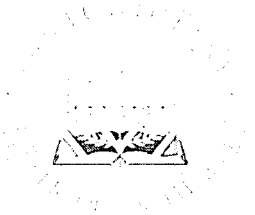

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: **71044/13**

DATE: ~~10~~ 22 NOVEMBER 2016

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

.....
SIGNATURE

21/11/2016
.....
DATE

**In the matter between:**

**PASITO TRADING ENTERPRISES (PTY) LTD** **APPLICANT**

**and**

**THE GAUTENG PROVINCIAL LIQUOR BOARD** **RESPONDENT**

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**JUDGMENT**

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**BAM AJ**

[1] This is an application for the review in chambers of the Taxing Master's decision to disallow Value Added Tax (VAT) on a bill of costs presented for taxing. The review is unopposed.

On the 1st April 2015, Mr Christo van Niekerk from Marius Blom Incorporated presented a bill of costs on behalf of the applicant who had been awarded costs on a party and party scale and on which VAT had been charged on the fees allowed. The taxation was unopposed.

[2] The Applicant's representative alleges that the Taxing Master disallowed the VAT when he failed to produce proof that his client was not registered for VAT. He allegedly requested an indulgence from the Taxing Master for time to establish the VAT status of the applicant but same was refused. His contention is that one cannot prove that they are not registered for VAT, but it can be proven that one is a VAT vendor through the production of a registration certificate. He is asking the court to review and set aside the Taxing Master's decision.

[3] In her stated case, the Taxing Master requests the court to dismiss the application for review with costs. She alleges that the reason she disallowed the VAT is because the presenter intimated that **"the fees on the bill was (sic) for the attorneys and not the applicant, and the attorney is not registered for VAT".** Contrary to the version of the presenter that she refused a request for an indulgence to verify the applicant's VAT status, the Taxing Master avers that no such request was made, and that if it been made, she would have postponed the matter accordingly.

[4] The Taxing Master states further that in the case where a bill for party and party costs is brought for taxation, the VAT status of the attorney is irrelevant because the costs are for the client, not the attorney. She concludes by stating in paragraph 4, page 2 that ***"The Taxing Master exercised her discretion to make the decision and disallowed VAT because the presenter failed to produce proof that the applicant is not registered for VAT".*** This decision, she says, is based on her interpretation of the judgment of the Supreme Court of Appeal in the case of **Price Waterhouse Meyernel v The Thoroughbred Breeders' Association of South Africa 2003 (3) SA 54 (SCA).**

[5] In the **Price Waterhouse Meyernel case** cited above, the Respondent had objected to, amongst other things, the inclusion of VAT in the bills of cost presented for taxation on the basis that same did not constitute an expense actually incurred. The Taxing Master duly disallowed the VAT portion of the bills as he was not satisfied that it constituted a true disbursement and added further that the VAT status of a party and its entitlement or otherwise to an input VAT credit were to be decided between that party and the receiver of revenue, not the Taxing Master. The review was brought in terms of Rule 17 of the Supreme Court of Appeal Rules which provides that *"Value-added tax may be added to all costs, fees, disbursements and tariffs in respect of which value-added tax is chargeable".* The wording is exactly the same as that of Rule 70 (3A) of the Uniform Rules of Court which reads as follows:

**"Value added tax may be added to all costs, fees and tariffs in respect of which value added tax is chargeable".**

[6] The Supreme Court of Appeal, per Howie JA, disagreed with the Taxing Master's stance and indicated that the issue of whether VAT had properly been claimed ought to be determined through the application of the provisions of the Value Added Tax Act No. 89 of 1991. The court continued to clarify that the inclusion of the word "may" in the Rule conferred a choice on the winning party to either include or exclude VAT in its bill of cost, not a discretion on the Taxing Master to allow or disallow the inclusion of VAT. Howie AJ says on **page 61at D-F** that:

***"Once that party decides to include VAT, the Taxing Master has to decide whether such inclusion is proper. That is not a matter of discretion. A costs order – it is trite to say – is intended to indemnify the winner (subject to the limitations of a party and party costs scale) to the extent that it is out of pocket for pursuing the litigation to a successful conclusion. It follows that what the winner has to show – and the Taxing Master has to be satisfied about – is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket. The sub-rule is consequently an empowering provision. It enables the party concerned to claim reimbursement of the items referred to but obliges the Taxing Master to allow or disallow them depending on whether they are expenses of the nature I have described"***

[7] In deciding whether the VAT claimed by the winner is properly included, the Taxing Master has to consider the items against which such VAT is charged to check if they are vatable. Once it has been established that they are, then the Taxing Master has to allow the VAT provided that it represents a cost out of pocket to the winning party. This will depend on whether or not the party is registered for VAT.

