IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: ~~YES~~/NO
(2)OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO (3)REVISED.

11/12/2014
DATE SIGNATURE

CASE NUMBER: 15360/2009

In the matter between:

FRANCOIS VAN DER MERWE N.O.	Applicant
And	
MEC FOR HEALTH, GAUTENG	First Respondent
THE STATE ATTORNEY	Second Respondent
HURTER & COETZEE	Third Respondent
THE TAXING MASTER, MR SCHALK VILJOEN	Fourth Respondent
In re:	
NICOLENE STEENKAMP (THE DECEASED)	Plaintiff
And	
MEC FOR HEALTH, GAUTENG	Defendant

JUDGMENT

STRAUSS, AJ:

INTRODUCTION

1. The applicant is the duly appointed executor in the estate of the late Nicolene Steenkamp, the plaintiff, who passed away on 24 December 2012.

2. The applicant in his capacity as such applies for an order that the taxation of the applicant's bill of costs and allocatur in respect of such bill of costs, dated 23 April 2003, be reviewed and set aside in its entirety and that the applicant is permitted and directed to present an attorney and own client bill of costs on behalf of the deceased estate of Mrs Steenkamp, in respect of case number 15360/2009, for taxation thereof *de novo*. The costs of the application be paid by the respondents who opposes the application on attorney own client alternatively on a *de boni proriis* scale.

3. The application was opposed by the second respondent on behalf of the 1st respondent, counsel for the 3rd respondent only attended court, mandated as a watching brief, to defend any cost order against the 3rd respondent and take note of any defamatory statements if made by applicants counsel during argument. Counsel for the applicant indicated at the outset that they will not persist with a cost order against the 3rd respondent but only against the 1st and 2nd respondent, as sought in the notice of motion.

THE APPLICATION

4. Mrs Steenkamp, the deceased plaintiff, was hospitalised in a provincial hospital and pursuant to the negligence of the hospital the plaintiff sustained septicaemia culminating in the amputation of her limbs as a result of she passed away.

5. Prior to the passing away of the plaintiff an action for damages had been brought against the defendant (1st respondent) in which action the plaintiff was represented by Adv JF Mullins SC together with junior counsel.

6. The issues in the trial were separated in accordance with Rule 33(4) of the Uniform Rules of Court and the merits of the action were disposed of on 9 October 2012, in accordance with a court order dated 24 October 2012 annexed to the papers as "SA1".

7. The court order read in regards to costs:

> *"2 The defendant is ordered to pay the plaintiff's taxed or agreed costs on the scale as between attorney and own client, including the following:*
>
> *2.1 The costs of two counsel:"*

8. The application is brought as a common law review and setting aside of the allocatur and is not brought under Rule 53 or Rule 48 of the Uniform Rules of Court. This is set out in the papers and in argument.

9. The applicant represented by Attorneys Paul du Plessis instructed Sophia Avvakoumides, "*herein after referred to as Ms Avvakoumides*", a legal cost

consultant, to prepare and draw the attorney and own client bill of costs pursuant to the court order granted in favour of the plaintiff as set out *supra*.

10. The office of Ms. Avvakoumides employs several employees, most of who have been trained in the drafting of bills and all these employees act as assistants to Ms. Avvakoumides. One Ms Claire May Wilmot was instructed to prepare the bill of costs in this specific matter. She drafted the bill and returned it to Ms. Avvakoumides. Ms. Avvakoumides neglected to verify the bill of costs and that it was drawn in accordance with a court order of 9 October 2012. Neither she or Ms Wilmot, noticed that the bill of costs had in fact been drafted on a party and party scale instead of on an attorney and own client scale, as set out in the court order.

11. The bill of costs was served upon the second respondent representing the first respondent in accordance with the rules and practice with the date of taxation fixed as 22 April 2013. The second respondent instructed Natasha Maria Aletta Kruger ("Ms Kruger") of the third respondent to oppose the taxation on behalf of the first respondent.

12. When Ms Avvakoumides attended the taxation she was still under the mistaken belief that the bill of costs had been correctly drafted in accordance with the court order and not incorrectly as stated in the bill on party and party scale.

13. She and Ms Kruger attempted to settle some of the items on the bill. Items that were argued before the Taxing Master were particularly the hourly rate of counsel in respect of which the Taxing Master made certain rulings.

