



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **12607/20**

In the matter between:

FAREED MOOSA & ASSOCIATES INC

Applicant

And

TAXING MASTER, WESTERN CAPE HIGH COURT

First Respondent

ANTHONY PAUL PETER TEUCHERT

Second Respondent

KEREN MACHANIK trading as MACHANIK ATTORNEYS

Third Respondent

JUDGMENT DELIVERED AND SUBMITTED ELECTRONICALLY ON 12 JULY 2021

GOLIATH DJP

[1] The central question in this matter is whether Uniform Rule 70(3B) permit any document or note pertaining to any item appearing on a bill of costs, be excluded from inspection in taxation proceedings. Put differently, may legal professional or litigation privilege be invoked as a ground to exclude certain documents from inspection by a costs debtor. The Taxing Master did not file a Notice of Opposition

nor a Notice to Abide. Second and Third Respondent opposed the action. In this judgment, the Second and Third Respondents are therefore collectively referred to as “*Respondents*” where necessary.

[2] This matter has its genesis in a matrimonial dispute. Applicant represents the Plaintiff in the matrimonial action, in which Second Respondent is the Defendant. Second Defendant opposes the matrimonial action and is represented by the Third Respondent. On 30 October 2019, following proceedings relating to a Rule 43 and Rule 30 application, Sher J granted the following order:

“3. That the applicant’s’ attorneys in the rule 43 application shall be liable de bonis propriis for the costs of both the rule 30 application as well as the Rule 43 application, on the scale as between attorney and own client.”

[3] On 5 February 2020 the Third Respondent sent a bill of costs to the Applicant demanding payment in the sum of R421 313,00. The Applicant refused payment on the basis that the quantum was exorbitant and unreasonable. Applicant pointed out that considering the papers filed and submissions made in the relevant matters, it was highly improbable that the Second Respondent could have incurred legal costs in the sum of R 421 313,00.

[4] On 26 February 2020, and pursuant to Uniform Rule 70(3B), Third Respondent served a bill of costs and a Notice of Intention to Tax the bill on the Applicant, which stated as follows:

“You may inspect the documents or notes pertaining to any item on the Bill of Costs (excluding documents or items which are privileged and/or confidential ... for a period of ten (10) days after receipt of this notice”.

[5] Third Respondent indicated that most of the 387 items *“is correspondence between client and attorney and/or client and counsel and as such are privileged and/or confidential.”* On 27 February 2020, Third Respondent requested the Applicant to indicate which of the 387 items on the bill of costs will be the subject of their inspection. The Applicant objected to Respondents’ intention to refuse inspection of certain documents and notes pertaining to certain items on the bill of costs. They recorded their view that privilege and confidentiality cannot be asserted for purposes of a Rule 70 inspection. The Applicant insisted that the denial of access to such privileged documents tantamount to *“a denial of an effective right of inspection.”*

[6] On 6 March 2020, Third Respondent replied and insisted that the right of privilege between attorney and client pending finalization of the main action is valid and enforceable. They expressed the view that the objective of inspection is to determine if a particular item on the bill exists and whether the item may be allowed, and that the content and relevance of the item is not open for inspection. Third Respondent emphasized that Rule 70(2) provides that the Taxing Master may call for the relevant supporting documents if necessary. They accordingly undertook to provide any item to the Taxing Master for determination, including items protected by attorney-client privilege. Third Respondent subsequently provided a list of 163 items in respect of which their client invoked litigation privilege. According to Third

Respondent they had consented to inspection of the remaining 224 items without any restrictions.

[7] Further correspondence was exchanged between the parties. On 16 March 2020, the Applicant informed Third Respondent that they would attend to the inspection on 17 March 2020 and included a list of the items which they required for inspection. Applicant contended that the list of 224 items was provided expressly on a without prejudice basis, and they had reserved their rights in respect of the list of excluded items. Evidently no limitations were initially enforced by the Respondents in respect of the supporting paperwork of the 224 items to be inspected. The Applicant therefore requested that Third Respondent make available for inspection *“all notes, documents, accounts, papers and books related thereto”*. Third Respondent confirmed that the files would be made available on 17 March 2020 on condition that no copies of documentation would be permitted.

