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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

OCEAN COMMODITIES INCORPORATED

AND OTHERS ..... Applicants

and

STANDARD BANK OF S.A. LTD AND ANOTHER Respondents

Coram : RABIE, CJ, KOTZÉ, JOUBERT, TRENGOVE, JJA,

et GALGUT, AJA.

Heard : Delivered.

17 February 1984 29 March 1984

J U D G M E N T

RABIE/.....

RABIE, CJ :

This is a review of taxation in terms of Rule 9 of the rules of this Court. The applicants were the successful respondents in the appeal reported as Standard Bank of South Africa Ltd and Another v. Ocean Commodities Inc and Others, 1983(1) S.A. 276 (A.), in which the following order was made : "The appeal is dismissed with costs, such costs to include the costs of two counsel."

Pursuant to the aforesaid order the respondents submitted a bill of costs between party and party for taxation which included the following

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items :

"21 ..... paid senior counsel on heads R1 200-00

22 ..... paid junior counsel on heads ..... R 800-00

24 ..... paid counsel's and attorney's air fares (3 x R138) ..... R 414-00

25 ..... paid counsel's and attorney's hotel expenses.. R 214-91

26 ..... paid senior counsel on arguing appeal R10 500-00

27 ..... paid junior counsel on arguing appeal ..... R 7 000-00"

The taxing master taxed off the entire amounts claimed in items 21, 22, 24 and 25. In item 26 he taxed off

the amount of R6 500, and in item 27, R4 300, thereby allowing a fee of R4 000 in the case of senior counsel, and a fee of R2 700 in the case of junior counsel.

It appears from the taxing master's report, furnished in terms of Rule 9(4), that he allowed each of the said fees of R4 000 and R2 700 as a composite fee for the appeal, i.e., as a fee for preparing for the appeal, drawing the heads of argument and appearing in court to argue the appeal.

The question as to when the Court will interfere with rulings made by the taxing master in the exercise of the discretion he enjoys when

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taxing bills of costs, was dealt with by this Court in the case of Legal and General Assurance Society Ltd v. Lieberum, N.O. and Another, 1968(1) S.A. 473. In that case Potgieter, J.A., delivering the judgment of the Court, stated (at p. 478 G) that -

> "the review referred to in Appellate Division Rule 9(1) confers upon this Court the wider exercise of supervision envisaged by Innes, C.J., in this decision (i.e. Johannesburg Consolidated Investment Co. v. Johannesburg Town Council, 1903 T.S. 111). The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in Shidiack's case (i.e., Shidiack v. Union Government, 1912 A.D. 642) but also when it is clearly satisfied that he was wrong.

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> Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point in issue."

In the course of his judgment Potgieter, J.A., referred, with apparent approval, to decisions in which it was said that the Court would be entitled to interfere with a ruling by a taxing master only if it were satisfied that the taxing master was "clearly wrong" (see Century Trading Co. (Pty) Ltd v. The Taxing Master and Another, 1958(1) S.A. 78 (W.) at p. 84 E; Adamant Laboratories (Pty) Ltd v. General Electric Co., 1964(3) S.A. (T)/at p. 366 F-G), and it would

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therefore seem doubtful whether the learned Judge intended to lay down a test different from the one mentioned in the earlier cases. (See also the remarks of Botha, J., in Noel Lancaster Sands (Pty) Ltd v. Theron and Others, 1975 (2) S.A. 280 (T) at pp. 282H - 283 C.) In Scott and Another v. Poupard and Another, 1972(1) S.A. 686 (A.) this Court (per Jansen, J.A.), applying the test laid down in the above-quoted passage in the Legal and General Assurance Society case, set aside a ruling by the taxing master on the ground that had he had "clearly erred in his assessment of inter alia the complexity of

the appeal in issue in that case. This case indicates, I think, that the Court was of the view that the test as formulated by Potgieter, J.A., in the Legal and General Assurance Society case, supra, and the statement that the Court will interfere with a ruling of a taxing master only if it is satisfied that he was clearly wrong, are merely two ways of saying the same thing. I think, with respect, that it is better to state the test to be that the Court must be satisfied that the taxing master was clearly wrong before it will interfere with a ruling made by him, since it indicates somewhat more clearly than

does the formulation of the test by Potgieter, J.A., what the test actually involves, viz. that the Court will not interfere with a ruling made by the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate his ruling.

