REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 3555/2017

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

16/9/2019

SIGNATURE DATE

In the matter between:

PIETER LODEWIKUS VAN REENEN — APPLICANT

And

THE GAUTENG PROVINCIAL LIQUOR BOARD — 1ST RESPONDENT

THE CHAIRPERSON OF THE GAUTENG PROVINCIAL LIQUOR BOARD — 2ND RESPONDENT

JUDGMENT

SENYATSI AJ

[1] This is an application review against the Taxing Master, Munira Ayob, regarding certain rulings she made during a taxation held on 8 August 2018. The application is brought by the successful applicant in the main application.

[2] The Applicant submits that the Taxing Master failed to exercise a proper discretion, alternatively to apply her mind properly in the light of the order of this court that the Respondents are to pay the costs of the application on a punitive scale as between attorney and client.

[3] The Applicant contends that the Taxing Master found that the fee agreement was unreasonable. I must state that in her submission, the Taxing Master does not say so, but rather contends that the agreement is binding between the Applicant and his own attorneys but not the losing Respondents.

[4] The Applicant furthermore contends that the Taxing Master erred in her ruling in that she relied on the wrong principles when deciding not to follow the fee agreement, but to allow R1 600.00 per hour on party and party tariff for the remainder of the fee items.

[5] The Applicant further contends the Taxing Master came to a wrong conclusion because she did not evaluate either the merits of the matter, reasonable standard fees charged, the timeline of the specific matter, the seniority of the attorney acting on behalf of the Applicant nor the importance of the matter to client.

[6] The Applicant also contends that items 1, 5, 6, 7, 8, 10, 12, 13, 17 to 29, 32, 34, 37 to 41, 43 to 50 and 52 relate to consultations, drawing and perusing documents, copies, attendances at court, payment of disbursements, time spent by the attorney attending on the matter. The Applicant agrues that the court order provides for a punitive order on an attorney and client scale to be

taxed in favour of the Applicant. The fee mandated, so argues the Applicant, was presented to the Taxing Master at an hourly rate of R2 500.00 as well as specified amounts for all other attendances.

[7] Item 14 of the Bill of Costs deals with the service of the application on the Respondent and the Applicant contends that it was charged in accordance with the fee agreement. The Applicant argues that the Respondent *mero motu* decided not to allow a fee and allowed only R5.00 per km.

[8] Items 35 and 36 on the Bill of Costs relate to an index to the miscellaneous documents and included the practice note of the previous application referred to in this application. The items were taxed of *mero motu* by the Respondent as she deemed the items were not necessary.

[9] The issue for determination is whether or not the Taxing Master acted unfairly in disallowing the items relating to costs as between attorney and client as ordered by MOKOSE J.

The Legal Principles

[10] Rule 70(5)(a) provides that: -

> "*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.*"

The discretion must be exercised judicially and justly on sound principles based on the circumstances of each case.

[11] In affirming the principle as set out above, LEACH J held in *Kloot v Interplan Inc and Another* 1994 (3) SA 238H-I (SECLD) as follows:

> "*The Taxing Master has a discretion to be judicially exercised in allowing or disallowing or reducing the various items of a bill of costs. That discretion must be exercised reasonably and justly on sound principles and with due regard to all the circumstances of the case. In exercising his discretion he should ensure that the unsuccessful litigant is not oppressed by having to pay an excessive amount of costs and accordingly, although the court does not have a free hand to interfere with a Taxing Master's discretion on review, where he has failed to exercise ... judicially or properly or failed to bring his mind to bear upon the question, intervention is demanded.*"

[12] The taxation of costs in terms of Rule 70 of the Uniform Rules of Court is based on fairness and practicality to effect a just balance between victory and defeat in civil litigation. [See *Van Rooyen v Commercial Union Assurance Co of SA Ltd* 1983 (2) SA 465 at 467D]

[13] The Taxing Master argued that the main application was urgent but unopposed. She noted the punitive cost order granted against the Respondent and found it fair and reasonable to allow the applicant's attorney an increased hourly rate of R1 600.00 which was over 50% above the

regulated hourly tariff as stipulated in Rule 70 of the Uniform Rules. The Taxing Master reduced all other non-time based items to the tariff as specified in Rule 70.

[14] The Taxing Master furthermore argued that the fee agreement was entered into between the Applicant and his attorney. She found that there was no agreement between the attorneys and the Respondents and the hourly rate agreed upon could therefore not be enforced against the third party and in particular the Respondents, irrespective of whether there is an attorney and client punitive order.

