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

REPORTABLE
CASE NO: 15120/2022

In the matter between:

J[…] J[…] V[…] R[…]	Applicant
And	
THE TAXING MASTER, HIGH COURT OF SOUTH AFRICA (WESTERN CAPE DIVISION)	First Respondent
A[…] J[…] V[…] R[…]	Second Respondent
MARYNA VAN STADEN	First Intervening Party
STANLEY JOSEPH HOROWITZ	Second Intervening Party
SOUTH AFRICAN LEGAL PRACTICE COUNCIL	Third Intervening Party

Bench: P.A.L. Gamble, D.M. Thulare, JJ & R. Wathen-Falken, AJ
Heard: 28 July 2023
Delivered: 20 October 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 11h30 on Friday, 20 October 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. "*Traditionally taxation has been, and still is, regarded as an integral part of the judicial process and …the rights and obligations of the parties to a suit are not finally determined until the costs ordered by the Court have been taxed. Accordingly, the only persons who can appear before a Taxing Master in a Supreme Court are persons who are permitted to practice in such Court*."[1]

2. Notwithstanding this clear and unambiguous statement by the erstwhile Appellate Division more than 40 years ago, there are some costs consultants[2] who claim that they are entitled to appear before a Taxing Master and attend to the taxation of litigants' bills of costs, notwithstanding the fact that they are not admitted to practice as legal practitioners under the Legal Practice Act, 28 of 2014 (the LPA). The argument by those costs consultants is that, provided they are accompanied by a duly qualified attorney, they may present the bill of costs at taxation, address the Taxing Master and argue for or against the allowance and/or assessment of respective items in the bill of costs.

THE RELEVANT FACTUAL BACKGROUND

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[1] Bills of Costs (Pty) Ltd and another v The Registrar, Cape, NO and another 1979(3) SA 923 (A) at 946B

[2] The term "costs consultant" is used in common legal parlance to refer to those persons who, on the instructions of attorneys involved in litigation, prepare detailed bills of costs relating to litigation matters for assessment at taxation before a Taxing Master of the High Court. In some instances, the person is referred to as a "cost consultant" and alternately, as a "costs consultant". For the sake of consistency, I shall adopt the latter phrase, unless the context reflects otherwise.

3. The applicant, Mr. J[…] J[…] V[…] R[…], and the second respondent, Ms. A[…] J[…] v[…] R[…], were involved in opposed divorce proceedings in this Division. As a consequence of various orders made in the course of that litigation, Ms. V[…] R[…] instructed her attorneys to procure the taxation of a series of costs orders granted in her favour. After the various bills of costs in respect of both interlocutory applications and the main action had been drawn they were presented to the first respondent (the Taxing Master) for taxation. Mr. v[…] R[…] opposed those bills of costs and instructed his attorneys to take the necessary steps to attend the taxation thereof before the Taxing Master.

4. To that end, Mr. v[…] R[…]'s attorneys procured the services of a certain Ms. Pauline Erasmus, who describes herself as a "Cost Consultant", to attend to the taxation of Ms. V[…] R[…]'s bill of costs. Ms. Erasmus prepared the necessary documentation to oppose the taxation and, on 11 April 2022, attended the first part of the taxation in the company of an attorney, Mr. van Niekerk, where she proceeded to argue the taxation with negligible (if any) input from Mr. van Niekerk.

5. The taxation was not completed in April 2022 and was set down to be continued in August 2022. On 12 August 2022, Ms. Erasmus was accompanied at the taxation by a junior advocate at the Cape Bar, Ms. Meyer. As before, Ms. Erasmus appeared before the Taxing Master and argued the taxation with Ms. Meyer looking on and holding what Ms. Erasmus terms a "watching brief". The matter was still not finished and it was adjourned to 26 August 2022.

6. On that occasion, the attending assistant Taxing Master, Ms. Ashleen Jones-Pretorius, informed Ms. Erasmus that she would not allow her to address her on any issues relating to the taxation and would only permit Ms. Meyer, as a duly admitted legal practitioner, to do so. Ms. Meyer was unable to step into the breach and accordingly requested a postponement of the taxation until 21 April 2023.

7. On 2 September 2022 Ms. Erasmus emailed Ms. Jones-Pretorius requesting clarity on a number of rulings she allegedly made on 26 August 2022. For present purposes I need only address one aspect which was set forth as follows.

