

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

24/6/16.

Case no. 51502/2012

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : YES/NO	YES /NO
2. OF INTEREST TO OTHER JUDGES: YES/NO	YES/ NO
3. REVISED	
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

IN THE MATTER BETWEEN:

TH RESTAURANTS (PTY) LIMITED

PLAINTIFF

and

PICABIZ 48 CC t/a BABY CUCINA

1st DEFENDANT

MARKOULA TSONGAS

2ND DEFENDANT

JUDGMENT

LEGODI J:

JUDGMENT HANDED DOWN ON: 24 June 2016

[1] Firstly, the court apologises for not having this matter disposed of as speedily as possible. The delay is greatly regretted.

[2] This is a taxing review application brought in chambers before a judge as provided for in terms of the Uniform Rules. The issue before me is whether the Taxing Master erred in finding that a tacit fee agreement existed between attorney and client in terms of which an hourly rate of the R2200.00 plus vat was agreed upon.

[3] An attorney, Mr Allschwang who apparently represented Picab 12 48 cc t/a CIAO Baby Cucina and Marroula Tongas sued by the plaintiff, (TH Restaurants (Pty) Ltd (formerly TH Restaurant CC), submitted a bill of costs based on an attorney and own client scale to Taxing Master for taxation.

[4] The defendants objected to items 1,8,27 and 60 which are stated as follows:

"1. 27.8.12 Consultation with the client and other franchisee discussing the matter (AA) 1hour 2200.00

2. 8.2.10.12 Consultation with counsel and client discussing the matter 1.5 hrs 3300.00

27. Consultation with counsel and client, discussing the matter (SS) 3600.00.

60. Consultation with client advising of the set down, discussing prospects of success and explaining court procedure 1hr 2200.00".

[5] The Taxing Master having heard argument during taxation proceedings found for attorneys Allschwang. Paragraph 2.3 of the defendants' notice in terms of Rule 48 (1), dealt with the finding inter alia, as follows:

"2.3 After hearing arguments from both parties, the Taxing Master made the following findings of fact, which the first and second defendants objected to on the grounds set out hereunder:

"2.3.1 That an account/tax invoice rendered by attorney Allschwang to first and second defendant's afforded grounds for construing a tacit agreement by the first and second defendants' to pay attorney Allswang's hourly rate of R2 200,00.



2.3.2. The Taxing Master then proceeded to allow attorney Allswang an hourly fee of R1491,00 and reduced items 1,8,27 and 60 accordingly, pro rata.

2.3.2 The Taxing Master then proceeded to allow attorney Allswang an hourly fee of R 1 491.00 and reduced item 1,8,27 and 60 accordingly. Pro rata. This constituted an application of the hourly consultation rate as per the then prevailing tariff, plus 75%.

2.3.3 The first and second defendants objected to the finding of fact regarding the existence of a tacit agreement by the first and second defendants to pay attorney Allswang's hourly rate of R2 200.00 on the basis that the evidence in the form of the account\tax invoice did not support such a finding.

2.3.4. The first and second defendants objected to the application of the hourly fee rate of R1 710.00 on the basis that it was not consistent with, and was in fact contradictory of, the Taxing Master's finding of fact (which was also objected to) that there was a tacit agreement by the first and second defendants to pay attorney Allswang's hourly rate of R2 200.00 and furthermore that if (as also appeared to be the case), the Taxing Master found the matter to be an extraordinary or exceptional case strict adherence to the tariff would be inequitable and had increased the hourly sum permitted by the tariff, then this finding of extraordinary or exceptional; circumstances and resultant inequity was not supported on the facts."

[6] The Taxing Master in coming to her conclusion stated in her report in terms of the Rule 48(5) as follows:

"6.3 The bill presented for taxation was drawn on an hourly tariff of R2 200.00 per hour for a senior attorney in Alan Allswang and Associates Inc. (herein after referred to as AA Attorneys) and R1800.00 per hour for a junior Attorney in AA Attorneys.

6.4 It was confirmed during the taxation that accounts were already issued to the client i.e the first and second Defendants on the hourly fee mentioned in



paragraph 4.3 above before any monies were ever deducted from the first and second Defendants deposit place in trust account of AA Attorneys.