[8] On 17 and 18 March 2020, the Applicant's Dr Moosa attended on the inspection at the offices of Machanik Attorneys. According to the Third Respondent, Dr Moosa removed their timesheets without permission notwithstanding their request not to do so. Third Respondent complaint that copies of the relevant timesheets were attached to the Applicant's Notice of Intention to oppose the taxation. Applicant conceded that he had requested copies of certain documentation, and contended that he was entitled to do so. According to the Applicant, Third Respondent also imposed restrictions on the 224 items during the inspection notwithstanding the fact that none of these items were listed as those over which privilege was claimed. Applicant recorded their objections to the limitations placed on their right of

inspection pertaining to the remaining 224 items in question. The nature and extent of the limitations were described by the Applicant as follows:

- “(i) inspection was granted in relation to some of the Third Respondent’s time (attendance) sheets and refused in relation to others;*
- (ii) some time (attendance) sheets provided were redacted by Third Respondent blacking out some of its content;*
- (iii) although inspection was permitted for invoices issued by Advocates, inspection was refused in respect of Third Respondent’s invoices, statements of account, receipts and books of account.”*

[9] On 25 March 2020, the Applicant filed a Notice of Objection to the bill of costs. On 18 May 2020, Machanik Attorneys filed a Notice of Taxation with the Taxing Master. On 9 June 2020, the Notice of Taxation was issued by the Court, and thereafter served on the Applicant. The Taxing Master enrolled the matter on 19 October 2020 for purposes of the taxation of the bill.

[10] The nature and grounds of objections appear from the Notice of Objection. The Applicant pertinently objected to the items which were excluded on the grounds of attorney-client privilege. Applicant argued that the exclusion and caveat relating to certain items on the bill were irregular, impermissible, unlawful, and in violation of the Rules of Court. The Applicant referred to the relevant statutory framework relating to taxations and argued that the Respondents cannot invoke attorney-client privilege in respect of a bill of costs.

[11] On or about 7 September 2020, the Applicant launched this application in which they sought an interim interdict. The application was set down on an urgent basis two court days before the taxation. Part A of the application served before Magona AJ on 15 October 2020, whereupon an interim order was granted, interdicting the Taxing Master from proceeding with the taxation which had been set down for 19 October 2020, pending the determination of this application.

[12] Third Respondent averred that the Applicant received the Notice of Intention to Tax (together with the caveat), they attended the inspection process over two days, and then delivered a Notice of Opposition in which their objections were stipulated. Third Respondents expressed the view that upon service of the Notice of Opposition, Machanik Attorneys were legally entitled to set the matter down for taxation in terms of Rule 70(3B). Third Respondent emphasized that notwithstanding the Applicant's objections, they effectively took further steps in furtherance of the taxation process. They therefore argued that by attending the inspection and delivering the Notice of Opposition, the Applicant provided an explicit and, at the very least, an implied indication to Machanik Attorneys that they had submitted to the taxation process.

[13] Third Respondent argued that if a party objects to a procedural step that is allegedly irregular, or impermissible, then such a party would have recourse to the relief afforded in terms of Rule 30 of the Uniform Rules of Court. They submitted that the Rule specifically provides for a situation where proper notice of taxation had not been given. Third Respondent averred that the Applicant should have availed themselves to the mechanism of Rule 30 but failed to do so. Third Respondent

emphasized that it is well established that a party who takes a further step with the knowledge of an irregularity, would effectively have waived his/her entitlement to the recourse provided for in terms of Rule 30.

[14] Consequently, Third Respondent submitted that the Applicant had acquiesced to the defect and cannot now reprobate to what they had already approved to. Respondents therefore asserted that, viewing the conduct of the Applicant objectively, the Applicant had waived their right to now seek relief setting aside the processes which they had participated in, in clear furtherance of the prescripts of Rule 70(3B). According to Third Respondent, it was within the discretion of the Taxing Master to decide whether there had been proper notice in terms of Rule 70(3B). They argued that given the peremptory provisions of Rule 70(4) and the clear discretion which it affords to the Taxing Master, only once the Taxing Master has exercised his/her discretion with regard to the notice in terms of Rule 70(3B), would the Applicant (or for that matter the Respondents) be entitled to challenge any decision of the Taxing Master by way of review proceedings.

[15] Third Respondent expressed the view that the relief sought by the Applicant would facilitate a judicial interference with the Taxing Master's discretion, even before the exercise of such a discretion. The Third Respondent therefore contended that this application is an attempt by the Applicant to pre-empt and interfere with the discretion of the Taxing Master. They contend that the relief sought by the Applicant casts the net far too wide as to who will determine whether there had been proper compliance with Uniform Rule 70, since this power falls exclusively within the domain of the Taxing Master.

