"REPORTABLE"

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case Number: 250/2006

In the matter between:

THE CITY OF CAPE TOWN Appellant

and

ARUN PROPERTY DEVELOPMENT (PTY) LTD First Respondent

THE TAXING MASTER Second Respondent

JUDGMENT: delivered on 7 May 2008

SHOLTO-DOUGLAS AJ:

BACKGROUND

[1] The appellant in this matter took an exception to the first respondent's particulars of claim on the grounds that in three principal respects they were vague and embarrassing. The matter was heard by Blignault, J over two days and his judgment is reported as **Arun Property Development (Pty) Ltd v The City of Cape Town** 2003 (6) SA 82 (C). The exception was upheld with costs, including the costs of two counsel.

[2] We were informed by counsel for the appellant that the issues in the exception were complex. The claim was for payment of some R57 million. There was an alternative prayer for a declarator to the effect that the first respondent had become the owner of certain land and there were apparently wide-ranging aspects of law which required to be addressed. Other than pointing out that the issues were not as complex on exception as they may be at trial, counsel for the first respondent did not express any serious disagreement with the applicant's counsel's assessment of the nature and complexity of the matter.

[3] The appellant's attorney drew a bill of costs which was, in due course, submitted to the second respondent ("the taxing matter") for taxation. The bill reflected disbursements of R136 147.20 excluding VAT, most of which were made up of counsels' fees. Senior counsel charged R71 250,00 and junior counsel charged R48 150,00, both figures excluding VAT.

[4] As uniform rule 69(2) restricts the amount recoverable in respect of junior counsel's fees – where two counsel are employed – to one half of senior counsel's fees, it is to senior counsel's fees that attention must be given for present purposes. His detailed schedule of fees and attendances records attendances and charges which can be paraphrased as follows:

17.3.3 Conferring with junior counsel, settling heads of argument and notice of amendment and research – 2 hours

31.3.3 Perusing papers and conferring with junior counsel - 4½ hours

1.4.3 Perusing and considering plaintiff's heads of argument, relevant legislation and authorities and preparing heads of argument in reply – 5 hours

2.4.3 Research and preparing heads of argument in reply and conferring with junior counsel - 3¾ hours

3.4.3 Preparing heads of argument in reply – 3 hours

5.4.3 Settling heads of argument in reply – 1 hour

7.4.3 Conferring with junior counsel re heads of argument – 2 hours

8.4.3 Preparing for hearing with junior counsel - 5½ hours

9.4.3 Hearing – 1 day

[5] Senior counsel charged a fee (excluding VAT) of R1 500 per hour and R15 000 per day. At no stage has it been suggested that the rate at which senior counsel charged is unreasonable. In fact, it was drawn to our attention during argument by the first respondent's counsel that the fee charged fell in the middle of the range indicated for a senior counsel of his rank in the bar council's guidelines.

[6] Senior counsel clearly charged his fee for appearing in court on the basis of a daily (some times referred to as a "refresher") basis, i.e. the fee was intended to remunerate him for his day in court and not for additional or preparatory work (see **Sliom v Ziman** 1934 TPD 307 at 309). He was engaged in the matter for two days and, as I have said, it has not been suggested that his fee in this regard was unreasonable.

[7] In addition to his daily fee, he charged for a total of 27½ hours for work on the matter. This time can be divided roughly as follows:

> Settling heads of argument, perusing papers, research and settling notice of amendment - 6½ hours
>
> Perusing the plaintiff's heads of argument and matter referred to therein – about 5 hours.
>
> Attendances relating to the preparation of heads of argument in reply – about 9¾ hours

Preparation for oral argument - 5½ hours

[8] Unfortunately, counsel did not specify what time had been allocated to settling the notice of amendment. Such an indication would have been of assistance to the taxing master, since Blignault, J's costs award did not include an award of costs in relation to an amendment. Nonetheless, an enquiry directed to the appellant's attorney may have elicited an informative response. The taxing master would, of course, be perfectly correct to disallow the fee charged in relation to settling the notice of amendment.

[9] In taxing the bill, the taxing master allowed an amount of R37 500,00 in respect of senior counsel's fee for all his attendances. The appellant was dissatisfied with the taxing master's ruling in this regard (as well as in regard to the effect that it had on junior counsel's fee by virtue of the operation of rule 69(2)) and requested the taxing master to state a case for the decision of a judge in terms of rule 48(1). The taxing master duly stated a case in terms of rule 48(2) in which she sought to justify her taxation of the bill and, more particular, the taxing off of a substantial portion of counsel's fees.