> "On [26 August 2022] you made the following rulings;
>
> 1…
>
> 2. Postponement was granted due to a new Practice being implemented as to where Cost Consultants are no longer allowed to address or present bills for taxations, despite an admitted Attorney or Counsel being present…
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> My questions to you Ms. Taxing Master are as follow (sic) in order to move forward and to do preparations necessary, as follows:
>
> 1…
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> 2. Can you please indicate and/or confirm in writing your ruling on this matter only, indicating the Cape Divisions (sic) Practice in so far as Cost Consultants addressing Taxing Masters on taxations with the SCA judgment[3] being implemented and adopted."

8. On the same day Ms. Jones-Pretorius replied in detail to Ms. Erasmus' email. Once again, I cite only the passage relevant to this matter.

> "2. No new practice are (sic) being implemented. It has always been the position that only a legal practitioner with right of appearance can present a matter for taxation. I have allowed cost consultants to address me in the past

[3] This appears to be a reference to Bills of Costs.

but after an engagement with management this has been addressed and only legal practitioners with right of appearance in the High Court are allowed to address the taxing master. Further the postponed (sic) was allowed due to the fact that adv Meyer requested more time to properly prepare for the matter as she indicated that she is not in a position to proceed on the day."

9. Dissatisfied with the Taxing Master's explanation of as aforesaid, Mr. v[…] R[…] immediately launched proceedings to review her decision not to permit Ms. Erasmus to appear further at the taxation. The application was launched on 12 September 2022 and relied on a founding affidavit deposed to by Ms. Erasmus which was confirmed by a short affidavit by Mr. v[…] R[…]. On 22 September 2022 Ms. V[…] R[…] filed a notice to abide the review.

10. Thereafter, and on 17 October 2022, the first and second intervening parties filed a notice in terms of Uniform Rule 16A seeking permission to be admitted in the proceedings as *amici curiae.* They were represented by attorneys, Van Rensburg & Co (no relation to the applicant, and to whom I shall refer to as Attorney van Rensburg to avoid confusion). Shortly before the hearing of the matter on 28 July 2023, the third intervening party, the South African Legal Practice Council (the LPC)[4] applied for leave to intervene.

11. At the hearing of the review, Mr. v[…] R[…] was represented by Adv. A.N. Katz SC (who appeared with Ms. C. Tait) on the instructions of Maurice Phillips Wisenberg attorneys, the Taxing Master was represented by Adv. S. Ngombane instructed by The State Attorney, the first and second intervening parties were represented by Mr. L. van Rensburg of Van Rensburg & Co and the LPC by Mr. S. Sirkar of Herold Gie Attorneys. The Court is indebted to all the legal representatives for their comprehensive and helpful written submissions which have facilitated the preparation of this judgment.

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[4] Leave to so intervene was sought by the national body and not the regional branch in the Western Cape.

ADMISSION OF THE *AMICI*

12. The application by the LPC to be admitted as *amicus* was not opposed by any of the other parties and it was duly admitted as such at the commencement of the hearing. This application was not made in compliance with Rule 16A but effectively moved from the Bar by Mr. Sirkar at the hearing of the matter after he had filed heads of argument the previous day. In those heads it was recorded that the LPC had decided at a late stage to request consent from the other parties for its admission as an *amicus.* The heads go on to state that the response of the other parties was still awaited and that the requisite notice under Rule 16A would be filed when that consent had been given.

13. It is a matter of some concern to this Court that the LPC, a statutory body charged with the control of the legal profession, did not make timeous application for admission as an *amicus* and comply properly with Rule 16A. Further, it did not put up an affidavit to explain why it had been dilatory and left matters until the last minte. As I have said, there was no objection to the LPC being given leave to intervene as an *amicus* and we considered it necessary to hear its submissions in the circumstances, hence our decision to grant its application.

14. Mr. Katz correctly noted that the first and second intervening parties had gone way beyond what was normally expected of an *amicus* and had obviously pinned their colours to the mast in opposing the review. It was correctly submitted that if these parties wanted to enter the lists for the purposes referred to they should have applied to be joined as co-respondents where they would have been exposed to the possibility of adverse costs orders.

15. Prior to the hearing we drew the parties' attention to the recent judgment of the Full Bench of the KwaZulu Natal High Court sitting in Pietermaritzburg in

Maughan[5] in which the court discussed in detail the role and function of an *amicus curiae* and pertinently dealt with the situation where an *amicus* purported to take sides in the litigation. The relevant section in the judgment is cited in full because it is regarded as directly in point to Mr. Katz's objections.