[16] Respondents objected to the nature of the relief sought insofar as it amounts to final interdictory relief in the sense that the Applicant seeks the court to interdict its own procedures, by specifically requesting an order directing that *“the Attorney-own client bill of costs ... cannot be re-enrolled for taxation until such time as there has been proper compliance with Uniform Rule 70.”* Third Respondent pointed out that the Applicant had not dealt with the requirements of final interdictory relief in this respect.

[17] Third Respondent clarified that they do not seek the Taxing Master to consider whether the documents in issue are privileged, or not. They simply proposed to hand such documents to the Taxing Master so that s/he can exercise the discretion to decide whether such expenditure was reasonably and properly incurred, and whether it should be allowed. They averred that such an exercise is precisely in accordance with the powers afforded to the Taxing Master. Third Respondent argued that the Applicant, having filed a Notice of Objection, would have had an opportunity to object to any item at the taxation, and address the Taxing Master in this regard.

[18] They contended that the issue of privilege is of paramount importance in the inspection process given that the Applicant, and specifically Dr Moosa, is the legal representative and uncle of their client's wife in the divorce proceedings. Thus, any incursion into the realm of privileged information would have a direct bearing on the main action. The Third Respondent emphasized that cognizance must be given to the common law right of privilege and made extensive submissions in this regard.

Respondents contended that rights of privilege trump any other rights such as the Applicant's right to inspection.

[19] Uniform Rule 70 places the authority to tax bills in the domain of the Taxing Master who is empowered to conduct taxations as an extension of the Court. The Taxing Master is a creature of Rule 70(1) of the Rules of Court, which provides:

“(1)(a) The taxing Master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of sub-rule (5), in accordance with the provisions appended to the tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered to do.”

[20] In **Berman & Fialkov v Lumb** [2002] 4 All SA 432 (C) at paragraph 20, the Court approved the following dictum from **Martens v Rand Share and Broking Finance Corporation (Pty) Ltd** 1939 WLD 159 at 163 where the general functions of a Taxing Master were described as follows:

“... to decide whether the services have been performed, whether the charges are reasonable or according to tariff and whether disbursements properly allowable as between party and party have been made; his function is to determine the amount of the liability, assuming that liability exists, and the fact that he requires to be satisfied that liability exists before he will tax does not show that there is any liability. ...”

[21] The Taxing Master has a discretion as to whether to allow an item on the bill as being reasonable and necessary. To this end, Rule 70(2) stipulates that:

“At the taxation of any bill of costs the taxing master may call for such books, documents, papers or accounts as in his opinion are necessary to enable him properly to determine any matter arising from such taxation.”

[22] The Taxing Master has circumscribed powers and has limited powers such as those prescribed in rule 70(3). (See: **Grindlays International Finance (Rhodesia) Ltd v Ballam** 1985 (2) SA 636(W) at 645E). The ultimate objective of Rule 70 is to fix costs at a reasonable amount in favour of the successful costs creditor, and to ensure that the party condemned to pay the costs, is not mulcted for excessive costs. Before the taxation can take place, Rule 70(4) provides that *“the taxing Master shall not proceed with the taxation of any bill of costs unless he or she is satisfied that the party liable to pay costs has received due notice in terms of subrule 3B”*.

[23] Uniform Rule 70(3B) provides as follows:

“(3B) (a) Prior to enrolling a matter for taxation, the party who has been awarded an order for costs shall, by notice as near as may be in accordance with Form 26 of the First Schedule-

(i) Afford the party liable to pay costs at the time therein stated, and for a period of ten (10) days thereafter, by prior arrangement, during normal business hours and on any one or more such days, the opportunity to inspect such documents or notes pertaining to any item on the bill of costs; and

- (ii) *Require the party to whom notice is given, to deliver to the party giving the notice within ten (10) days after the expiry of the period in subparagraph (i), a written notice of opposition, specifying the items on the bill of costs objected to, and a brief summary of the reason for such objection.”*

[24] Rule 70(3B) makes it clear that no bill of costs may be enrolled for taxation unless there has been compliance with the procedural stipulations in Rule 70(3B)(a) and (b). The obligation imposed by rule 70(3B) (a) on a costs creditor to allow a costs debtor to inspect documents and notes pertaining to a bill of costs is couched in peremptory terms. Rule 70(3B) contains no express limitations on a costs debtor’s right of inspection. Rule 70 does not provide a costs creditor with an election to make documents and notes available to a Taxing Master, but not to the costs debtor from whom payment is sought.

