REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES /~~ NO
(3) REVISED: ~~YES /~~ NO

[redacted]

6 March 2026 ____________________________

DATE SIGNATURE

CASE NUMBER: 02317/2018

In the matter between:

MEC: HEALTH GAUTENG PROVINCIAL GOVERNMENT **APPLICANT**

And

TAXING MASTER OF THE HIGH COURT OF SOUTH

AFRICA, GAUTENG DIVISION, JOHANNESBURG **FIRST RESPONDENT**

BEATRICE NTULI OBO

MPILWENHLE THAPELO NTULI **SECOND RESPONDENT**

JUDGMENT

WINDELL J:

Introduction

[1] This is a review in terms of Rule 48 of the Uniform Rules of Court of rulings made by the taxing master (the first respondent) during taxation of the second respondent's bill of costs. The taxation arises from an order for costs granted against the applicant in a medical negligence action on a party and party scale.

[2] It is necessary to emphasise at the outset the limited ambit of such an order. Party and party costs are intended to indemnify a successful litigant only for those costs that were necessarily and properly incurred for the attainment of justice or for defending the rights of a party. They do not permit the recovery of every expense incurred between attorney and client.[1]

[3] The bill under consideration is the second respondent's advocate's bill of costs. In the action, which proceeded to trial on the merits only and was finalised after eight days of evidence, senior counsel claimed fees totalling R2 142 544.50. On taxation the taxing master substantially reduced the claim and ultimately allowed costs in the amount of R1 194 553.30.

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[1] *Bowman v Avraamides* 1991 (1) SA 92 (W) at 95B–E.

[4] Notwithstanding the reduction effected by the taxing master, the applicant contends that several items were allowed on an incorrect basis, particularly items relating to travelling expenses, consultations and pre-trial attendances, and items which the applicant submits fall properly within the category of attorney and client costs rather than party and party costs.

[5] The taxing master furnished a stated case and supplementary explanations and, after considering the written submissions, abides the decision of this Court.

Legal Framework governing review of taxation

[6] The purpose of taxation is to ensure that a party ordered to pay costs is not burdened with excessive costs while at the same time ensuring that the successful litigant is not deprived of a reasonable indemnity.[2]

[7] Rule 70(3) provides that the taxing master shall allow such costs, charges and expenses as appear to have been necessary or proper for the attainment of justice or for defending the rights of any party. It reads as follows:

'With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or

[2] CR Cilliers, M Cilliers. Law of Costs. Issue 50.

by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[8] In *Trollip v The Taxing Master ('Trollip'),*[3] the Full Court held that:

'The intention of rule 70(3) is to ensure that the ultimate winner of a suit should not have the fruits of victory reduced by having to pay too high a proportion of his or her costs by way of an attorney and client bill. It has also been recognised, on the other hand, that the interests of the loser must be protected and that party should not be oppressed by having to pay an excessive amount of costs. In *Thusi v Minister of Home Affairs & another and 71 other cases* Wallis J held that the indemnity principle is of general application in the field of costs, and that it has not become outdated. We agree. The touchstone is for expenditure to be allowed which has been reasonably and properly incurred.'

[9] A taxing master thus enjoys a wide but not unfettered discretion to allow, reduce or reject items in a bill of costs. That discretion must be exercised judicially, reasonably and on sound principle.

[10] Courts are slow to interfere with the exercise of that discretion. Interference will occur only where the taxing master has failed to exercise the discretion judicially, acted on a wrong principle, misconceived the facts or the law, or was clearly wrong.[4] As stated in *Ocean Commodities Inc & Others v Standard Bank Ltd & Others*,[5] the Court will

[3] 2018 (6) SA 292 (ECG) para [15].
[4] *Ocean Commodities Inc & others v Standard Bank of SA Ltd & others Ocean* 1984 (3) SA 15 (A); *President of the Republic of South Africa & others v Gauteng Lions Rugby Union & another* 2002 (2) SA 64 (CC) para [13].
[5] *Supra* at 18E-G.

interfere with a taxing master's ruling only where the difference between its view and that of the taxing master is so material that the ruling is vitiated.