14. The applicant states in their founding papers that Ms Avvakoumides taxed the bill on behalf of the applicant, and the respondents state in their founding papers that the bill of costs was taxed by Ms Wilmot. It seems, however, that all references by the applicant made in their letters and also in the founding papers and replying affidavit reiterate that it was the deponent, Ms Avvakoumides, who attended to the taxation and settled the bill with Ms Kruger and not Ms Wilmot as the respondents suggest.

15. As now issue was taken with this contradiction I find that the Ms Avvakoumides taxed the bill on behalf of the applicant.

16. After the bill was finalised, Ms Kruger submitted a copy of the taxed bill of costs to the State Attorney for its attention and necessary action. Payment of the costs was then made to the applicant's attorneys, Messrs Paul du Plessis, at the beginning of May 2013. The payment was accepted by the said attorneys on behalf of their client who was the plaintiff in the action.

17. Ms Avvakoumides's offices were contacted by the plaintiff's attorneys on 19 June 2013, Messrs Paul Du Plessis attorneys, who informed them that the bill had been incorrectly drafted on a party and party scale, and not in accordance with the court order granting cost on an attorney and own client scale.

18. Ms Avvakoumides, instructed her office to phone Ms Kruger on 20 June 2013. She advised that the bill had been taxed incorrectly. A letter dated 20 June 2013 from the offices of Ms Avvakoumides to the third respondent referred to a telephone conversation between Ms Kruger and Ms Wilmot. To this letter was attached the partly taxed bill of costs as at 23 April 2013.

It was indicated that the court order stated that an attorney and own client costs award had been granted, but that the bill of costs had been drawn on a party and party scale, which was taxed on a party and party scale.

19. It was indicated that neither Ms Avvakoumides nor Ms Kruger picked up this unintentional error and the respondents were requested to get instructions from the second respondent to set aside the allocatur and have the bill of costs set down for taxation again.

20. Thereafter various e-mails were written from Ms Kruger to Ms Wilmot, employed by Ms Avvakoumides. Eventually on 15 July 2013 the third respondent per e-mail indicated that it had received instructions from the State Attorney not to consent to the setting aside of the allocatur. There was a denial that it was an unintentional error on their side and that during the opposition of the taxation of the bill their Ms Kruger was aware of the fact that the court order provided for attorney and own client costs, and the fact that the heading of the bill read party and party costs, did not change their evaluation when opposing the bill.

21. They indicated that various items on the bill were therefore allowed specifically because a costs order obtained was for attorney and own client costs and not party and party costs.

22. Hereafter, once again, Ms Avvakoumides directed a letter to the State Attorney and requested once again that the allocatur be set aside and that she was not aware of the attorney and own client costs order and that she taxed the bill on a party and party scale, believing that it was the correct costs order granted.

23. The second respondent was urged to reconsider its position and there was an indication that as there was no prejudice the refusal to consent to the setting aside would be construed as vexatious.

24. In another letter, dated 26 July 2013, Ms Avvakoumides set out the prejudice that would be suffered by the plaintiff in her estate due to the *bona fide* mistake in drafting the bill on the incorrect scale, which could amount to a substantial amount, that would then have to be paid out of the estate of the plaintiff, due to the bill being taxed on the incorrect scale.

25. On the conspectus of the correspondence, it seems that at the end of July 2013, the parties had reached a deadlock in settling the matter and the applicant had to apply for the rescission or review of the allocatur of the bill of costs.

26. Ms Avvakoumides, after the stance of the respondents were made clear, approached her husband, Adv GT Avvakoumides, a practising advocate of this court for advice and assistance. Mr Avvakoumides knows Mr Coetzee, the senior member of the third respondent. He contacted Coetzee and discussed the matter with him and Coetzee undertook to liaise, meet and discuss with the State Attorney, Mr Kopmann, to endeavour to obtain an agreement from Kopmann in the setting aside of the allocatur.

27. There were discussions held between Mr Avvakoumides and Mr Coetzee of the third respondent in which Mr Avvakoumides was told that they should not proceed with the application until he reverted to Mr Avvakoumides.