"**The role of an *amicus***.

[141] In its role of assisting the court, the *amicus* does not need to have a direct interest in the outcome of the litigation and joins the proceedings due to its expertise on or interest in the matter before the court. In *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others,* the Constitutional Court described the role of an *amicus* as follows:

> '*The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceeding without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence*.'

[142] Rule 16A governs the admission of an *amicus curiae*. The rule provides that a party seeking admission as *amicus curiae* must:

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[5] Maughan v Zuma and others [2023] 3 All SA 484 (KZP)

(a) seek the written consent of the parties and in the absence of such consent apply to court for admission;

(b) show that it has an interest in the proceedings; and

(c) demonstrate that it will make submissions that are relevant, and which will assist the court, and which submissions are different from those of the other parties.

[143] Emanating from the case law concerning the admission of *amicus curiae* a number of principles have emerged. These relate to the nature of the *amicus curiae's* role in the proceedings and in the determination of whether or not it ought to be admitted. These principles are the following:

(a) an *amicus curiae's* contribution lies in the additional, new and different perspective it brings on the issues between the parties;

(b) the *amicus* is not prevented from supporting one party's side of the case and neutrality of the *amicus* is not a requirement in the proceedings;

(c) the contribution which an *amicus* makes must materially affect the outcome of the proceedings.

[144] With regard to the Respondent's submissions that certain of the *amici are* not neutral parties and support the contentions of the Applicants in the main application, our courts have indicated that there is nothing improper in an *amicus curiae* supporting the contentions of one of the parties. This is demonstrated if one has regard to the Constitutional Court decision in *Chakanyuka and Others v Minister of*

Justice and Correctional Services and Others (Scalabrini Centre of Cape Town, The International Commission of Jurists and The Pan-African Bar Association of South Africa Amicus Curiae) and *Minister of Police and Others v Fidelity Security Services.* In these instances, all of the *amici* supported the stance taken by one of the parties to the litigation. Similarly, in *Economic Freedom Fighters v Manuel* the *amici* supported the Respondent's submission that a party ought to be able to approach a court on application to seek relief including the recovery of damages.

[145] The Constitutional Court in *S v Molimi* remarked, on the approach of the *amicus curiae,* that it did not only generally support the contentions of the Applicant but also contributed a different perspective. Even where an *amicus'* support for one side of the case was described as vigorous, the court allowed its admission and did not make an adverse costs order.

[146] The interest of an *amicus* must be an interest in the correct application of the law. What is required is for an *amicus*' submissions to be directed towards a just outcome and often this may necessitate written submissions before a court steering it towards a particular direction. But this does not disqualify a prospective Applicant from admission as an *amicus* or their submissions being considered.

[147] That neutrality is not a requirement for admission has been upheld in a number of cases. In *S v Engelbrecht* the court held that 'neutrality is neither necessary nor a requirement of the *amicus curiae* function'. Satchwell J further observed at paragraph 51 that:

> '*…it is difficult to conceive that any individual or organisation would wish to intervene as an amicus unless there was a*

particular piece of information or area of learning or point of view of which the amicus wished the Court to be cognisant. The aloof and disinterested and apathetic would be highly unlikely to seek to enter the arena at all.'

[148] Having regard to the submissions of the first to fourth amici although they support the relief sought in the applications by Downer and Maughan, their submissions and contributions and reasons advanced differ from those of the Applicants." (Internal references omitted)

16. Having perused the affidavits filed on behalf the first and second intervening parties, the Court was of the view that the material deposed to therein was likely to be of assistance in the adjudication of this matter. And, when Attorney van Rensburg abandoned the prayer for costs, the Court concluded that their admission would not only be of assistance to the Court but would occasion no prejudice to any of the other parties. In the result the Court admitted the first and second intervening parties as *amici* at the commencement of the hearing.