[10] In addition, the parties availed themselves of their right to make submissions on the stated case in terms of rule 48(5)(a) and the taxing master then furnished her report as contemplated in rule 48(5)(b). This

report was in two parts; the first dealing with the first respondent's submissions and the second dealing with those of the appellant.

[11] The stated case, submissions and reports were then placed before a judge in chambers in terms of rule 48(5)(c) for determination in terms of rule 48(6). The learned judge ***a quo*** made an order in which she, ***inter alia***, dismissed the review of taxation in respect of the items for counsels' fees and ordered each party to pay its own costs in relation to the review.

[12] With the leave of the learned judge ***a quo***, the appellant has appealed against those aspects of the judge ***a quo's*** orders to which reference has been made above.

GENERAL PRINCIPLES

[13] The principles applicable to the taxation of party and party bills of costs in general were not in issue and require little comment. The starting point is Rule 70(3), which reads:

> "(3) 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."

[14] In what has been described by Cilliers in his **Law of Costs** (loose-leaf edition par 13.02) as a leading case dealing with a taxation provision practically identical to rule 70(3), Milne JP in **Hastings v The Taxing Master** 1962(3) SA 789 (N) at 793 A-D found its meaning to be:

"(1) *that the words in the Rule, " a full indemnity for all costs reasonably incurred by him in relation to" were taken from the judgement of ATKIN, LJ; in the* ***The Merchants' Marine Insurance Company*** *case, (1928) 1 KB 750 CA at p 762 , and that there can be no manner of doubt that, subject to the specified exceptions, the rule is intended to give to the successful party a full, not a partial, indemnity for all costs reasonably incurred in relation to any legal proceedings;*

(2) That costs may be reasonably and properly incurred within the meaning of the Rule, even though they may not have been strictly necessary at the time they were incurred, or at all;

(3) That costs may be reasonably and properly incurred before the institution of the relative legal proceedings depending entirely on the circumstances;

(4) That whilst the Court will not, in general, substitute its discretion for that conferred upon the Taxing Master, it will interfere with the taxation if it appears that the Taxing Master has not exercised his discretion in the manner contemplated by the Rule."

[15] Of course, the successful party is not entitled to a full indemnity in respect of all of its costs, but only those recoverable as party and party costs. This is illustrated in the following passage of the report of the judgment of **Kriegler, J** in **President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another** 2002(2) SA 64(CC) at par [47].

> "In addition it should be remembered that although a rate per unit of time worked can be a useful measure of what would be fair remuneration for work necessarily done and although the need for written submissions in this Court may permit this method more readily that in the SCA, the overall balance between the interests of the parties should be maintained. The rate may be reasonable enough and the time spent may be reasonable enough but in the ultimate assessment of the amount or amounts to be allowed on a party and party basis a reasonable balance must still be struck. Here the inherent anomaly of assessing party and party costs should be borne in mind. One is not primarily determining what are proper fees for counsel to charge their client for the work they did. That is

> mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When *taxing a party and party bill of costs the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid or has to pay on her or his own side. Or, to put it differently, how much of the client's disbursement in respect of her or his own counsel's fees would it be fair to make recoverable from the other side?"*

Although the quoted portion of the judgment deals particularly with counsel's fees, the principle articulated in regard to the distinction between the attorney and client and party and party scale of fees is, I believe, of wider and more general application.

[16] As **Howie JA** (as he then was) said in **Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa** 2003(3) SA 54 (SCA) at 61 E-F.

> "A *costs order – it is trite to say – is intended to indemnify the winner (subject to the limitations of the party and party costs scale) to the extent that it is out of pocket as a result of 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 TAXING MASTER'S DISCRETION AND REVIEW

[17] The taxing master has discretion to allow, reduce or reject items in a bill of costs. She must exercise this discretion judicially in the sense that she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, her decision will be subject to review. In addition, even where she has exercised her discretion properly, a court on review will be entitled to interfere where her decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances or as to the practice of the court. **Cash Wholesalers, Ltd v Natal Pharmaceutical Society and the Taxing Master** 1937 NPD 418 at 425; see also **Duvos (Pty) Ltd v Newcastle Town Council and Others** 1965 (4) SA 533 (N) at 558 A-C; **City Deep Ltd v Johannesburg City Council** 1973 (2) SA 109 (W) at 113 E; the **Gauteng Lions** case at par [13] and the cases there cited. In the **Price Waterhouse** case (at par [25]), the court considered the fact that the taxing master had used the fee charged by the defendant's leading senior counsel as the yardstick by which to determine the fee allowable in respect of the plaintiff's senior counsel as "enough reason for interference".