Party and party costs and attorney client costs

[11] The distinction between party and party costs and attorney and client costs is central to the present review. Herbstein and Van Winsen[6] describe attorney and client costs in the following terms:

'Attorney-and-client costs are the costs that an attorney is entitled to recover from a client for the disbursements made on behalf of the client, and for professional services rendered. These costs are payable by the client whatever the outcome of the matter for which the attorney's services were engaged and are not dependent upon any award of costs by the court. In the wide sense, it includes all the costs that the attorney is entitled to recover against the client on taxation of the bill of costs, but in the narrow and more technical sense, the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party.'

[12] The significance of this distinction is that expenses which fall within the category of attorney and client costs are ordinarily not recoverable from the opposing party where the order is limited to party and party costs.

[13] The present review therefore requires consideration of whether certain expenses allowed by the taxing master were properly recoverable on a party and party scale.

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[6] Herbstein and Van Winsen, Fifth Edition, p 953.

Travelling expenses and consultations

[14] A central feature of the review concerns the taxing master's decision to allow several items relating to travelling expenses incurred by senior counsel.

[15] These items stem from senior counsel attending consultations with experts and the instructing attorney in Johannesburg, as well as pre-trial conferences, while practising in Mthatha.

[16] The taxing master accepted that such travel was permissible in terms of the Covid-19 regulations then in force and reasoned that counsel was entitled to travel for purposes connected with court proceedings.

[17] While it may be correct that the regulations permitted such travel, that is not the correct enquiry in taxation. The relevant question is not whether travel was legally permissible, but whether it was reasonably necessary for the purposes of the litigation.

[18] It is trite that a litigant is entitled to brief counsel of its choice. However, that principle does not mean that the opposing party must necessarily bear the additional costs arising from that choice. Where counsel is briefed from outside the jurisdiction in which the matter is heard, the question remains whether the additional costs associated with such choice were reasonably and necessarily incurred so as to be recoverable on a party and party scale.

[19] As was emphasised in *City of Cape Town v Arun Property Development (Pty) Ltd and Another*,[7] the taxing master must consider the nature of the matter, the work

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[7] 2009 (5) SA 227 (C).

performed by counsel and the overall reasonableness of the fees claimed when determining whether such costs were properly incurred. The enquiry is ultimately whether the expenditure was necessary and reasonable in the context of the litigation.

[20] By the time the consultations and pre-trial conferences in question occurred, remote consultation platforms such as Zoom and Microsoft Teams had become widely used within the legal profession. Consultations with attorneys and experts as well as pre-trial conferences were frequently conducted virtually.

[21] In those circumstances the taxing master was required to consider whether the physical attendance of senior counsel at consultations and pre-trial conferences was reasonably necessary or whether those engagements could reasonably have been conducted remotely.

[22] The stated case indicates that this enquiry was not undertaken. Instead, the taxing master proceeded on the basis that because travel was permitted under the Covid-19 regulations the associated costs were recoverable.

[23] That approach constitutes a misdirection. The enquiry in taxation is whether the expense was reasonably and necessarily incurred for the conduct of the litigation.

[24] In circumstances where consultations and pre-trial conferences could reasonably have been conducted virtually, the costs associated with senior counsel travelling between Mthatha and Johannesburg cannot readily be justified on a party and party scale.

[25] Such expenses fall more appropriately within the category of attorney and client costs and must be disallowed.

Preparation and consultation items

[26] The applicant also challenges various items relating to consultations with the instructing attorney and preparation for trial.

[27] As held in *Trollip,* [8] while a taxing master may not ignore evidence suggesting that work charged for has in fact not been done, practitioners are not required to prove their claims in the strict sense. Members of the legal profession are officers of the court and are expected to display absolute personal integrity and scrupulous honesty. A taxing master is therefore generally entitled to accept counsel's fee list as prima facie evidence of the work performed. At the same time, it remains the duty of the taxing master to ensure that the expenditure claimed was reasonably incurred and that the fee charged is reasonable.

