IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 33185/2015 (4026/2003)

In the matter between:

KISHORE SONNY	**FIRST APPLICANT**
JAYANTHIE DEVI SONNY	**SECOND APPLICANT**

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL	**FIRST RESPONDENT**
ETHEKWINI MUNICIPALITY	**SECOND RESPONDENT**

REVIEW OF TAXATION

MBATHA J:

[1] This is a review of taxation in terms of rule 48 of the Uniform Rules of Court.

[2] A number of items in the applicants' bill of costs were disallowed which included a significant portion of the costs of experts fees and counsels' fees.

[3] In respect of experts and counsels' fees the applicants state that:

(a) Initial consultations were limited to 1 hour;

(b) Consultations with counsel were limited;

(c) No perusal of reports of other experts was allowed for purposes of either drafting reports or **preparing to testify**;

(d) Tests and assessments prepared by experts in formulation and compilation of their reports were disallowed;

(e) Drafting and hourly rates were allowed at R425 (four hundred and twenty five rand) per page for drafting in 2014 subject to a 7.5% decrease per annum and the hourly rate was fixed at R1000 (one thousand rand) per hour subject to a 7.5% decrease per annum.

[4] The applicants are challenging the Taxing Master's decision on the basis that she disregarded the following:

(a) the ambit of the court order;

(b) the complexity of the matter;

(c) the merits as such;

(d) the particular function of each expert; and

(e) the economic reality of funding litigation of this nature.

[5] The first respondent's argument at taxation was that a significant portion of counsels' fees were attorney and client in nature and did not fall within the ambit of party and party costs, which was accepted by the Taxing Master. The respondents agree with the Taxing Master regarding the taxation of the bill of costs.

[6] The Taxing Master has filed a stated case and all the parties hereto have made their submissions. Upon receipt of the stated case, this court referred this matter to court in terms of rule 48(6) of the Uniform Rules of Court, where those who

represented the applicants and the first respondent were given an opportunity to articulate and clarify their submissions to the court.

[7] It is of importance that I should state how the cause of action arose in this matter so as to appreciate the issues raised by the parties in the stated case. The plaintiffs instituted an action for damages in 2003 for a claim for R6 600 000 (six million six hundred thousand rand) against the defendants. On or about 26 June 2002, the second plaintiff attended a clinic in connection with her pregnancy, whereby she expected that the defendants' employees would take reasonable steps to establish if a substantial risk existed that the foetus would suffer from any severe physical and mental abnormalities, as this would have afforded the plaintiffs an opportunity to elect whether to terminate the pregnancy or not in terms of the Choice on Termination of Pregnancy Act.[1] They alleged that due to the negligence of the defendants' employees, the second plaintiff gave birth to a baby girl, with one of the most severe types of "Down's Syndrome" on 16 November 2002. The plaintiffs further allege that the defendants' employees performed a bilateral tubal ligation on the second plaintiff without her consent, which rendered her permanently incapable of bearing children again.

[8] The trial commenced in March 2007 and judgment on the merits was delivered on 7 August 2009, where Levinsohn DJP found in favour of the plaintiffs with costs. The defendants proceeded to the Supreme Court of Appeal, whereupon the Supreme Court of Appeal dismissed their appeal on 4 March 2011 and upheld DJP Levinsohn's judgment in favour of the plaintiffs.

[9] The claim was finally settled on 6 May 2013. A settlement for an amount of R4 458 000 (four million four hundred and fifty eight thousand rand) being damages, and 66,6% of the first and second plaintiffs' taxed or agreed party and party costs on the high court scale was awarded to the plaintiffs in regard to all costs incurred in respect of the issue of quantum, which costs shall include:

(a) the costs consequent on the employment of senior and junior counsel;

[1] Act 92 of 1996.

(b) **the reasonable costs for the plaintiffs' experts, including preparation time, consultation fees,** medico-legal examinations, drafting of experts reports, qualifying, reservation and attendance fees and their expenses incurred;

(c) the reasonable costs consequent upon preparation time, consultation with the expert witnesses referred to in the order including travelling time and travelling expenses as may be allowed at taxation or agreed; and

(d) the plaintiffs' reasonable travelling and subsistence expenses to attend with the minor child on the experts referred to for medico-legal examinations, and for consultations with the plaintiffs' attorney in preparation for the consultation as allowed at taxation or agreed upon.

The Law

[10] Uniform rule 70(3) provides as follows:

> 'With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.'

[10.1] Rule 70(3) clearly expresses the intention of the Legislature by protecting the interests of the successful litigant, in that expenditure reasonably incurred should be reimbursed to him, without overburdening the unsuccessful litigant with unreasonably incurred expenditure.