THE APPROACH TO THE TAXATION OF COUNSEL'S FEES

[18] The taxing master in her stated case reveals clearly the stance she adopted to the taxation of senior counsel's fees. I believe I do her no disservice in summarising it as follows: Having commenced with a recitation of rule 70(3) and a reminder of the nature of the discretion with which a taxing master is vested, she proceeded to deal with counsel's charges for the preparation of heads of argument. She asserted that no separate fee was allowable on taxation for the preparation of heads of argument and disallowed counsel's fee in this regard. She then turned to the fee charged for preparation and, on the basis of her understanding that in motion proceedings no separate fee should be allowed for preparation and reading papers, she disallowed most of the fee charged for these attendances. Relying on "the established practice" and the authority of **Ocean Commodities Inc and Others v Standard Bank and Others** 1984(3) SA 15 (A), she allowed "one composite fee, including the drawing of heads of argument and preparing and arguing the appeal". She considered counsels' fees, "found them to be unreasonable and also not allowable in terms of the rules relating to the taxation of party and party bills of costs" and taxed twenty-two and a half hours from senior counsel's bill. It seems that in effect, she allowed senior counsel his fee for the two days in court at R15 000 per day and allowed a fee for a further five hours as the remaining component of the composite fee for heads of

argument and preparation. This interpretation is borne out by the fact that the taxing master records in the stated case that she taxed off junior counsel's fee for heads of argument and preparation, save for five hours of work in relation to specific attendances. It is also the interpretation arrived at by the leaned judge ***a quo***.

[19] In its submissions to the judge ***a quo*** – and in its heads of argument on appeal – the principal contention advanced by the appellant was that the practice of allowing a composite fee on taxation of counsel's fees in an appeal was not a practice which was appropriate in this particular matter. Reliance was placed on **Louw v Santam** 2000(4) SA 402(T) and, in oral argument, also on the unreported decision Brand J (as he then was) in **Siebert v Siebert** (CPD case no 796/99, delivered 13 June 2000). Rather, it was argued, the approach of charging separately (and more transparently) for work actually done in preparation and then charging refresher or day fees for days engaged in court should be recognised and allowed on taxation.

[20] In the alternative, it was argued that if a composite first day fee was regarded as appropriate, such fee should have been substantially higher than a refresher fee, and should have made provision for the reasonable time expended by counsel in drafting heads of argument and preparing for

the hearing.

[21] I think it is fair to say that counsel who addressed us on behalf of the appellant placed more reliance on the alternative argument than the principal one articulated in the heads. In my view, he was correct in doing so. Both **Louw** and **Siebert** were decided before the **Gauteng Lions** and **Price Waterhouse** cases and I regard myself as bound by the **ratio** of the later decisions. I should add that I do not read **Siebert's** case as differing in approach from that in the **Gauteng Lions** or **Price Waterhouse** cases. In par [9] Brand J expressed himself as follows:

> "A*s far as counsels' fees are concerned, it has been established in principle on more than one occasion that in general, counsel is not allowed to charge a separate fee for preparation of argument and for drafting heads of argument. The stated reason for this general rule is that, in general, counsel's compensation for this work is included in his appearance fee."*

In the face of this and the authority of the judgments in the **Gauteng Lions** and **Price Waterhouse** cases as well as those preceding them such as **Scott and Another v Poupard and Another** 1972(1) SA 680 (A); **Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others** (supra) and **J D van Niekerk en Genote Ing v Administrateur,Tansvaal** (supra), it must be accepted that for the

purpose of taxing a party and party bill, it is correct to take preparation and a refresher or day fee together for the purpose of assessing the reasonableness of counsel's fee. It makes no difference in my view that the fee was charged for an exception rather than an appeal or application, or even a trial. **Sieberts** was a trial and in **City Deep** Galgut J (as he then was) said the following at 116 A-B:

> "Similarly the Appellate *Division Rules require "heads of argument" in appeals to that Division. No fee is allowed to counsel for preparing such "heads". The work is regarded as being part of the preparation of argument and in practice is part of the fee charged for the appeal brief. It follows that, if no such fee is chargeable when the Rules require heads of argument, no fee is chargeable as between party and party when the Court requests such heads. In principle there can be no difference between briefs on trial and on appeal in this regard."*