[25] The taxation framework envisages a fair and equitable process. It is incumbent upon a costs creditor to justify its claims for reimbursement as contained in the bill of costs. The taxation regime requires fair treatment of costs debtors who must, prior to taxation, be afforded an opportunity to inspect all relevant documents and notes pertaining to every item on a bill of costs. A costs debtor is called upon to pay for items on a bill and is therefore entitled to undertake a thorough process of verification in relation to claims for payment made on a bill of costs.

[26] I am of the view that a costs debtor may not be deprived of the opportunity to inspect all the relevant documentation within the prescribed period. In such

circumstances a costs debtor will be unable to meaningfully assert their right of objection or defend their position. It must be borne in mind that a party is bound by the grounds relied upon in a Notice of Objection filed under Rule 70(3B)(b), and cannot introduce new objections not recorded in the notice. As a result of the approach adopted by the Respondents, the Applicant is effectively denied a fair opportunity to object to at least 163 items on the disputed bill of costs, as well as items relating to Third Respondent's time sheets, accounts and other undisclosed material. I am not inclined to conclude that the Applicant had unequivocally acquiesced to the taxation proceedings by filing a Notice of Objection. Applicant was consistent throughout by objecting to the caveat and reserving their rights in respect thereof.

[27] When issues are raised which falls outside the scope of the Taxing Master's authority, those issues must first be referred to a Court of law for adjudication. (See: **Berman & Fialkov v Lumb (supra)** at paragraph 23). Third Respondent conceded that the Taxing Master lacks jurisdiction to decide whether attorney-client privilege exists in relation to any item on the bill. Consequently, it is common cause that the determination of issues relating to attorney-client privilege does not fall within the scope and powers of the Taxing Master. In **Competition Commission v Arcelormittal SA (Ltd) and Others** 2013 (5) SA 538 (SCA) at paragraph 21 the Supreme Court of Appeal held that litigation privilege has two components. First, the document must have been obtained or brought into existence for the purposes of a litigant's submission to a legal advisor for legal advice; and second, that the litigation was pending or contemplated as likely at the time. Litigation privilege protects

communication between a litigant or his/her legal adviser and third parties if such communications are made for the purpose of pending or contemplated litigation.

[28] In **Zuma v National Director of Public Prosecutions** 2009 (1) CC at [184] the Constitutional Court stated that “...*It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This in turn promotes fairness in litigation ...*” The privilege belongs to a litigant, not the legal advisor, and may be waived only by the litigant. In **A Company and Others v Commission, South African Revenue Service** 2014 (4) SA 549 (WCC) the Court held that fee notes are not ordinarily of such a nature that it would be directly related to the performance of an attorney’s professional duties as legal advisor to a client, but it is conceivable that attorneys fee notes might contain references to legal advice sought. The test was whether upon an objective assessment, the references disclose the content, and not just the existence of privileged material.

[29] The grounds of privilege must be stated with sufficient clarity for a Court to determine whether the document falls within the grounds of privilege. In this matter the list of items over which the client invoked his right of privilege have not been contextualized. Consequently, the Court is not in the position to apply the test as enunciated in **A Company and Others v Commission, South African Revenue Service (supra)**, to determine whether any of the undisclosed documents and notes are entitled to be protected by the shield of privilege. Third Respondent also failed to justify the redaction of the remaining items in terms of which no privilege was initially

claimed. It appears that the caveat in respect of 163 items on the bill is incompatible with the clear and unambiguous language of Rule 70, having regard to the contextual and purposive interpretation thereof. The Taxation regime envisages a transparent process, and Rule 70 does not provide any mechanisms to shield any bill from scrutiny or to conduct a taxation under the veil of secrecy.