LEGAL BASIS FOR THE REVIEW

17. The relief sought in the notice of motion was for the following order –

"1. That the decision taken by the first respondent at the taxation between the applicant and the second respondent ("the taxation"), which was held on 26 August 2022 in terms whereof the first respondent ruled that persons who do not have Right of Appearance in terms of s 4(2) of the Right of Appearance in Courts Act 62 of 1995 or in terms of s 25(3) of the Legal Practice Act 28 of 2014 may not appear and represent the parties therein and may, similarly, not be called as experts, ("the impugned decision"), be reviewed and set aside in terms of s 6(2)(e) and/or s 6(2)(f)(ii) of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"); and

2. varying and substituting the impugned decision in terms of s8 of PAJA, to allow a person who acts as a Cost Consultant and who does not have Right of Appearance in terms of s4(2) of the Right of Appearance in Courts Act 62 of 1995 or in terms of s25(3) of the Legal Practice Act 28 of 2014 to appear, with the assistance of a person who has such right, at the taxation and to address the first respondent on the issues relating to the taxation of costs, and to be called as an expert, if necessary.

3. costs of suit only in the event of opposition."

18. In the founding affidavit Ms. Erasmus pleads the case for review as follows.

"24. As stated, the first respondent's decision to allow me, a Cost Consultant duly appointed by the attorneys of record for the applicant for the very purpose of preparing and presenting the opposition to the second respondent's bill of costs at the taxation thereof, from addressing her, whilst accompanied by an Advocate who enjoys the Right of Appearance in the High Court, is nonsensical and irrational and stands to be set aside in terms of ss 6(2)(e) and/or 6(2)(f)(ii) of PAJA.

25. This is so, because taxation is a quasi-judicial proceeding and although taxation proceedings form an integral part of the legal process, the nature thereof differs from the legal process in the usual sense. The goal or objective of taxation is firstly to quantify the costs incurred in the pursuance of litigation and secondly, to ensure that the taxation of costs is based upon notions of fairness and practicality and the burden of defeat in the sphere of litigation expenses.

26. Furthermore, the taxing master is not a judicial officer and is not bound by the strict rules of evidence. His/her position is analogous to the position held by an arbitrator or referee, and he/she is appointed to assist the court in

> determining what a just remuneration should be for a legal representatives services in any particular case.
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> 27. There is no specific procedure prescribed for taxation. The Taxing Master determines the course of the proceedings. What occurs in front of the Taxing Master is, in essence, a debate pertaining to a bill of costs. As such, there is no rational reason why the Taxing Master should deny a person, such as a Cost Consultant, who compiled a bill of costs and who is doubtless in the best position to provide the necessary information, the opportunity to deliver a contribution. It may even be essential for the proper execution of the Taxing Master's task. I reiterate, therefore, that the impugned decision is not rationally connected to purpose (sic) for which it was taken, which purpose is to, as stated, reach a fair and equitable result whereby costs should be awarded to the prevailing party.
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> 28. I reiterate that in all previous proceedings before the first respondent, where I was accompanied by a person with Right of Appearance, I was afforded an audience, actively participating in the taxation process. The impugned decision, made without reason or justification, to change this position, I respectfully contend, is irrational capricious, and arbitrary."

19. Ms. Erasmus goes on to contend, in support of the claim for a substituted decision under s8 of PAJA, that the present circumstances are exceptional and that, should the review be granted, it should not be left up to the Taxing Master to make her decision afresh.

20. Given that the review was brought under PAJA, it was incumbent on Mr. v[…] R[…] to establish that the alleged "impugned decision" constituted "administrative action" as defined under s1(a) PAJA, which is to the following effect –

> "**administrative action"** means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation…"

21. Relying on Grey's Marine[6] and the cases which follow it, Mr. Katz argued that the impugned decision was undoubtedly administrative action. Mr. Katz submitted that the facts establish that the Taxing Master was effectively told by "management"[7] what to do and that she did not apply an independent mind to the situation. Thus, it was submitted, she did not exercise any discretion at all in the circumstances.

22. In a spirited argument on behalf of the Taxing Master, Mr. Ngombane went straight to the point and submitted that there was no question of the Taxing Master being required to have exercised any discretion in the present case. The question of the right of appearance was not an issue in the taxation itself. Rather, it was a question of the Taxing Master simply following the letter of the law and pronouncing on what was essentially a legal issue. There was, said counsel, nothing wrong with a senior manager informing a functionary of the legal position and directing that she apply it correctly. That after all, it was said, is the essence of the principle of legality and has little to do with the exercise of a discretion.[8] Accordingly, it was submitted that there was no administrative decision capable of review under PAJA and the application fell to be dismissed on that basis alone.

