IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

19/11/2012.

CASE NO: 596/06

In the matter between:

JOHAN PETRUS VAN DEN BERG NO First Plaintiff

ADW Second Plaintiff

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/11/12
DATE

SIGNATURE

and

DR RL DIPPENAAR Defendant

JUDGMENT

Tuchten J:

1 This is a review of a taxation conducted by the taxing master in relation to a trial matter which was settled. The case concerned the damages suffered as a result of the allegedly negligent treatment of the son ("LR") of the second plaintiff and a senior member of the Pretoria bar. The relevance of this last fact will emerge later.

2 LR was born on 24 August 1988. Since birth, LR has suffered from significant disabilities in the form of severe cerebral impairments, probably resulting from brain damage sustained at birth. However up to 1991, he suffered from no significant physical disabilities.

3 In 1991, LR was treated by the defendant for a severe form of allergic conjunctivitis, inter alia with eyedrops containing steroids. He went blind in 1998.

4 Action was instituted on behalf of LR in 2006 for damages allegedly caused by the negligence of the defendant in diagnosing and treating LR. The claim raised issues of considerable complexity. I refer to one example to demonstrate this complexity. It was accepted that LR had a pre-existing condition, congenital glaucoma. The issue raised was whether LR would have gone blind in any event, ie given his condition and assuming "proper" treatment, and if so, at what age and whether he would have gone blind to such a degree that he could not distinguish between light and dark.

5 Although the various experts agreed that LR had reached his scholastic ceiling, there were differences in expert opinion on whether he required remedial tuition, therapy and treatment and for how long. This raised a further issue which was difficult of determination, ie LR's life expectancy. This was relevant in quantifying the award for such treatment because such treatment and the like would at most be required for his lifetime.

6 The case was ultimately settled and on 7 February 2011, an order was made by consent in this court in terms of which the defendant paid the plaintiffs certain sums of money (in addition to a sum which had already been paid to the plaintiffs under rule 34A). The order recorded that the defendant asserted that the amounts were to be paid without admission of liability on the part of the defendant.

7 In addition, the order provided for the defendant to pay the plaintiffs their taxed or agreed party and party costs, including the reasonable fees of senior and junior counsel, the reasonable taxable costs of obtaining all expert, medico-legal and actuarial reports from experts retained by the plaintiffs or jointly with the defendant which had been furnished to the defendant, the reasonable taxable preparation and reservation fees of sixteen named experts and the fees of the curator ad litem appointed to safeguard LR's interests.

8 The plaintiffs' attorneys proceeded to draw a bill of costs in respect of quantum[1] as between party and party. The defendant's attorneys did not agree the bill and a contested taxation took place before the taxing master. Rule 70(1) provides that such a bill must, subject to one exception, be drawn in accordance with the tariff appended to rule 70. A difference in principle emerged at the taxation: the plaintiffs relied on the exception I have mentioned: their bill was drawn on the basis that the matter was an extraordinary or exceptional case which, they contended, justified the departure by the taxing master from the provisions of the tariff.

9 Rule 70(5)(a) gives the taxing master a discretion in such matters:

> The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

10 The defendant opposed the argument that the case was extraordinary or exceptional. The taxing master agreed with the defendant and determined this issue in his favour. The practical effect of this determination by the taxing master was that the attorneys' hourly rate

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1 In earlier proceedings, the defendant had conceded the issue of negligence (but not the issue of causation) and I assume that a separate bill had been drawn and disposed of in relation to the proceedings up till then. Nothing however turns on this.

before the addition of VAT claimed by the plaintiffs (R1 065) was reduced to that provided for under the tariff (R852). In addition, the taxing master disallowed the number of hours preparation for trial by the plaintiff's attorneys claimed by the plaintiffs (38½ hours) and allowed as between party and party only 29½ hours for that preparation.

11 In the result, the taxing master taxed off an amount sufficient to bring the bill within the provisions of tariff item E3(b) under which the fees for drawing the bill and attending taxation otherwise allowable under tariff items E1 and E2 may, at the discretion of the taxing master be disallowed. But the taxing master decided not to disallow these fees.

12 Both sides were aggrieved by the taxing master's rulings and, under rule 48, requested him to file a stated case setting out his reasons for the rulings in question. The defendant's notice was dated 30 August 2011. The complaint was that the fees for drawing the bill and attending the taxation had not been disallowed.

13 The plaintiffs responded in kind, in a notice was dated 5 September 2011. As required under rule 48(1)(c), the plaintiffs' notice contained the plaintiffs' grounds of objection, which were as follows:[2]

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[2] Paragraph numbers omitted.

> All parties concerned with the matter agreed that the above matter was an exceptional, extraordinary and complex matter and thus falls within the ambit of rule70(5);
> The quantification of the matter, the volume of documentation and the issues in dispute were of such a nature that it required a specifically expert [sic] in the field of medical negligence to completely and properly grasp the complexity of the matter and issues in dispute in order to bring the matter to finality.
> ...
> The decision of the Taxing Master to reduce the Attorney's preparation for trial from 38 hrs 30 minutes to 29 hours 30 minutes ... in view of what has been stated ... supra.