[30] In my view, the Third Respondent should not have requested the Taxing Master to enroll the matter in circumstances where they invoked attorney-client privilege in respect of 163 items. They indicated that they did not require the Taxing Master to determine whether the items were privileged, but merely to assess whether the costs incurred were necessary or proper. However, the crux of this matter does not concern the Taxing Master's discretion to tax a bill of costs in terms of the provisions of Rule 70, but rather, whether any item on the bill should be protected by privilege. The inference is incontrovertible that at all material times the Third Respondent was alive to the fact that the Taxing Master was not empowered to determine the legal question of attorney-client privilege, and a legal dispute regarding privilege and the confidentiality of documents were likely to arise. Consequently, Third Respondent must have been aware that the Taxing Master was legally handicapped to determine 163 items on the bill of costs because it triggered the legal question of privilege. However, the Court will accept the reasoning and approach adopted by the Respondents were *bona fide*, in order to preserve and protect the interests of Second Respondent.

[31] The Respondents contended that the Applicant should have brought an application in terms of Rule 30 if they considered the setting down of the taxation as an irregular step, instead of launching interdict proceedings. In my view it is highly

probable that such an application would also have been opposed by the Respondents. In any event, even if the Respondents are correct in invoking the provisions of Rule 30, it does not bar the Applicant from utilizing a different remedy at their disposal. I do not deem the remedy and approach adopted by the Applicants as extraordinary. The Taxing Master had already enrolled the matter. Consequently, an application for an interim interdict to prevent the Taxing Master from proceeding with the taxation does not seem inappropriate or unreasonable in the circumstances.

[32] The aim of an interim interdict is essentially to preserve or restore the status *quo ante* pending the final determination of the rights of the parties. The Applicant was granted such relief in Part A, and I am satisfied that the Applicant had made out a proper case for the granting of an interdict. Therefore, the order granted by Magona AJ was justified. Both Respondents opposed the application in Part A. Applicant enjoyed a measure of success in this regard and is accordingly entitled to the costs thereof.

[33] I am satisfied that the Applicant will be severely prejudiced should the bill of costs be taxed in circumstances where they are denied a fair opportunity to inspect certain items in respect of the bill as contended for by the Respondents. Allowing the taxation of a bill of costs under these circumstances would be oppressive, render the statutory protected right to inspection nugatory and purely cosmetic, and undermine the objectives of inspection of a bill of costs as envisaged in Rule 70. The Respondents had expressed their intention to make available a copy of all the relevant documentation at the hearing of the matter for purposes of a “*judicial peek*”.

However, such an undertaking does not nullify on the Applicant's procedural right to inspection in terms of Uniform Rule 70(3B).

[34] At the hearing of this matter, it was evident that the parties are embroiled in extremely acrimonious divorce proceedings. The bill of costs in interlocutory Rule 43 and Rule 30 proceedings amounts to the sum of R421 313, 00. Apparently, the Plaintiff in the divorce action currently has an outstanding amount of R400 000, 00 in respect of legal fees. The record also refers to a costs estimation of legal fees in the sum of R946 000, 00. The parties would be well advised to settle their disputes amicably in order to preserve their estate for the benefit of both parties.

[35] In respect of the merits of this matter, both parties have invoked important legal rights in justifying the position that they contend for. Notwithstanding any criticisms in respect of the litigation privilege defense raised by the Respondents, it is evident that in the final analysis, the Court must strike a balance between the Second Respondent's purported right to privilege and the Applicant's right of inspection. I am accordingly of the view that the interests of justice dictate that the only manner to protect the interests of both parties, is to direct that the taxation of the bill of costs be deferred until conclusion of the main hearing. With regard to costs, after careful consideration of all the relevant facts of this matter, I am satisfied that it would be just and equitable if no costs order is granted in this matter.

[36] In the result, the following order is made:

- (a) The Taxation of the Bill of Costs arising from the Order granted by Sher J on 30 October 2019 is hereby stayed pending final determination of all legal proceedings relating to the main action issued under case number 1215/2019;
- (b) In the alternative to paragraph (a), the Taxation of the Bill of Costs arising from the Order granted by Sher J on 30 October 2019 is stayed until such time as and when the Third Respondent had waived his right to privilege in respect of all the items as set out in the relevant Bill of Costs to be submitted for taxation;
- (c) The inspection held in terms of Uniform Rule 70(3) (B) (a) on 17 and 18 March 2020 in relation to the relevant Bill of Costs is set aside;
- (d) The enrolment of the relevant Bill of Costs for taxation is set aside;
- (e) The interim interdict granted on 12 October 2020 is discharged;
- (f) Second and Third Respondent shall pay the Applicant's costs in respect of Part A of this application jointly and severally, the one paying, the other to be absolved;
- (g) There shall be no order as to costs.

DEPUTY JUDGE PRESIDENT GOLIATH