[10.2] The Taxing Master is vested with a discretion to allow costs necessarily incurred in the litigation. However, a court of law can still interfere with the exercise of the Master's discretion even when exercised properly, a court on review will be entitled to interfere where her decision is based on a misrepresentation of the law or a misconception as to the facts and circumstances or as to the practice of the court. (See *Cash Wholesalers, Ltd v Natal Pharmaceutical Society and The Taxing Master*.[2])

[10.3] In a party and party bill of costs, the Taxing Master should apply the tariff. However, rule 70(5) provides for a departure from the tariff in the exercise of his discretion in extraordinary or exceptional circumstances where adherence to the tariff would be inequitable. This discretion is not only limited to items on the tariff, but also where there is a *lacuna* in the tariff.

[10.4] In general, fees allowed to counsel are often left at the discretion of the Master. It is trite that the court will not interfere with such exercise of discretion, unless the Taxing Master has acted upon a wrong principle or exercised his discretion in an incorrect manner.

[11] It is trite that the discretion of the Taxing Master will generally not be interfered with unless it is found that he or she did not exercise a proper discretion, for example, by disregarding factors which were proper for him or her to consider or by considering matters which were improper for him or her to consider, or if he or she has disregarded relevant factors or has had regard to improper factors, or by giving a ruling which the court can see no reasonable person would have given. (See *Wellworths Bazaars Ltd v Chandlers Ltd & others.*[3]) The courts have also recognised the principle that the court may interfere in those classes of cases where the court is able to form as good an opinion as the Taxing Master and perhaps an even a better opinion. (See *Wellworths* above.)

[2] 1937 NPD 418 at 425.
[3] 1947 (4) SA 453 (T) at 457-458.

[12] Rule 69(5) states that where the tariff is not applicable, in the taxation of advocates' fees as between party and party, the Taxing Master shall allow fees in excess thereof as he or she considers reasonable.

[13] Certain fees fall within the discretion of the Master in the determination of counsel's fees, taking into account the following:

(a) the complexity of the matter, both as regards to facts and law. (See *Scott & another v Poupard & another.*[4])

(b) the category to which counsel belongs to;

(c) the prevailing level of fees by counsel;

(d) the actual time spent by counsel. This is a decisive factor as fully canvassed in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC & another*;[5] and

(e) the fee allowed by the Master must be reasonable in the circumstances. In the ultimate result, counsel must 'be fairly compensated as a professional man for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter. . . .'[6]

[14] It is my view that the matter was complex. It involved complex medical jurisprudence and the court had to determine whether failure to inform of risks attendant upon the pregnancy and to ensure timeous conclusive chromosomal testing to enable a termination of pregnancy in terms of the Choice of Termination of Pregnancy Act would result in negligence on the part of the defendants and liability for damages. This factor was conclusively determined by the Supreme Court of Appeal. I find the determination to be even more complex on the basis of the extreme nature of the Down's Syndrome that presented upon the child, the reliance

[4] 1972 (1) SA 686 (A).
[5] 2010 (5) SA 124 (CC) at 127C-D.
[6] *Kromoscope (Pty) Ltd & aother v Rinoth* 1991 (2) SA 250 (W) at 256E.

on the Choice on Termination of Pregnancy Act and other legal issues that the court had to determine as finally determined by the Supreme Court of Appeal.

[15] Every sort of expert had to be consulted including an Ear, Nose and Throat Surgeon, Independent Living Expert, Consulting Psychologist on family earnings, Specialist Orthopaedic Surgeon, Occupational Therapist, Ophthalmologist, Orthotist, Periodontitis, Social Worker, Augmentative and Alternative Communicator Specialist, Specialist Psychiatrist, Educational and Counselling Psychologist, Specialist Paediatrician, Actuary, Speech and Language Therapist, Dietician, Audiologist, Gynaecologist and Obstetrician, Cardiologist, Clinical Psychologist, Orthodontist, Dentist and Dermatologist to try and assess how the child and parents can be assisted to cope with the life of having a severely disabled child and to quantify damages. Needless to say, such experts were required also in the determination of the merits of the case.

[16] This is not a matter which one would compare with cases of a fracture of a femur or the like. It is therefore my view that the reasonableness of the fees should be measured by the time, effort and skill required by whoever was required to perform the tasks due to the unknown results or unforeseen circumstances arising from having a child with such severe disabilities. I have taken into account the novelty of the issues that confronted the advocates and experts involved in this matter, the difficulties and expertise that were required in compiling and comprehending expert reports, to regard it as a very complex matter.