[8] In a typical scenario involving legal fees, the attorney, if he is registered for VAT, will charge the client fees inclusive of VAT. This is not a matter of choice – a registered VAT vendor has to collect input tax and pay it over to the receiver of revenue. If the client is also registered for VAT, they will be able to claim the tax paid to the attorney either as a refund or as a credit in respect of any input excess established during reconciliation. It cannot, in this instance be said that the VAT constitutes an expense as described by the Howie JA above. Thus the Taxing Master would be right to disallow the VAT included in a bill of costs. If on the other hand, the winner/client is not registered for VAT and the attorney has collected it from him, it stands to reason that it becomes an expense because he cannot claim it back from the revenue services and thus he will be out of pocket to the tune of that tax. The Taxing Master will then have to allow the inclusion of VAT in the bill of costs.

[9] The indemnity provided by Rule 70(3) is such that the successful litigant must be made whole by being able to recover costs necessarily and/or properly incurred. The role of the Taxing Master is to ensure on the other hand that the unsuccessful party is not unduly punished by being made to pay excessive costs.

[10] Coming to the present case, it is now clear that the Taxing Master brought in the exercise of discretion where it was not fitting. Whether or not a person or an entity is registered for VAT is a factual enquiry and the Taxing Master should have allowed the presenter an opportunity to establish the VAT status of the Applicant. It would have possibly meant the faxing or e-mailing of documentary proof or postponing the matter. The request to prove non-vendor status is unusual in itself, though not unreasonable under certain circumstances, because the normal practice is to require proof of registration as a VAT vendor.

[11] The Taxing Master is correct in saying that the VAT status of the attorney is irrelevant for purposes of taxing a party and party bill of costs because same is for the client, not the attorney. She stated further that "***the taxing master feels that the applicant (presenter) erred by saying that the fees are for attorney***". Having made this, and may I say correct observation, the Taxing Master goes on to refer to the onus that rests on the parties (to taxation) to prove any queries raised by the Taxing Master, which is also the correct approach. But it does appear that the Taxing Master was not prepared to correct the misstatement by the presenter, nor was she willing to afford the presenter an opportunity to discharge the onus. Instead she summarily made a determination to disallow the VAT portion on the bill of costs. Thus, at the end of the day, if the applicant is not a VAT vendor, as appears from the Replying Affidavit by the attorney, this has resulted in the applicant being out of pocket to the amount of the disallowed VAT.

[12] It however appears that there is a different angle to this matter which may have led to the hasty determination. The attorney had not yet billed the Applicant as of the date of taxation. There is apparently an agreement between the parties that:

***"the client will not be billed and that we will recover against the cost order granted in favour of the client and the client in any case was not registered for VAT purposes as was confirmed by me subsequent(ly) to the taxation (my emphasis). This simply means that the client will not be claiming VAT as a repayment from the South African Revenue Services and that Marius Blom Incorporated must pay the VAT on the fees over, being a registered VAT vendor." Para. 7 Replying Affidavit.***

[12] The question one might ask is whether under the above circumstances, the VAT had been properly claimed. The answer in my view is yes. Absent the arrangement between the applicant and the attorney, the applicant would still have been entitled to claim VAT if not registered as a vendor. The attorney would have billed the applicant in the normal way and collected VAT from the applicant who in turn would be have been entitled to be refunded by the Respondent in order to be made whole again. The attorney under the arrangement, will satisfy his fees invoice from the costs awarded, including the VAT that he is obliged to collect and pay over to the revenue services. The applicant, if he had by the date of taxation already paid the attorney, would have been out of pocket in the amount of the fees and VAT on the fees. In terms of the arrangement, the fees and VAT are being collected by agreement direct from the Respondent through the taxed bill of costs instead of

from the applicant. Thus the VAT, if properly charged, cannot be disallowed – there is no discretion to be exercised in this regard.

It does not appear from the Taxing Master's stated case that her query related to the applicability of the provisions of the Value Added Tax Act on the allowed items, but rather on the validity of the applicant's entitlement to collect VAT. All that needed to be done in this case was to verify the VAT status of the applicant. It is my view that disallowing VAT on the bill of costs was improper.

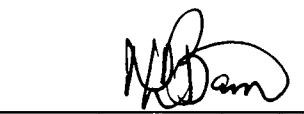
In the result the following order is made:

1. The Taxing Master's decision to disallow VAT on the Applicant's bill of costs is set aside.

2. The matter is remitted back to the Taxing Master to consider the taxation afresh.

3. The Taxing Master is directed to allow the Applicant's attorney to provide proof of the Applicant's VAT status in order to make a determination of whether or not the Applicant is entitled to claim VAT on the awarded costs.

4. There is no order as to costs.



**BAM AJ**

**ACTING JUDGE OF THE HIGH COURT**

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|---|---|
| *ATTORNEYS FOR THE APPLICANT:* | *Marius Blom Incorporated* |
| *DATE OF JUDGMENT:* | *10 November 2016* |