[15] The court in *AA Allow Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) considered the legitimacy of an agreement or order that one party is to pay the costs of another taxed as between attorney and own client. HARMS JA observed at 648G-I para [20] that:

> "*It has become notable that a practice has taken root in some jurisdictions of making awards of costs on an attorney and own client scale where someone other than the own client or his privy is involved. Whether such orders are justified or justifiable in the light of decisions of this court (such as Nel v Waterberg Landbouwers Ko-operatiewe Vereenigning 1946 AD 597) may be questionable consequences. Further, sight appears to have been lost of the fact that they may have been unexpected or unforeseeable consequences. [Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 1 (A).*"

[16] In *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd and Others* 1995 (4) SA 790 (A) SMALBERGER JA at 807C-D, dealt with a request by the appellant for the costs in the court below to be paid on an attorney and own client scale. The learned judge referred to the distinction formulated in the *Cambridge* case (*supra*) between an order that the one party pays the costs of another on an attorney and client scale. The court did not critically examine the legal basis for the distinction.

[17] In *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171(C) a full bench of three judges held that:

> "*... direction that he [the Taxing Master] treat the losing party as if he stood in the same position vis-à-vis the winner's attorney as the winner himself could never result in a taxation on that simple basis.*"

[18] In *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T) DIJKHORST J held at 255J-257A that: -

> "*It is immediately evident that when an order is made in favour of a successful party that opponent pays the costs on the basis of attorney and own client, the customary safeguards against that practice are absent. A client against who his own attorney taxes his bill of costs will know whether there was an agreement to pay counsel a fee higher than the usual or to do work of an unusual nature and he will vehemently object if that is not so. Should the attorney and client costs have to be paid by his opponent, however, he will take no interest in*

the taxation and probably rejoice in an exorbitant assessment. The unsuccessful party may be taken to the cleaners. This is the danger that lurks in an order that the losing party pays costs on the attorney and own client scale."

[19] The *Ben McDonald Inc* case (*supra*) is an authority for the proposition that when an order is made for a costs debtor (a losing party) to pay costs taxed as between attorney and 'own' client to a costs creditor (a victorious litigant) an agreement between the costs creditor and his attorney for fees exceeding the tariff rates (being an agreement to which the costs debtor is not a party) does not bind either the Taxing Master or the losing party (costs debtor). [See *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* (*supra*) at page 130G-H].

[20] In *Kloot v Interplan Inc and Another* 1994 (3) SA 238H the court held that the Taxing Master has a discretion which must be judicially exercised in allowing or disallowing or reducing items on the bill of costs. This discretion, as already stated must be exercised reasonably and justly on sound principles and with due regard to the circumstances of each case.

[21] I now turn to each of the items that form the subject of review in the bill of costs. It is common cause that items 1, 5, 6, 7, 8, 10, 12, 13, 17 to 29, 32, 34, 37 to 41, 43 to 50 and 52 relate to the creditor attorney's fee in respect of time based items such as consultations, as well as non-time based items such as drawing, perusal and copies charged for those items.

[22] In my respectful view, the Taxing Master was within her rights and exercised her discretion reasonably and judicially by finding that the cost creditor or the losing party was not bound by the fee agreement concluded between the applicant and his attorney. The Taxing Master, correctly, reduced for instance the agreed hourly rate of R2 500.00 to R1 600.00 which was of over 50% above the regulated hourly tariff. Consequently there is no basis to interfere with her discretion in terms of Rule 70(5)(a) of the Uniform Rules.

[23] In regard to item 14 which refers to a fee of R250.00 which was taxed off in total for the service of the application or the state attorney, I am of the view that the reduction thereof to R150.00 for service of the application, was justified in that the losing party could not be expected to be bound by a largely higher rate of R250.00. It is therefore unnecessary, in this regard, to interfere with the Taxing Master's discretion.

[24] Items 35 and 36 of the Bill of Costs related to index to miscellaneous documents which included the previous application. Those items were found by the Taxing Master to have related to the previous application under the same case number. She was of the view that that previous application before court had to have already been in the court file and indexed and paginated and costs for the drawing of that index should have already been allowed on the previous application. I find no fault on the Taxing Master's approach on these items and will therefore not interfere with her discretion.

[25] In view of the reasons given above, the application for review of the Taxing Master's decision to disallow certain items of the bill of cost, must fail as the

applicant has failed to show fault in the Taxing Master's exercise of her discretion.

ORDER

[26] The following order is made: -

(a) The application to interfere with the Taxing Master's decision on the contended items of the bill of costs is refused and the decision of the Taxing Master is confirmed.

M.L.SENYATSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

I agree

DE VOS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

APPEARANCES

For The Applicant:	Marius Blom Incorporated, Pretoria
For The Respondent:	The Gautent Legal Board, Jhb
Date of Hearing:	5 September 2017
Date of Judgment:	

applicant has failed to show fault in the Taxing Master's exercise of her discretion.

ORDER

[26] The following order is made: -

(a) The application to interfere with the Taxing Master's decision on the contended items of the bill of costs is refused and the decision of the Taxing Master is confirmed.

M L SENYATSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

I agree

H J DE VOS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

APPEARANCES

For The Applicant:	Marius Blom Incorporated, Pretoria
For The Respondent:	The Gautent Legal Board, Jhb
Date of Hearing:	5 September 2017
Date of Judgment:	