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[6] Grey's Marine Hout Bay and others v Minister of Public Works and others 2005 (6) SA 313 (SCA) at [24] – [25]

[7] In the circumstances this would imply a directive by the Chief Registrar of this Division.

[8] See for example, Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at [56] & [59].

23. Mr. Sirkar, a senior attorney in the city and a practitioner who regularly attends to matters for the LPC, took the Court through the various statutory enactments to demonstrate why the review should not succeed. The LPC's position is clear: it contends that an appearance at a taxation before the Taxing Master may only be undertaken by a duly admitted legal practitioner and, further, it opposes the notion that a costs consultant be permitted to appear before the Taxing Master with a legal practitioner in tow. I shall return to the substance of Mr. Sirkar's submissions in this regard later.

REMEDY

24. At the conclusion of his address Mr. Katz conceded that the relief sought in prayer 2 of the notice of motion should not be granted in view of the fact that no exceptional circumstances had been alleged or demonstrated. Rather, counsel asked the Court to craft a suitable just and equitable order under s172(1)(b) of the Constitution, 1996[9], relying on cases such as Hoerskool Ermelo [10] and Van der Merwe[11].

25. In light of the fact that this matter concerns the exercise of the constitutional right to just administrative action under PAJA, it was suggested that the approach advocated by Moseneke DCJ in Hoerskool Ermelo was warranted.

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[9] **S172. Powers of courts in constitutional matters**

(1) When deciding a constitutional matter within its power, a court –

(a)…

(b) may make any order that is just and equitable…"

[10] Head of Department: Mpumalanga Department of Education and another v Hoerskool Ermelo and another 2010 (2(SA 415 (CC) at [97]

[11] Minister for Safety and Security v Van der Merwe and others 2011 (5) SA 61 (CC) at [59]

> "[97]… The remedial power envisaged in section 172 (1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172 (1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts with supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."

26. Mr. Katz referred the Court in this regard to a Practice Directive issued by Sutherland DJP in the Gauteng Division of the High Court on 14 June 2022 which presently governs the issue of the right of appearance at taxation in that court and asked this Court to craft a similar order. His Lordship's directive recorded that the issue of the right of audience before the Taxing Master in that Division had been the subject of debate and to that end a Practice Directive was issued until such time as a pending application for a declaratory order in that regard has been determined.[12]

27. The substance of the Gauteng directive is as follows.

> "2. Any attorney, permitted to practice, may appear before the taxing master. Right of appearance is not required.

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[12] Subsequent enquiry to the office of the Deputy Judge President established that the matter was due to be heard by that court in October 2023.

3. Candidate attorneys may not appear before the taxing master.

4. Costs consultants, who are not attorneys permitted to practice, may appear before the taxing master in order to assist with the presentation of bills of costs in the presence of an attorney permitted to practice or an advocate. The costs consultant may address the taxing master, whilst the attorney or advocate will take the responsibility for the presentation of the bill of costs.

5. Should the attorney or advocate appearing at the taxation not be from the firm of attorneys of record or the advocate briefed in the hearing, the taxing master shall refuse to tax the bill in the absence of a signed certificate by an attorney from the firm whose bill is being presented."

28. Before dealing with the legalities of the matter at hand it is apposite to consider certain of the facts which the first and second intervening parties have placed before the Court.

WHO IS PAULINE ERASMUS?

29. The principal affidavit on behalf of the aspirant *amici* was deposed to by the first intervening party, Ms. Maryna van Staden, with a confirmatory affidavit filed by the second intervening party, Mr. Stanley Joseph Horowitz. Ms. van Staden says that she was admitted as an attorney of this court in 2000 and as an advocate in 2003 and has specialized in the field of legal costs since 2003. She has regularly appeared before the Taxing Master in the assessment of contested bills of costs.

30. Ms. van Staden observes that Mr. Horowitz was formerly employed by the Department of Justice from 1992 to 1996 and was this Division's senior Taxing Master between 1993 and 1996 before he founded "Stan Horowitz Legal Costs Consultancy" of which he is still the sole proprietor. Mr. Horowitz is also an admitted attorney and both he and Ms. van Staden have decades of experience in the field of taxation consultancy.

31. Ms. van Staden notes that both she and Mr. Horowitz have encountered Ms. Erasmus as an opponent in the course of their professional work and, for the sake of transparency, it is pointed out that Mr. Horowitz is the costs consultant who appeared on behalf of Ms. V[…] R[…] in the taxation that is the subject of this matter.