[22] This is a convenient juncture at which to reiterate a point of clarification: While the language of some of the cases may suggest that it is wrong or improper for counsel to charge separately for drafting heads of argument and preparation, this is not the case. What is being conveyed is that it is not correct to tax a party and party bill on that basis. The modern trend – if I may call it that – of charging a fee based on time actually expended is both acceptable and in the interest of transparency. It is likely to result in fees that are less troubling than those referred to in, for example, **Ocean Commodities**. In **Price Waterhouse** at par [15] the prevalence of this

practice was acknowledged without adverse comment thus:

> *"We were also informed that it is the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related and insofar as appeals are concerned, for counsel to charge separately for preparation, heads of argument and time in court."*

[23] Counsel before us acknowledged this to be the prevailing practice, although counsel for the first respondent submitted that there were still counsel who charged on a "first day fee" basis. By this he meant that, when briefed on an application, exception, trial or appeal, counsel marked a globular fee for preparation and the first day's appearance in court. Counsel drew attention to the applicable fee parameters of the Cape Bar Council and to the fact that it recorded, in a note, that in some cases (clearly the exception rather than the rule) counsel charge first day fees on the basis of about 1.5 times a refresher, without providing separately for preparation. It was in fact counsel's contention that this is precisely how the taxing master had approached the taxation of senior counsel's bill. She had accepted the reasonableness of the rate of the daily fee charged by him and had then multiplied that rate by 1.5 to arrive at a first day fee. Other than the obvious coincidence, I cannot find support for this proposition in any of the statements of the taxing master. In my view, had this been her approach it would clearly have been wrong because it does

not amount to a true assessment of the reasonableness of the fee charged for the work done as required by Rule 70(3).

[24] It seems to me that the correct approach in determining the reasonableness or otherwise of counsel's fee for the purpose of the taxation of a party and party bill is that used by the taxing master in the **Gauteng Lions** case at par [26]. Both parties (at par [27] and par [35]) and the court (at par [35]) accepted that, in principle, she had considered the correct factors. In summary, they were the complexity of the matter; the volume of the case; the level of counsel's fees (by this I understand her to mean the actual fees charged rendered as a globular sum); inflation; and the fact that counsel must be fairly compensated for preparation and presentation of argument.

[25] This is clearly not a ***numerus clausus*** of considerations. In some cases certain of these issues will not arise; in others there will be other factors which should be taken into account. Nonetheless, the list will probably serve as a reasonable guide in most cases. As I see it, the taxing master ought to have approached the taxation of the bill of costs in this matter along the following lines:

(a) Consideration should have been given to the importance of

the matter, its financial value to the parties and the complexity of the issues raised and/or required to be canvassed. In this regard the taxing master should have had regard to the nature of the matter, the issues in dispute, the volume of the record and such other factors as may have assisted her in obtaining an impression of the matter relevant to assessing its importance and complexity. The taxing master may have been assisted by the submissions made by the representatives of the parties attending the taxation.

(b) The work actually done by counsel and the rate at which he charged should have been considered. A comparison between the rate charged and the Cape Bar Council's fee parameters ought to provide a sound basis for determining the reasonableness of the rate charged by counsel and, as long as regard is had to the fee parameters for the appropriate period, the question of inflation ought not to play any significant role, if it arises at all.

(c) An assessment should have been made as to the reasonableness of counsel's fees.

[26] In my view an enquiry along these lines would encompass a consideration of the five factors listed in the **Gauteng Lions** case.

[27] In allowing five hours for drafting or settling heads of argument, reading the first respondents heads and preparation for trial on the basis she did (or on the basis of multiplying senior counsel's day fee by 1.5), the taxing master could not have taken the appropriate considerations into account. We have not seen the papers in the exception, nor have we seen the heads of argument and lists of authorities prepared by counsel. This would be a prerequisite to assessing the complexity of the matter and the volume of the case. However, counsel were agreed that the matter was a complex one and we know it was argued for two days (an unusual length of time) and that senior and junior counsel were employed by both parties. These facts point to a matter of greater than usual complexity. The taxing master should be in a position to make a more accurate assessment of this given the greater quantity of information at her disposal.