[28] In the present matter the taxing master explained that the consultations in question were necessary for the preparation of the case and for responding to requests for further particulars as well as for purposes of the Rule 37 pre-trial procedures.

[29] Consultation between counsel and instructing attorneys forms a routine and often necessary part of trial preparation. Such consultations do not fall outside the ambit of party and party costs merely because the client was not present.

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[8] *Supra* para 20 and 21 with reference to *General Council of the Bar of South Africa v Geach & Others* 2013 (2) SA 52 (SCA) para 87.

[30] In these circumstances it cannot be said that the taxing master acted on a wrong principle. The allowance of these items falls within the taxing master's discretion and no basis has been established to interfere with those rulings.

Preparation of heads of argument

[31] The applicant further objects to the allowance of fees relating to the preparation of heads of argument.

[32] Item 55 of counsel's bill reflects that senior counsel charged for the preparation and drafting of the plaintiff's heads of argument over a period of five days from 15 to 19 August 2022. The fee claimed was calculated on the basis of 17 hours per day at a rate of R68 000 per day. On taxation the taxing master reduced the amount claimed and allowed a day fee of R35 000 per day.

[33] Approximately a month later, counsel charged a further five days, from 23 to 27 September 2022, for the preparation of replying heads of argument at a fee of R40 000 per day, amounting to R200 000 (Item 57). On taxation the taxing master reduced the claim and allowed three days at a day fee.

[34] The preparation of heads of argument following a trial necessarily involves the analysis of the evidence, consideration of the legal issues and formulation of written submissions. In assessing the reasonableness of such fees, regard must be had to the nature of the case, the issues in dispute and the volume of the record.

[35] In the present matter the trial extended over several days and the record was substantial. The heads of argument ultimately filed were approximately 116 pages in

length. While the record was voluminous, the issues that arose for determination were not unusually complex for litigation of this nature.

[36] Taking these considerations into account, the time claimed in this instance is excessive. Five days calculated on the basis of 17 hours per day for the preparation of heads of argument cannot reasonably be justified on a party and party scale. The same applies to the further five days claimed for replying heads of argument.

[37] While the taxing master reduced the amounts claimed, the reductions do not address the underlying difficulty, namely the excessive number of hours claimed for the preparation of the heads. The enquiry in taxation is not merely whether the fee charged should be reduced, but whether the time spent was reasonably necessary.

[38] In addition, counsel charged for the preparation of replying heads approximately one month after the main heads were drafted. Replying heads, by their nature, are confined to responding to issues raised in the opposing party’s heads and do not ordinarily require the same level of preparation as the principal heads.

[39] In a taxation conducted on a party and party basis, the enquiry is not whether counsel in fact spent the time claimed, but whether the time was reasonably necessary for the conduct of the litigation.

[40] In the circumstances of this matter the time allowed by the taxing master for the preparation of heads of argument and replying heads exceeds what can reasonably be justified on a party and party scale.

[41] In my view a reasonable allowance would be three days for the preparation of the main heads of argument at a day fee of R35 000 per day.

[42] As far as the replying heads of argument are concerned, a reasonable allowance would be one and a half days at a day fee of R35 000 per day.

[43] The taxing master's ruling in respect of these items must therefore be varied accordingly.

[44] In the result the following order is made:

1. The review in terms of Rule 48 succeeds in part.
2. The items relating to travelling expenses incurred by senior counsel are disallowed.
3. The taxation of Item 55 relating to the preparation of heads of argument is varied so that the allowance is limited to three days at a day fee of R35 000 per day.
4. The taxation relating to the preparation of replying heads of argument is varied so that the allowance is limited to one and a half days at a day fee of R35 000 per day.
5. Save for the above variations, the rulings of the taxing master are confirmed.

[redacted]

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 March 2026.

APPEARANCES

For the Applicant:	Ms N.N. Ntombela
Instructed by:	Masinya Attorneys obo State Attorney, Johannesburg
For the Second Respondent:	Ms R. Sempe
Instructed by:	Ndlebe Msuthu Incorporated
Date of hearing:	22 October 2025
Date of judgment:	6 March 2026