[17] The limitation of the fees for consultations with experts to one hour would not be appropriate in these circumstances. Experts consultations are involved as they involve examinations and at times tests are carried out. The results of these tests are to be firstly examined by an expert who can interpret and analyse them before they can be examined by the expert who requested them, for example, x-ray reports are interpreted by experts and sent with results to the doctor who requested them. The limitation to one hour consultation would not be a fair measure in the circumstances. I find that the experts should be in a position to specify the number of hours spent on

each consultation and that this should be used as a guideline in the determination of the hours spent in each consultation. In the result, they should be indemnified for the specified number of hours as tabled before the Taxing Master, on the basis of whether the fees were reasonable in the circumstances.

[18] In *Glenister v President of the Republic of South Africa & others*[7] the court held that it is appropriate to award qualifying fees when qualified expert witnesses assist the Constitutional Court. The court referred to the function of an expert as follows:

> 'In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance.'[8]

[19] The perusal of reports of experts by other expert witnesses should be allowed and be limited to only those who referred to those reports in their reports. . I can accept that other experts may independently give their reports, but those who had to refer to other expert reports should be entitled to a reasonable fee determined by the Taxing Master. I make reference to an Actuary, who may need to peruse certain expert reports to give an informed opinion on the matter.

[20] Rule 70(3) states that the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. It also carries a caveat in that the Taxing Master will be allowed to tax off costs which have been incurred or increased through over-caution, negligence or mistake, or by payment of any specific fee to an advocate or witness or to other persons. In cases where there is a duplication of experts or use of an expert to confirm a single result,

[7] (CCT 28/13) [2013] ZACC 20; 2013 (11) BCLR 1246 (CC) (14 June 2013).
[8] *Glenister* para 7.

the other fee should be for attorney and client and not form part of a party and party bill of costs, if the Taxing Master believes that it was done through over-caution or negligence on the part of the applicant. Her exercise of discretion is limited to exceptional cases, like this one, otherwise the tariff applies. This case was *sui generis* in nature and in all fairness, it must be taken into account that the plaintiffs' were indigent persons, and that the attorney and client fee will only come from the award made in favour of the child.

[21] In general, consultations with experts by counsel or attorney are excluded, save for costs to inform them of their mandate and issues on which they will be required to testify. The court may make a special order for them to qualify as party and party costs. In this case I find that the order catered for these costs in prayer 2 and 3.

[22] Though specified categories of fees have been stated in the settlement agreement, the Master, in the exercise of her duties, has a duty to ascertain if work has been done and should demand proof to his/her satisfaction that the services for which payment is demanded have actually been rendered.[9] I am referring to this aspect having considered the complexity of the subject matter that was investigated, the arduousness of the investigations, the calibre and type of expert witnesses that were used in the trial.

[23] This is also regulated by rule 70(5)(a) which gives the Taxing Master a discretion, at any time to depart from the provisions of the tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable. This should also apply to consultations, appearances and conferences, inspections, drafting and drawing.

[24] The objection raised by the defendants' counsel that the significant part of counsels' fees were attorney and client in nature, cannot be accepted on the basis of the nature of the claim, which required the expertise use of counsel in consultations

[9] *Gluckman v Winter & another* 1931 AD 449 at 450.

with the plaintiffs. The Master in her stated case has stated that when she taxed the bill of costs she treated it as a complex matter. I have had the opportunity to peruse the entire file and the judgments in the matter, which is the subject of the taxation and have a better insight to the issues that presented before the court. I commend her for having given it that status irrespective that she did not have the opportunity to assess the matter as I have been able to do so.

[25] Senior counsel's fees at item 1278 totalled R242 592 (two hundred and forty two thousand five hundred and ninety two rand) and junior counsel's fee at item 1281 totalled R95 600 (ninety five thousand sixty hundred rand). The applicants have tabled out in their case regarding the amounts allowed for trial for drafting and preparation for trial for 6 May 2013 as follows:

(a) Senior counsel was allowed R25 000 (twenty five thousand rand) for the first day inclusive of preparation. Then R2 400 (two thousand four hundred rand) per hour subject to a 10% decrease per annum.

(b) Junior counsel was entitled to 50% of senior counsel's rate in terms of rule 69. In 2014 it equalled R1 200 (one thousand two hundred rand).

(c) Drafting for senior counsel, counsel was allowed R900 (nine hundred rand) per page in 2014 subject to a 10% decrease per annum and junior counsel was entitled to 50% of senior counsel's rate in terms of rule 69.