6.5 In *Ben McDonald Inc and Another vs Rudolph and Another 1987 4 SA*. It was held that "costs incurred with the express or implied approval of the client are presumed to have been reasonably incurred and where the amount has been agreed upon it is presumed reasonable.

6.6 Taking into consideration that interim account were given to the client, before debating the trust deposit the Taxing Master ruled that there was an implied approval \ agreement between the attorney and his clients regarding the hourly tariff mentioned in paragraph 4.3 above."

[7] Having made the finding aforesaid, the Taxing Master then proceeded to determine the reasonableness of the hourly fee as purportedly agreed and came to the conclusion that the hourly rate has to be reduced because the fee agreed upon exceeded more than 150% of the normal regulated fee.

[8] I have difficulties with this finding in particular that there was an agreement of hourly fee charge. Such an agreement without more, could not have been implied or inferred from the fact that 'accounts were already issued to the clients i.e. the first and second defendants on hourly fee mentioned ... before any monies were ever deducted from the first and second defendants deposit place in trust account of AA Attorneys.'

[9] Reliance on the case of *Ben Macdonald Inc and Another v Rudolpf and Another* that "costs incurred with the express or implied approval of the client are presumed to have been reasonably incurred and where the amount has been agreed upon , it is presumed reasonable', in my view, was not justified.

[10] Firstly, the Taxing Master found that the hourly rate of R2 200.00 ought to be reduced as it exceeded more than 150% of the normal regulated tariff, thus, suggesting that the alleged agreed hourly fee was not reasonable. That being so, an agreement could not have been concluded by express or implied approval of the defendants. Secondly, in the absence of more information, it cannot be assumed or implied that 'there was an agreement based on the fact that the interim accounts were given to client before debiting the trust deposit.'



[11] Very often, you find unsophisticated clients who would not have known that they could challenge an attorney's fee charge. When an objection was not raised at an earlier stage, and it is only raised during taxation, it would not be reasonable to consider the objection on the basis that there is implied agreement. A prudent attorney, to avoid unnecessary dispute, would mention a fee amount upfront to client before a deposit is made either as a fixed amount or as an hourly rate and have it reduced into writing especially the hourly rate.

[12] I say so, because if there is a dispute, without evidence, it would be difficult for the Taxing Master to determine where the truth lies. In the instant case, I am not satisfied that there were sufficient factors placed before the Taxing Master, to make a finding as she did. The result of all this is that she should have determined the items based on the normal regulated tariff.

[13] There was another item that was objected to. This was item 42 (b) stated in the bill of costs as follows:

"42. 31.10.12 Attending on receipt of counsel's brief perusing account drawing cheque and attending to pay advocate MM Segal.

a. ...

b. Drafting affidavit resisting summary judgment 15000.00?

[14] In paragraph 7.4 and 7.5 of her report, the Taxing Master found:

"7.4 Taking into consideration the decision of Du Plessis J the above review, it is clear that that the taxing master will be committing an error in principle if she interferes in the account of the counsel under these circumstances –i.e an attorney own client bill payable by the attorneys own client.

7.5 The advocates account was an actual disbursement incurred by the attorney on his client's behalf and if the client wish to object to the counsel's account, that account needs to be referred to the relevant authorities i.e the Bar Council to have same assessed. The abjection to the interference of the taxing master in reducing the counsel's account in the case of Juice Boys (Pty) Ltd above was upheld and on that basis, the Taxing Master in casu did not interfere



and/or drastically reduce counsels account but referred same to the Advocates Bar Council."

[15] I am unable to fault the Taxing Master in this regard and the objection in my view, was correctly referred to the Bar Council as stated by the Taxing Master.

[16] Consequently an order is hereby made as follows:

[16.1] The decision of the Taxing Master dismissing the defendants' objections to items 1,8,27 and 60 is hereby set aside and substituted as follows:

"The objections to items 1,8,27 and 60 are hereby upheld."

[16.1.1] The Taxing Master is hereby directed to determine the bill on the aforesaid items in accordance with the normal regulated tariff.

[16.1.2] The Taxing Master referral of item 42(b), of the bill of costs to the Advocates Bar Council is hereby confirmed.



M F LEGODI

JUDGE OF THE HIGH COURT