32. According to Ms. Van Staden, in this matter Mr. v[…] R[…] is really a stalking horse for Ms. Erasmus: it is suggested that this case is all about establishing Ms. Erasmus' right to practice as a costs consultant forever and a day in circumstances where her reputation and integrity is dubious to say the least. Ms. Erasmus denies this and says that it is important to review the Taxing Master's directive because otherwise Mr. v[…] R[…] will have to avail himself of the services of another person to represent him in the taxation and that this will result in additional and wasted costs.

33. Ms. van Staden goes on to say that Ms. Erasmus is also known as "Pauline Pretorius" and "Petronella Jansen van Vuuren". Under the latter name, says Ms. van Staden, Ms. Erasmus had purported to practice as an advocate in Gauteng. After committing so-called "identity theft", Ms. Erasmus adopted the identity of the said Petronella Jansen van Vuuren and was admitted to practice as an advocate under that name. Her purported professional standing came to an abrupt end on 8 November 2020 when she was exposed in the well-known Sunday night television programme "*Carte Blanche".* Pursuant to this expose, Ms. Erasmus (cited in the relevant court document as "Pauline Pretorius (Erasmus)") was interdicted by the High Court in Pretoria in September 2021 from holding herself out as a legal practitioner. That court also directed that its order be circulated to all Registrars and Taxing Masters throughout the Republic.

34. Documents subsequently filed herein by the *amici* reveal further that an earlier court order granted in respect of the admission to practice by the real Ms. van Vuuren had been manipulated and altered in the application by Ms. Erasmus to be admitted to practice as an advocate under that name.

35. These allegations of dishonesty, deception and fraud are not denied by Ms. Erasmus in her affidavit opposing the *amici's* intervention application. While castigating Ms. van Staden and Mr. Horowitz for employing "*bullying tactics*" as "*practitioners jealously gatekeeping their profession*", Ms. Erasmus skips the light fandango with the Court regarding what she euphemistically terms "my *regrettable past"* and does not in any way seek to meaningfully explain the reasons for her egregious conduct.

> "23.4 My name is indeed Pauline Erasmus. Erasmus is my maiden name and Pretorius is my married name. The first intervening party's intimation that I go by three different names is incorrect and added simply to further vilify my character.
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> 23.5 It is true that I appeared on *Carte Blanche* on 8 November 2020 and that I had unlawfully held myself out to be Advocate Petronella Jansen van Vuuren during a taxation. I admit that my actions in so doing are not above reproach and I have regretted these actions ever since. I cannot justify what I have done, and no purpose will be served by advancing any excuse for my actions, but I can attest to the fact that I am remorseful for my actions, every day of my life."

36. Faced with these serious allegations, the Court required of Ms. Erasmus that she depose to a further affidavit in these proceedings in which she produced her birth certificate, identity document and marriage certificate to establish her true identity. Having perused that affidavit the Court is satisfied that Ms. Pauline Erasmus (with South African identity number 8[…]) is indeed the person referred to in this litigation.

37. In an affidavit filed in opposition to the application for admission as *amici* Ms. Erasmus says that after she was found out in Gauteng she decided to start a new life in the Western Cape. In this province she has apparently practiced as a costs

consultant without at any stage having held herself out to be a legal practitioner. Further, says Ms. Erasmus,

> "23.7 … I have not attended a taxation without a suitably qualified legal practitioner since the order was granted and all the presiding Taxing Masters I have appeared before had been aware of the fact that I am not a legal practitioner. It bears noting that the order does not prohibit me from practicing as a Costs Consultant or appearing at a taxation. It simply prohibits me from parading as a legal practitioner, which, I reiterate, I have not done since the order was granted."

38. What the papers thus reveal is that Ms. Erasmus has regularly appeared before the Taxing Master and has argued for the presentation or contestation of bills of costs which she has drawn up. This she believes she is entitled to do on condition that she is accompanied at the taxation hearing by a duly admitted legal practitioner. Just what the attendance of such a legal practitioner serves at taxation is not really explained by Ms. Erasmus. Seemingly, she surmises that the mere presence of such a practitioner in some manner or other serves to legitimize her entitlement to argue the bill of costs. However, Ms. Erasmus gives the game away when referring to the role of Ms. Meyer before the Taxing Master in August 2022 as no more than a "watching brief". Traditionally a person with a watching brief does just that – s/he observes the proceedings on behalf of a party not actively involved in the litigation and does not participate therein as a representative of that party.