[26] It is common cause that the court authorised payment of the costs consequent on the employment of senior and junior counsel. It is also trite that rule 69 states that where the court authorises payment of two counsel, fees for an additional advocate shall not exceed one half of those allowed in respect of the first advocate. The Taxing Master shall use the tariff in this regard as between party and party. She shall allow fees in excess thereof, as she considers to be reasonable in terms of rule 69(5). However, she must also take into account that the norm in this division is that junior counsel of five years' experience or more is often awarded two thirds of senior counsel's fee. The Taxing Master in this regard shall take into account the complexity of the matter, both as regards to law and facts, the category

to which counsel belongs, their prevailing level of fees and the actual time spent on the matter. The 10% reduction applied by the Taxing Master is not in line with the aforementioned principles.

[27] Though counsel must be fairly compensated for his expertise in preparation for the trial, it must be borne in mind that it is not the function of counsel to draft affidavits, it is only in exceptional cases where due to the complexity of the matter it will be necessary to brief counsel to draft affidavits. I would say that this principle should be extended to the particulars of claim and defendants' plea or counter claim. Furthermore, in the exercise of her discretion, the Taxing Master will have regard to the complexity of the matter, the amount of work required to be done and how long before the date of trial the matter was settled[10] in assessing the fees that arose as at the date of settlement of the matter. This should be considered also in regard to preparation fees for counsel.

[28] It is desirable that if a matter is capable of settlement, that it should be settled timeously enough for it to be removed from the trial roll. This will alleviate the necessity of preparing for a trial that will not take place and will also be beneficial to the party who has been ordered to pay the costs of the action.

[29] The fees are to be measured against what the services would be worth if done by any other counsel, taking into account the time spent on the matter, the expertise required and the complexity of the matter. I have not seen counsels' fee notes, which must be made available to the Taxing Master, so that she can determine if the consultation fees were justified, attorney and client or party and party fees. She must not work on a global figure. She must consider any such consultation fee on a basis of whether it was reasonably necessary or not.[11] Counsels' fees have been drastically reduced to almost a third of what was claimed. It is my view that they need to be reviewed in line with all the principles which I have outlined above.

[10] *Ndlovu v Santam Insurance Co. Ltd* 1982 (2) SA 199 (T).
[11] *Knipe v Venter* 1965 (4) SA 1 (C)

[30] Junior and senior counsel were involved because of the complexity of the nature and I also accept that junior counsel's services were extensively, as it is evident from the voluminous documents in the court file..

[31] Consultations with experts by counsel are excluded, save costs to inform them of their mandate or issues where they will be required to testify. The court must make a special order for them to qualify. I do not know if this formed part of counsels' bill. If the case is settled, qualifying expenses of a witness when the court has not proceeded with the trial cannot be party and party fees, unless provided for in the court order. These were catered for in the court order.

[32] In motion proceedings where an opposed matter has become unopposed the court held that the Taxing Master was wrong in regarding the matter as unopposed from the point of view of assessing the proper fee which counsel was entitled to charge for the day in question. See *Baars v Near East Rand Darts Association & others*.[12] What was to be considered was what was the reasonable fee for counsel to have charged in the circumstances, particularly in view that counsel reserved the day in question to argue an opposed matter.

I see no reason why the same rule should not apply to trials.

[33] Rule 70(3) require the Taxing Master to strive to give the successful party a full indemnity in respect of costs 'reasonably incurred'. If counsel's fee is a reasonable fee it should be allowed in full without any form of a deduction. Be that as it may, the Taxing Master may consider the reasonableness of senior counsel's fee in a deserving case. Due to the complexity of this matter, which I have determined, as well as its voluminous nature, the decisive factor should be the value of the work done.[13]

[12] 1993 (3) SA 171 (W).
[13] *Ocean Commodities Inc. & others v Standard Bank of SA Ltd & others* 1984 (3) SA 15 (A) at 22.

[34] The Taxing Master in this case had not read the pleadings, the judgments on the merits and had not read the enormous and complex expert reports to be able to determine the complexity of its nature. I had to request the entire file, transcripts of judgments from this court, the Supreme Court of Appeal judgment and hear submissions in court to determine the issues that I had to adjudicate upon. Be that as it may I find that she acted *bona fide*, but wrongly on issues that have been brought under review.

[35] I am of the view that the Taxing Master failed to take into account relevant factors in taxing the bill of costs on the issues raised by the applicants. The Bill of Costs and allocatur should be set aside and the matter referred back for taxation, taking into account the issues referred to in this judgment.

[36] Accordingly, I make the following order:

(a) The taxation of a bill of costs under case number 4026/2003 be and is hereby set aside;
(b) The bill of costs is referred back to the Taxing Master who must tax the bill of costs *de novo* only on the issues raised in this review; and
(c) Each party to pay its own costs.

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MBATHA J

12 December 2016

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