14 The taxing master duly stated a case in relation to both complaints. In regard to the defendant's complaint that he ought properly to have disallowed the fees for drawing the bill and attending the taxation, he said, in a stated case bearing the registrar's date stamp 24 February 2012, that his disallowances had essentially embraced two categories: firstly, that items had constituted attorney and client costs and were thus not to be allowed in a bill as between party and party; and, secondly, that disallowances had followed the taxing master's conclusion that the matter did not qualify for enhanced fees under rule 70(5). The taxing master reasoned that the bill had been "properly drafted". I think what he meant was that it did not contain fictitious items, something that is not in dispute, and had been drawn on the basis that rule 70(5) applied. That being so, the taxing master

concluded, it would be an inappropriate exercise of his discretion to disallow the fees in question because the only way for the taxing party to put their contentions before the taxing master was to raise the items in the bill pursuant to those contentions.

15 In relation to the plaintiffs' complaints, the taxing master pointed out in his stated case dated 16 November 2011 that the parties had not been in agreement that rule 70(5) applied. This must be so because the taxing master would not otherwise have decided the issue at all. He explained that he could not find that this case was more complex than a complex third party claim and that the resolution of the complex issues was the province of the experts rather than that of the attorneys.

16 The taxing master went on to reason that the fact that the attorney and client agreement between the father and the plaintiffs' attorneys was that he would be charged on the same basis as any other client showed that the attorneys could not have considered the case exceptional because if they had, they would have charged a higher fee.

17 The taxing master also explained that the tariff must be regarded as sufficient and that the man in the street who wants his case to be heard in court should not lightly be further burdened by the thought of the overwhelming cost he will most likely incur. This is described by the Constitutional Court as having a potentially chilling effect on litigants seeking to assert their rights.[3]

18 In relation to the disallowance of a portion of the plaintiffs' attorneys' preparation hours, the taxing master set out the factors that he took into account in such cases.

19 Both sides responded as permitted by rule 48 and the matter came before me in chambers on review. I found the case difficult to grasp from the papers with which I had been provided and called, under rule 48(6)(a)(iii) to hear the parties in chambers. The day chosen by the parties for the hearing was 14 November 2012. Both sides delivered heads of argument and the plaintiffs' representatives put before me a consolidated bundle containing the most important documents relevant to their submissions. In addition, I was provided with certain bundles prepared for the trial which contained documents which I was asked to read. I have read everything put before me.

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3 *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 6 SA 232 CC para 23

20 The contention for the plaintiffs was that the determination of LR's pre-existing condition, fluid and complex as it indisputably was, made their task very difficult. This related substantially to the question of causation and arose because the onus on a plaintiff in a medical negligence case requires him to establish amongst other things, on a preponderance of probabilities, the difference between the pre- and post morbid conditions of the patient. The plaintiffs' difficulty was in identifying LR's pre-morbid condition or, to put it another way, whether the post-morbid condition which the plaintiffs contended required future tuition, therapy and treatment arose from or was accelerated by the conduct of the defendant.

21 To add to the plaintiffs' attorneys' burden, it was submitted, the scope of such future treatment and the like was very extensive, involving speech therapy, occupational therapy, special and adapted equipment, extra help, the services of an educational psychologist, a urologist, an architect to design alterations to LR's dwelling, an ophthalmologist, a biokineticist and a clinical psychologist.

22 And then there was the question of LR's life expectancy. This required the retention of an expert from abroad. There are two approaches to the determination of life expectancy: the clinical approach and the statistical approach. It seems to me that in most applicable cases,

where this is in dispute a prudent plaintiff's attorney would try to get evidence to advance his client's case on both approaches. It was argued before me that the determination of LR's life expectancy was a complex and nuanced question. I have no doubt that it was. The problem was exacerbated by the fact that the data bases from which the experts worked were drawn from populations in other countries, whose social conditions were and are in relevant respects different from those in South Africa.

23 The defendant's case is that complex as these questions undoubtedly are, the work of the plaintiff's attorneys was relatively straightforward: they had a comprehensive body of relevant material in the form of the complete history of LR's treatment from birth onwards and an intelligent and accessible client in the father (and no doubt the second plaintiff as well). The case required that material to be ordered and presented appropriately to the court. In relation to the issue of life expectancy, as the expert evidence in that regard was to be that of two acknowledged experts in the field, the burden of the plaintiffs' attorneys required no extraordinary or exceptional effort on their part.

24 "Extraordinary", according to the Shorter Oxford Dictionary, carries the meaning of that which is out of the usual course or order; special. "Exceptional" according to the same authority is "unusual, out of the

ordinary". These words must of course be interpreted in their context, which is a legislative scheme to provide for a remuneration to attorneys which is fair to both them, their clients and, where appropriate, their clients' opponents in litigation.