28. The conversations between Adv Avvakoumides and Coetzee and their endeavour to speak to Mr Kopmann came to no fruition. I will not deal with the merits of what either party said under oath in connection with conversations that were held. I find that there are conflicting versions to what was said in the conversations, and these disputes add nothing to the merits of the application.

29. In addressing condonation of the late bringing of the application the applicant alluded to a bizarre turn of events in that the first appointed Executrix in the estate of the plaintiff also passed away. That in turn created a delay and another Executor had to be appointed, which was only done on 15 November 2013. Consequently the applicant states that these are the reasons that the application could only be finalised with consent of the Executor upon his appointment. Thus the application was brought within a relatively short time hereafter.

30. By the same token the respondents, both second and third respondent, opposed the application and also brought condonation applications to file their answering affidavits, late.

31. I find that having regard to my discretion in granting condonation, and that both parties sought such leave and provided sufficient grounds for condonation, such condonation is be granted in regards to all parties concerned.

32. The respondents oppose the application and reject the contention of Ms Avvakoumides in her founding affidavit. They state that contrary to what Ms Avvakoumides believed, the bill of costs was approached by Ms Kruger

on an attorney and own client scale, when she proceeded to tax same. The respondents aver that this is supported by the fact that some of the costs were awarded on attorney and client scale and were offered by Ms Kruger on such scale, and not taxed and awarded on a party and party scale.

33. The respondents therefore proposed that there had been no error on the side of Ms Kruger, when she taxed the bill and settled some of the items with Ms Avvakoumides, and that the only person who might have erred was Ms Avvakoumides, in regards to the bill of costs. They lambaste her for being negligent and reckless in the circumstances. The respondents say that even though the bill of costs in its heading refers to costs on party and party scale the bill in its essence was taxed as in terms of the court order.

34. The applicant sets out in their heads of argument and in the papers that specific items in the bill of costs, relate to consultation with counsel, advice on evidence and tactical approaches to adopt and that these items would ordinarily have been awarded on attorney and client scale by their nature. However, they were actually conceded by Ms Kruger on that basis. If the bill, however, had been presented on the correct basis, attorney and own client scale, and on the related tariff, these items would have been allowed on the attorney and own client scale, but with reference to the mandate.

35. They further state that Items 345 and 346 on the bill, related to the Taxing Master's ruling and based on the misconception that the bill was one as between party and party. The Taxing Master allowed senior counsel

R2,000.00 per day for the year 2000 and R2,200.00 per hour for the year 2010, etc. The junior counsel was allowed one-half of these charges in terms of Rule 69(2). However, senior counsel in this case charged R3,600.00 per hour and this charge would have been recovered in full if the bill had been treated on the scale as between attorney and own client. This is not disputed by the respondent as this is factually, what transpired.

36. Based on various items pointed out by counsel in argument the applicant's case is in essence, that if one has regard to the bill of costs the only conclusion to be drawn from it is that Ms Kruger indicated on several items on the bill that the costs would not be awarded on attorney and client scale. Most of the preparation and trial fees were taxed on party and party scale, and not on attorney and client scale and were reduced in substantial amounts due to the fact that the bill of costs had been drafted on a party and party scale.

37. I find, that the heading of the bill of costs certainly point to the scale on which the bill had to be taxed, this indicates to all the parties concerned including the taxing master, on which basis the taxing masters discretion should be exercised, and on which basis the parties allow certain items, it can be no other way.

38. The applicant states that having regard to the submissions the account in the deceased's estate has been impoverished by a substantial amount of approximately R280,000.00. The applicant confirms that payment was made by the State Attorney of the bill of costs as taxed on 22 April and that

because such payment was made electronically the applicant was not afforded the opportunity to either accept or refuse such payment.

39. The respondents are of the view that this application, if brought as a review application, cannot be brought in terms of the Rules of review of taxation due to the fact that it is not governed by Rules 48 and/or 53 of the Uniform Rules of Court, and that it is not a review of any decision, but is rather tantamount to a rescission application based on the facts as set out in the founding papers.

40. This was taken up with counsel for the applicant who confirmed that this was not a review in terms of either Rule 48 or Rule 53, but in terms of the common law.