[28] Having considered the complexity of the matter and the volume of the case, the taxing master ought to have had regard to the time actually spent by counsel on the matter and what it is that he said he did in that time. The authorities vary on the weight to be attached to this factor. In **Reef Lefebvre (Pty) Ltd v SA Railways and Harbours** 1978 (4) SA 961

(W) at 964 A, **Coetzee J** considered that:

> *"Whilst the actual time spent by counsel on any task is of paramount importance, it is not the only decisive criterion..."*

In the **Gauteng Lions** case, **Kriegler** J regarded the "rate-per-time basis" as "no more than a pointer" to what was reasonable. The decisive criterion is the value of the work done (**Ocean Commodities** at 22 H – I), but I venture to suggest that there are and will be cases where the time spent by counsel will be a very good indication of the value of the matter, whereas in others it will not. Care should be taken not to reward slow and inefficient work (cf **J D Van Niekerk** at 601 I – 602 A).

[29] Senior counsel spent in the order of 27½ hours in preparation, including the preparation of heads of argument. (The question of the time spent on the notice of amendment muddies the water somewhat). He spent approximately one-third of his time preparing and settling "heads of argument in reply" in addition to spending 5½ hours preparing for the hearing itself. The preparation of heads of argument in reply is unusual and would probably in the normal course be regarded as an attorney and client cost. This will not always be the case, but the taxing master would be entitled to subject this aspect of the fee to close scrutiny bearing in mind that the drafting of heads of argument in reply probably of necessity

includes some preparation that would in any event have been required for oral argument. It is nonetheless clear that senior counsel spent substantially more than 5 hours on those tasks the taxing master ought to have taken into account in assessing a "first day fee" or a "fee on exception". On the face of it, she should have allowed substantially more than she did. Without the wherewithal to do so, I am unable to say how much more, and the assessment of the correct quantum if this fee is best left to the taxing master, applying the correct principles.

[30] To reiterate, in matters of this nature I would expect the taxing master in considering the question of counsel's fees to adopt an approach along the following lines:

a) Consider the nature and complexity of the mater: What did the matter involve? How voluminous were the papers? Were there difficult areas of law involved or was the claim of particular importance to the parties by virtue, for example, of the amount of money involved? Did it involve an unusual amount of time spent in court?

b) Consider the work done by counsel: How difficult or complex were the matters dealt with in the heads of argument? How long did counsel spend drafting heads of argument? How long did counsel spend

considering the opponent's heads of argument and authorities? How long did counsel spend preparing his or her oral address to court?

c) Consider counsel's fee: Do they fall within the parameters familiar to the taxing master? Is it clear what is being charged for? Are all the charges covered by the costs award made?

d) Consider what is reasonable: In this regard the consideration that the litigant must not be out of pocket in respect of party and party fees charged by counsel must be taken into account together with the recognition that a reasonable rate coupled with reasonable time spent may not always, but certain can, amount to a reasonable basis for the taxation of counsel's fees. If the taxing master is of the opinion that the time taken by counsel to perform a given task is reasonable on a party and party basis and the rate at which he or she charged is reasonable, then the litigant should be entitled to an indemnity in respect of such charges.

e) Consider the totality of the fee for the matter: If the fee charged for the work done prior to the hearing is reasonable and the work done qualifies as party and party attendances, then the fee for such attendances should be added to the fee for the "refresher fee" charged. By way of example, if in this matter the taxing master determines that it

was reasonable to spend 5 hours drafting or settling heads of argument, 5 hours reading and considering the respondent's heads of argument and authorities and 5 hours preparing for the oral argument, she would allow a fee on exception of the equivalent of 2 days and 15 hours. If she felt an excessive amount of time was spent on items of preparation, she should disallow a fee for such excessive time.

[31] I am of the view that the taxing master failed to apply the correct principles and take the correct factors into account in taxing the bill of costs and that the **allocatur** should be set aside and the matter referred back for taxation, taking into account the matters referred to in this judgment. It follows that in my view the learned judge ***a quo*** erred in dismissing the review of taxation and the appeal against her order ought to succeed.

[32] I would make an order in the following terms:

1. The appeal is upheld.
2. The first respondent is ordered to pay the costs of the appeal.
3. Paragraphs (ii) and (iii) of the order of the judge ***a quo*** are set aside and replaced with the following:

(ii) The taxing master's **allocatur** in respect of counsel's

fees is set aside and the matter is remitted to her for taxation afresh.

(iii) The first respondent is to pay the costs of the review.

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SHOLTO-DOUGLAS, AJ

TRAVERSO DJP: I agree, it is so ordered

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TRAVERSO, DJP

LOUW J: I agree, it is so ordered

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LOUW, J