25 In *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 2 SA 64 CC para 13, the Constitutional Court referred with approval to a passage from the judgment in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, which for more than a century has been good law in this Division:[4]

> It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ in the *JCI* case. This means
> '... that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him ... viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling'.

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4 Footnotes omitted.

26 In *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (CCT 76/12) [2012] ZACC 17, the Constitutional Court dealt with a complaint on a review of taxation that counsel's fees were excessive. In para 4, the Constitutional Court said:[5]

> The principles applying to a taxation of a bill of costs in this Court were established in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*, and were restated in slightly expanded form in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* (Hennie de Beer). Their nub is that a successful party gets costs as an indemnification for its expense in having been forced to litigate, and that a moderating balance must be struck to afford the innocent party adequate indemnification within reasonable bounds. All circumstances must be taken into account, and an overall balance struck. The Court will not interfere with the Taxing Master's award simply because its views are different. It will interfere only when the Taxing Master's view is so materially different as to vitiate the ruling.

27 I must apply these principles to the present case. I think that the argument before me on behalf of the plaintiffs places too much emphasis on the requirements in rule 70(5) that the discretion arises in a case which is extraordinary or exceptional and loses sight of the

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5 Footnotes omitted.

rider that the discretion only arises in such cases where strict adherence to the provisions of the tariff would be inequitable.

28 I think that the jurisdictional prerequisites ("extraordinary or exceptional") to the exercise of the Rule 70(5)(a) discretion refer in their setting to extraordinary or exceptional demands on the practitioner whose work is said to justify a higher fee as between party and party. The case undoubtedly involved many very difficult questions but their resolution was predominantly a matter on which the plaintiffs' experts were to testify and plaintiffs' team of senior and junior counsel were to present the evidence and argue. The task of the attorneys was, in conjunction with counsel, to identify the evidence required to best advance the plaintiffs' case, order that material, ensure that procedural requirements were met and that the necessary witnesses were at court when their evidence was needed. The attorneys were entitled to ask counsel to advise them on evidence.

29 The taxing master concluded that the demands made upon the attorneys in the present case were no different from those made in comparable third party cases. I think that the taxing master might more appropriately have referred to comparable medical negligence cases but, in the broad sense, I cannot find that his conclusion is so

materially different from that to which I would have come as to vitiate his conclusion.

30 I do not agree with the conclusion of the taxing master that the nature of the attorney and client agreement between the plaintiffs' attorneys and the father is in any way relevant to the enquiry. The issue is whether objectively the case was extraordinary or exceptional. Whether a plaintiff's attorney thought, or says that he thought, that a case is extraordinary or exceptional can to my mind not advance the enquiry in this regard. To turn the point on its head, one can just imagine the inequities which would arise if the fact that a plaintiff's attorney says that he thought the matter was extraordinary or exceptional and translated that alleged thought into an extravagant fees agreement were to be held to justify an increased fee as between party and party.

31 The plaintiffs' attorneys were remunerated on taxation for all the hours they spent otherwise than in preparing for trial at the rate provided for in the tariff. The taxing master did not think that the allowance of an hourly fee in that regard and on that basis gave rise to an inequity and I do not think so either.

32 I would add to the factors which ought to weigh against the plaintiffs' contention on the hourly rate this: there is no suggestion that the plaintiffs' attorneys did their work other than in the comfort of their own chambers and at normal working hours. Contrast this with the situation, for example, of a junior counsel of my acquaintance who was required by the exigencies of his brief to take instructions in the open veld, late one freezing winter night, from a large group of poor people who had been evicted from their rural highveld homes, with the only illumination provided by some burning tyres.

33 In regard to the preparation fee, it is clear that the taxing master had proper regard to the principle that there must be some objective basis for assessing the losing party's liability for the costs of preparation of the winner's attorney. Different attorneys work at different speeds and will consider some aspects of potential preparation appropriate and others inappropriate. But some objective basis must be established for assessing a reasonable number of hours for which to mulct the loser. There was no attack during oral argument on the rationality of the basis used by the taxing master. The complaint was that a taxing master ought to be very slow to disallow preparation time proven, as was the case here, to have been honestly employed for the purpose contemplated by the tariff. I think that this argument misses the point which is that a more objective approach is required. The taxing master

disallowed 9 of the 38½ hours claimed. Here again, I cannot find that the taxing master's assessment was so different from my own as to justify interference.

34 I turn to the review by the defendant of the taxing master's decision to allow a fee for drawing the bill and attending taxation. His reasons were that the bill was proper and that no attempt had been made to claim for work which had not been done. I find his reasoning that the plaintiffs were entitled to draw a bill that gave expression to their contentions as set out above compelling. The taxing master considered that in those circumstances the plaintiffs should not be penalised. I agree.

35 It therefore follows that both reviews must be dismissed and the all the rulings of the taxing master must stand. Both parties have been successful in part. I accordingly make no order as to the costs of the reviews.

NB Tuchten
Judge of the High Court
19 November 2012