41. Neither party could, however, provide the Court with any case law in this regard. The Court, however, had regard to the matter of ***Gründer v Gründer & Another 1990 (4) SA 680 (C).*** The English headnote of this case at 680J – 681B correctly reflects what was stated in the judgment, namely:

> "*The Taxing Master's allocatur is a quasi-judicial administrative act: He must hear parties or their legal representatives (and if needs be also evidence) and exercise a judicial discretion. Inasmuch as proceedings before the Taxing Master constitute an action in miniature, common law principles applicable to the setting aside of default judgments apply also the setting aside of the Taxing Master's allocatur. An order as to costs cannot be enforced without the Taxing Master's quantification thereof, and a*

quantification done in the absence of one of the litigants ought to be open to challenge on the same basis as are default judgments. (See too ***Barnard v Taxing Master of the High Court of South Africa TPD & Others 2005 (2) All SA 485 (T)****."*

42. The Court found in the matter *supra* that having regard to authorities the proposed review of taxations under Rule 48(2), could in his view, could never succeed and that the applicant should instead have instituted proceedings for an order setting aside the taxation.

43. This is exactly what the applicant in this application proposes. It proposes so on two grounds, I find, as in a rescission application, the applicant has to set out sufficient reasons, *just cause* and a *bona fide* defence. Ms Avvakoumides states that she committed an error on her side in taxing the bill of costs in contradiction to the court order, and that in her mind, costs would only be allowed on a party and party scale and not as in terms of the court order, as on an attorney and own client scale. Thus, when taxing the bill she was not taxing such in terms of the court order, and was therefore acting to the prejudice of the plaintiff, in that any shortfall on payment made for the costs would have to come out of the plaintiff's estate or, as intimated by Ms Avvakoumides, she would have been willing to pay in the difference.

44. Her experience and persuasiveness at taxation in having some of the items taxed on a higher scale as party and party, simply points to her veracity as a tax consultant and does not point to this Court to a person

who in the circumstances knew the correct scale of costs in the court order, existed.

45. I am not going to deal with the various accusations between the parties of misconduct and untruthfulness as to Ms Kruger's version and/or what transpired between Coetzee, Avvakoumides, Kopmann and so forth, as previously stated.

46. Ms Avvakoumides specifically stated that she did not have sight of the court order and she was under the mistaken belief that the bill of costs had been correctly drafted as per the court order. She only found out that it had not been drafted correctly when the attorney who instructed her, Mr Du Plessis, to draft the bill and have it taxed, phoned her and informed her that the bill had been mistakenly taxed on another "lower" scale. Her immediate reaction to this was contacting Ms Kruger, and thereafter directing several letters to the respondents which in my mind, confirms her *bona fides* in the error she committed.

47. On the other side of the coin Ms Kruger states that she was aware that the bill was being taxed on an attorney and own client scale, thus she allowed certain of the items to be taxed at a higher scale, not informing Ms Avvakoumides that she was indeed acting in regards to the court order, but seemingly in her mind being fair and reasonable towards the plaintiff, as she states that she knew the court order made provision for attorney and own client costs.

48. It is also argued that there was no obligation on Ms Kruger to inform Ms Avvakoumides that the bill was incorrect, and that her failure to do so

cannot be construed as *mala fide* and or opportunistic. I can only find that her failure to do so was in the circumstances probably not collegial, and when failing to do so, she allowed Ms Avvakoumides to continue on her way of error, that culminated in the unfortunate outcome, of the bill being taxed incorrectly.

49. However, it is not set out by either of the parties that the Taxing Master had the court order in his possession, and that the taxing of the Taxing Master was done in terms of the court order. Thus, most of the amounts complained about are for counsel fees in terms of mandate, which would have been awarded by the Taxing Master had the bill been drafted correctly.

50. I find that court orders generally must be adhered to in the strictest manner that effectively gives effect to a specific order granted in favour of a party. The court order in the matter *in causa* was not adhered to and the bill of cost was taxed incorrectly and not in accordance with the court order, the heading of the bill is in contradiction to the court order, and this ambiguity lead to a taxation that was neither fair, nor in terms of the court order.

51. Based on this, I find in the circumstances that the applicant has succeeded in placing reasons before this Court for rescission and/or setting aside of the Taxing Master's allocator.

COST

52. In having regards to costs requested by the applicant, I consider the following. Costs on attorney and client scale is normally made in

circumstances that the applicant has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed a grave misconduct, either in the transaction under enquiry or in the conduct of this case.

