satisfied that the taxing master was clearly wrong. Interference is therefore required in respect of items 5 to 14.

Items 19 to 24 of the bill of costs.

[28] Kramer Weihmann contended that these fees and expenses relate to Joubert's application for condonation and that the court did not make any order in this regard. It was submitted on behalf of Joubert that the application for condonation was not opposed and that the notice clearly stated that it would be costs in the exception if unopposed. I cannot find that the taxing master was clearly wrong in concluding that these costs should be costs in the exception.

Items 18, 30, 44, 47 and 65 of the bill of costs

[29] Kramer Weihmann submitted that Joubert's counsel did not need to concern himself with the extra 7 000 pages of documents in order to consider whether an exception should be taken and/or applications to strike out be filed. Joubert obviously held a different view, submitting that these extra documents had to be perused 'in order to determine what to plead or whether an exception had to be filed ...'[22] The taxing master was wrong in submitting that fees should be allowed for the perusal of the extra documents 'in line with para 55 of the judgment in casu'. But this issue was not properly debated. I am prepared to accept the taxing master's ruling pertaining to the hourly rate charged by counsel notwithstanding the objections by Kramer Weihmann. Several amounts in respect of counsel's fees have been taxed off. The

[21] 2018 (6) SA 292 (ECG) para 17 read with para 45.
[22] Review record: p83.

hours claimed by counsel appear to be exorbitant. Although it might be a case where I could intervene, bearing in mind my experience as attorney and advocate and the authorities quoted, I prefer to accept that the taxing master duly considered counsel's fees and came to a just conclusion. If one considers what the attorney claimed for perusal of the additional 7 000 pages of documents – R432 000 – counsel's fees should not be reduced any further. No interference is justified.

Item 15 of the bill of costs

[30] I agree with the taxing master that there was no merit in Kramer Weihmann's complaint in this regard and the item should have been allowed.

Items 25, 31 and 32 of the bills of costs

[31] I am satisfied that the taxing master considered the contentions of the parties appropriately and deducted an amount of R1 400. Nothing more needs to be said in this regard, save to refer to my criticism about Joubert's verbosity. Although I am not completely satisfied with Joubert's approach, I am prepared to accept that the taxing master considered the complaint appropriately. No interference is justified.

Conclusion

[32] Kramer Weihmann achieved substantial success in this review application and no reason exists why they shall not be entitled to the costs of review. Such an order shall be made.

Order

[33] The following order is granted:

3. Items 5 to 14 of the bill of costs are disallowed and shall be taxed off.
4. Joubert, cited as the applicant in the papers (the respondent in the review application), shall pay the costs of Kramer Weihmann cited as the respondent (the applicant in the review application) in the amount of R1 000.

[redacted]

DAFFUE J
JUDGE OF THE HIGH COURT

For the applicant in the review application
(cited as respondent in the papers): Pieter Skein Attorneys
c/o Kramer Weihmann Inc
Bloemfontein.

For the respondent in the review application
(cited as applicant in the papers): Peyper Attorneys
c/o PH Attorneys
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