I turn now to applicants' attack on the taxing master's ruling in respect of the various items mentioned above,

Items 21 and 22 : Heads of argument

The applicants contend that the taxing master should have allowed separate fees for the drawing of heads of argument and that he erred in allowing a composite fee relating to the whole of the appeal, as mentioned above. It appears from the taxing master's report that it has always been the practice of the taxing master of this Court to determine a composite fee for the whole of an appeal, and to make allowance for the drawing of heads of argument when determining that fee. The applicants accept this to have been the case up

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to now, but they submit that the recent amendment to Rule 8(1) has made it necessary to alter this practice. In terms of this amendment, introduced by GN R248 of 8 February 1980, parties to an appeal may be required, if so decided by the Chief Justice, to lodge their heads of argument with the registrar of the Court before a date has been allocated for the hearing of the appeal, and the applicants' contention is that where heads of argument are called for at such an early stage, "the successful party will only receive his full indemnity if a separate fee is allowed for heads of argument." (The quotation

is from counsel's heads of argument.) It is submitted that when counsel is required to draw heads of argument well before the appeal (as happened in the present case), he will have to work up the appeal again before he appears in Court. Consequently, it is said, a separate fee should be allowed for the drawing of heads of argument. The submission has no real substance. Heads of argument are drawn when counsel has done his research and prepared for the appeal. They reflect the result of that research and preparation, and if counsel should thereafter, due to the lapse of time, regard it as

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necessary to consider them again, the extra work involved will normally not be so substantial as to warrant a separate fee. A taxing master could, of course, depending on the circumstances, and if persuaded that the extra work was such as to warrant his doing so, make allowance for that work when determining a composite fee for the whole of the appeal. I may add in this connection that the taxing master states in his report that, in considering the question of counsel's fees, he had regard inter alia to "die feit dat argumentshoofde elf maande voor die verhoor van die appèl aangevra is." The applicants were asked on 24 June 1981 to lodge their

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heads of argument with the registrar by 24 October 1981. In a letter dated 2 November 1981 their attorneys requested the Chief Justice to allocate a date for the hearing of the appeal on which counsel for all the parties would be available, and they stated that counsel would be available during the weeks commencing 13 September 1982 or 20 September 1982. The appeal was set down for 13 September 1982. (On 3 June 1982, I may add, the applicants' attorneys addressed a letter to the registrar in which they inquired about the possibility of postponing the appeal, for the convenience of counsel, to the

November term of 1982). In these circumstances it is difficult to see how the lengthy lapse of time between the drawing of the heads of argument and the date of the hearing of the appeal can be advanced as a reason why the taxing master should have allowed counsel a separate fee for drawing the heads of argument.

Counsel for the applicants made a few further submissions in support of his contention that a practice should be adopted of allowing a separate fee for the drawing of heads of argument. He submitted, firstly, that it may happen, if heads

of argument are to be lodged with the registrar before a date has been allocated for the hearing of the appeal, that counsel who drew the heads may not be available to argue the appeal, in which event he will receive no fee for the appeal itself. I realise that such a situation may arise, but such a possibility can hardly provide justification for the adoption of a practice as suggested by counsel. The burden of the party who loses an appeal ought not to be increased because counsel for the successful party, who drew the heads of argument, could not make himself available for arguing

the appeal. It should be observed, also, that counsel's submission has no real relevance to the facts of the present case, for counsel who drew the heads of argument also argued the appeal.