53. The Court's discretion to order the payment of attorney and client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct. It includes cases in which special circumstances or considerations justify the granting of such an order. Attorney and client costs have also been awarded where the defence was frivolous and was taken for the sole purpose of gaining time and where the defendant produced a plethora of unmerited defences and where the defendant was in default and it seemed to the Court that the defence was dilatory and not *bona fide*, as set out in ***Suzman v Pather & Sons 1957 (4) SA 690 (D).***

54. I also have regard to the fact that an order *de bonis propriis* will not be made lightly and mere errors of judgment on the attorney's side will not be sufficient and that it has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely.

55. The criteria that has been stated is actual misconduct of any sort or recklessness, and the reasonableness of the conduct should be judged from the point of view of the person of ordinary ability bringing an average intelligence to bear on the issues in question, and not from that of a trained lawyer.

56. The application for such cost had been made at the outset and counsel was present for the 1st and 2 respondents and argued against such costs. Legal practitioners have been ordered to pay costs where the practitioner had acted in an irresponsible and grossly negligent or reckless manner and has misled the Court in causing prejudice to the other party. Also where the conduct was unreasonable and negligent in handling of the client's case, was slack and apparently characterised by lack of concern. Generally speaking, costs *de bonis propriis* will be ordered against attorneys only in reasonable serious cases as set out in ***Waar v Louw 1977 (3) SA 297 (O)*** and ***Clemson v Clemson 2001 All SA 622 (W) at 627.***

57. I cannot on these facts find in support of the contention that costs should be awarded *de boni propriis,* as I find, that the 1st and 2nd respondent's practitioners did not act in an irresponsible and grossly negligent or reckless manner and had misled the Court in causing prejudice to the other party.

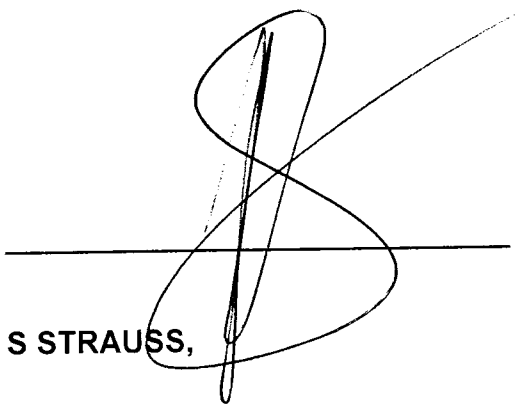
58. These parties were at logger heads and each stuck to their version, they somewhat lost sight of the legal principals when they alluded to facts and assumptions, of *bad faith*, and untruthfulness of each other, in regards to the conflicting version given under oath, as to what the bill would or should have been taxed on. As for the respondents version, one cannot in your mind want to comply with a court order, albeit to the benefit of the other party, if the order granted stipules the specific compliance. Compliance and ensuring that a court order is honoured and executed, is tantamount.

I therefore make the following order:

1. The taxation of the applicant's bill of costs and the allocatur in respect of such bill of costs, dated 23 April 2013, is set aside in its entirety.

2. The applicant is permitted and directed to present an attorney and own client bill of costs on behalf of the deceased estate in respect of case number 15360/2009 for such taxation *de novo*.

3. The first and second respondents jointly and severally, the one to pay the other, is ordered to pay the costs of opposition of the application from date receipt of such opposition by the applicant, including the costs of appearance of senior counsel on 3 December 2014, on a party and party scale.



S STRAUSS,

ACTING JUDGE OF THE HIGH COURT, PRETORIA

HEARD ON: 3 DECEMBER 2014

JUDGMENT DELIVERED ON: 11 DECEMBER 2014

ATTORNEYS ON BEHALF OF APPLICANT: SOPHIA AVVAKOUMIDES

ADVOCATE ON BEHALF OF APPLICANT: ADV S MARITZ, SC

ATTORNEYS ON BEHALF OF FIRST & SECOND RESPONDENT:

THE STATE ATTORNEY

ADVOCATE ON BEHALF OF FIRST & SECOND RESPONDENT: ADV ZZ MATABESE

WATCHING BRIEF APPEARANCE ON BEHALF OF THIRD RESPONDENT: ADV Q PELSER SC