Counsel also submitted that a separate fee should be allowed for drawing heads of argument because they are documents of "fundamental importance" which are required by the rules of Court and which are intended to assist the parties to the appeal and the Court. Heads of argument which are required by the rules of Court, counsel submitted, referring to the case of Minister of Water Affairs v. Meyburg,

1966(4) S.A. 51 (E C D) at p. 52 H, should be distinguished from "so-called heads of argument" which are not required by the rules of Court, but are prepared by counsel for the convenience of himself and the Court and are handed to his opponent merely as a matter of courtesy. Counsel's submission is that while the costs of drawing heads of argument of the latter kind are not allowed to counsel in a party and party bill costs, they should be allowed when heads of argument are required by the rules of Court, and that the dictum to the contrary of Galgut, J., in City Deep Ltd. v. Johannesburg City Council, 1973(2) S.A. 109 (W.) at p. 115 i.f. was

obiter and incorrect. Counsel's submission is without substance. Heads of argument, admittedly documents of great importance, have always been required by the rules of this Court, but this fact has never been considered to be a sufficient reason for allowing a separate fee for the drawing thereof, and there is nothing in the present case which persuades me that such a fee should have been allowed by the taxing master.

Counsel also contended that the fact that an attorney is entitled to a fee for perusing heads of argument (see Rule 10. C. 4) is a reason

why counsel's fee for drawing heads of argument should be allowed as a separate fee in a party and party bill of costs. I do not agree. The attorney is allowed such a fee for work he has done, but that is no reason why one should depart from the long-standing practice of not allowing counsel a separate fee for drawing heads of argument.

Items 24 and 25 : Travelling and hotel expenses

As to counsel's travelling and hotel expenses, the taxing master states in his report that expenses of this kind have never been allowed

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in party and party bills of costs in this Court. Counsel's submission is that, while claims for such expenses may generally be considered to be "unusual", there may be cases in which such claims would be justified. The present is such a case, it is said, because the appeal was a complicated one and because it was, for that reason, reasonable to engage the same counsel who had argued the matter in the Witwatersrand Local Division and thereafter in the Transvaal Provincial Division to argue the appeal in this Court. (The judgments of those Courts are reported in 1978(2) S.A. 367 (W) and 1980(2) S.A. 175(T).) There is nothing unusual in

the circumstances referred to by counsel, and there is, therefore, no basis for the contention that there should in the present case be a departure from the existing practice. The reason for the practice is, I have little doubt, that counsel, when marking his brief on appeal, takes into consideration the extra cost involved in his having to go to Bloemfontein. Under the existing practice the taxing master has regard to the cost involved in counsel's having to come to Bloemfontein when he determines the composite fee which he thinks ought to be allowed in respect of the appeal, and I am in no way persuaded

by the submissions that have been made to us that the taxing master was wrong in following this practice in the present case.

As to the fees claimed in respect of the Johannesburg attorney who attended the hearing of the appeal in Bloemfontein, the taxing master allowed his fee for attending Court (no similar fee was allowed in respect of the Bloemfontein attorney), but disallowed travelling expenses and his hotel expenses in Bloemfontein. The applicants' contention is that the circumstances of the case warranted the Johannesburg attorney's going to Bloemfontein, and

that the taxing master acted unreasonably in not allowing his travelling and hotel expenses. These circumstances were, it is said, the fact that the attorney had been involved in the matter from the start, that he had attended the hearing of the matter in both the Courts below, that the matter was a complex one, and that he was au fait with all the features of the case. In making these submissions counsel relied on the case of Groenewald v. Selford Motors (Edms) Beperk, 1971(3) S.A. 677(C), in which it was held inter alia that a Bloemfontein attorney had acted reasonably in going to Cape Town to attend

a trial, and that the taxing master should have allowed his travelling expenses. This finding was based, it would seem, on the Court's view that the attorney had an intimate knowledge of the facts of the case and that he could assist counsel in the conduct of the trial. (See p. 680 H of the report.) The present case is of a different kind. It was a motion Court matter, and it had gone through two Courts before the appeal was heard in this Court. It is difficult to see what assistance the attorney could have rendered to counsel in connection with the arguing of the appeal, and I may add that there

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is no suggestion in any of the papers before us that he was in fact of assistance to counsel. I am of the opinion that the taxing master had every reason to hold that it was not reasonably necessary for the attorney to have come to Bloemfontein; and, consequently, to disallow his travelling and hotel expenses.

Items 26 and 27 : Counsel's fees

In their written contentions on the case stated by the taxing master, the applicants (per their Bloemfontein attorneys) emphasize "the importance of the matter and the legal principles

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involved therein", the "complexity of the matter both in law and on the facts", the "substantial and extremely lengthy research" counsel had to undertake in preparing for the appeal, and the "novel" points of law "for which there existed no authority in the Republic of South Africa and very limited authority overseas", and they conclude by submitting -

> "that the fees charged by counsel are reasonable in the circumstances and that the full fees charged by them should be allowed."

In this Court counsel for the applicants did not contend that the taxing master should have allowed the full fees charged by counsel. He made no attempt

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to justify those fees, but submitted - I quote from his heads of argument -

> "that the fees allowed to counsel are, in the circumstances of the case, too low by a substantial margin."

He suggested that the taxing master should have allowed senior counsel a fee of R6 000, and junior counsel a fee of R4 000, plus, in the case of each counsel, a fee for drawing the heads of argument.

The taxing master states in his report that he appreciated that the appeal was a difficult one, both as to the facts and the law, but that he nevertheless did not consider it to be of such

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extreme complexity as to warrant the fees charged by counsel. He considered the fees charged to be "buitengewoon hoog" (i.e., unusually, or exceptionally, high), or even "skokkend hoog" (i.e., shockingly high), and out of all proportion to fees normally allowed in respect of appeals of comparable size and complexity.

Counsel for the applicants, in arguing that the taxing master erred in reducing counsel's fees to the extent that he did, submitted that he failed to take into account the following "relevant circumstances", viz. "(a) the matter involved

securities, the purchase price of which on 1 June 1975 was R568 890, (reported judgment at p. 285);

(b) the case involved principles of sufficient importance to have been reported in both Courts a quo....." . (The quotations are from counsel's heads of argument. I have omitted the references to the law reports.) As to (a), it appears from the taxing master's report that he was fully aware of what was in issue in the appeal and that he had regard to counsel's heads of argument and this Courts's judgment in the matter. In the circumstances there is no warrant for saying that the taxing master

failed to take into account the point referred to in (a). As to (b), the taxing master was, as I have said, aware of what was involved in the case, and the fact that the judgments of the Courts below were reported does not seem to me to be a point of any significance.

A further point raised by counsel in his heads of argument is that in the appeal both sides "saw fit to retain eminent counsel". On this point the taxing master refers to the following well-known statement of Curlewis, J., in Gundelfinger v. Norwich Union Fire Insurance Society Ltd, 1916 T.P.D.

341 at p. 348 :

> "Of course if a litigant wishes to employ eminent counsel who requires a very large fee before he comes into Court, he is entitled to do so, but the Court should not allow him to saddle the losing side with the cost of a specially large fee, which he has thought fit to allow his counsel."

I agree with this statement. (See also Wellworths Bazaars Ltd v. Chandlers Ltd and Others, 1947(4) S.A. 453 (W.) at p. 461.) The measure for determining what is a reasonable fee is the value of the work that was done, and the eminence of counsel is not by itself a good reason for allowing a larger fee.

Counsel's further submission is that the fees allowed by the taxing master are, when viewed in the light of the "recognized inflation rate and the falling value of money", "too low". It is not suggested that the taxing master did not have regard to the factors mentioned, and his report shows that there would be no grounds for any such suggestion. The complaint seems to be that the taxing master did not have proper regard to these factors. I do not agree. Information contained in his report shows that he has constant regard to the question of inflation, and that he has in the light of the

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increasing rate of inflation allowed increasingly larges fees in recent years. His report shows that, in determining the fees in issue in the present case, he had regard to fees that were allowed in comparable matters in recent years, and that the fees allowed by him represent a not insubstantial increase on fees previously allowed.

As appears from what has been said above, I am of the opinion that it has not been shown that the taxing master, in considering counsel's fees, overlooked or failed to have proper regard to any relevant factor. As to the amount of the

fees, I consider that the taxing master was quite correct in his view that the fees claimed by counsel were grossly excessive, and, as to the amount of the fees allowed by him, I am, applying the test discussed earlier in this judgment, in no way persuaded that it can be said that he was clearly wrong.

In view of all the aforegoing I consider that no part of the application can succeed, and the application is accordingly dismissed with costs.

P. J. RABIE

CHIEF JUSTICE.

KOTZÉ, JA.

JOUBERT, JA.

Concur.

TRENGOVE, JA.

GALGUT, AJA.