39. The question that arises in the circumstances is thus axiomatic – if the legal practitioner is there to participate in the taxation, why does s/he not address the Taxing Master? Indeed, the facts of this case illustrate precisely the folly of the arrangement. When the Taxing Master precluded Ms. Erasmus from participating further in the taxation of the v[…] R[…] bill of costs, the proceedings came to an abrupt halt because Ms. Meyer was not able to present the case on behalf of Mr. v[…] R[…]. It is hard not to draw the conclusion that the presence of the legal practitioner in the circumstances described by Ms. Erasmus was nothing more than

a chimera intended to add a transparent sheen of legality to Ms. Erasmus' appearance before the Taxing Master.

40. The ploy thus engineered by Ms. Erasmus illustrates that she appreciates the cardinal rule of taxation as set out in Bills of Costs: it is the ultimate phase of a court procedure which is the preserve of the legal practitioner. No doubt for that reason, Ms. Erasmus previously attempted to portray herself as an advocate in Gauteng, realizing that she could not attend a taxation unless she was a duly admitted legal practitioner.

41. Significantly, in this application for review Mr. v[…] R[…] did not cite the LPC as a respondent, notwithstanding its manifest interest in the principal relief sought in the notice of motion. In her affidavit opposing the admission of the *amici,* Ms. Erasmus answers their criticism of this obvious omission by saying that she believed it was unnecessary to join the LPC as a party and that service of the papers on it would suffice.

42. At issue then is whether the approach suggested by Mr. v[…] R[…] – that a person such as Ms. Erasmus be permitted to represent him further at the pending taxation as long as there is a legal practitioner present on his behalf – is legally permissible. In support of that argument, counsel for Mr. v[…] R[…] referred, in addition to the aforementioned Gauteng Practice Directive, to a pair of unreported decisions[13] which they said vindicated Ms. Erasmus' stance. I will discuss these judgments later.

SUBMISSIONS BY LPC

43. Mr. Sirkar commenced his address by stressing the LPC's concern that the effect of the ruling sought in this review might create a gateway for non-legal

[13] Middelberg v Takseermeester en andere [1998] JOL 2315 (T); Alberts v Malan Review Case No 5575/03, Cape Provincial Division, 26 August 2004.

practitioners to appear in a forum in which only duly admitted legal practitioners were permitted to appear, thereby compromising the integrity of the legal profession and ultimately placing the public interest at risk. In short, the LPC wishes to assert its statutory function to maintain regulatory control over those who are permitted to practice as legal practitioners and to restrain those who are not.

44. The LPC submissions focused on two discrete issues –

(i) who has the right of appearance before a Taxing Master of the High Court, and

(ii) does the appearance of non-legal practitioners at taxation, for a fee, amount to prohibited fee sharing?

The answer to these questions lies, firstly, in an analysis of the LPA, as Mr. Sirkar demonstrated.

THE RELEVANT PROVISIONS OF THE LEGAL PRACTICE ACT

45. From a general perspective, the LPC is a juristic person established in terms of section 4 of the LPA with its objects as specified in section 5 thereof. In this province it is effectively the successor-in-title to the former Cape Law Society which was established under the repealed Attorneys Act 56 of 1979.

46. Section 3 of the LPA prescribes its purposes to include:

(i) the provision of a legislative framework for the transformation and restructuring of the legal profession that embraces the values which underpin the Constitution and ensures that the rule of law is upheld;

(ii) the creation of a single unified statutory body to regulate the affairs of all legal practitioners and candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;

(iii) the creation of a framework for

(a) the development and maintenance of appropriate ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;

(b) the regulation of the admission and enrollment of legal practitioners; and the development of adequate training programs for legal practitioners and candidate legal practitioners.

(iv) the regulation of the professional conduct of legal practitioners so as to ensure accountable conduct;

(v) ensuring that the values underpinning the Constitution are embraced and the rule of law is upheld;

(vi) the strengthening of the independence of the legal profession;

(vii) ensuring the accountability of the legal profession to the general public; and

(viii) the protection of the public interest as envisaged in section 3 the LPA.

47. By virtue of the provisions of section 5, read with section 6 of Chapter 2 of the LPA, the LPC is statutorily enjoined and empowered to, inter alia, regulate all attorneys, advocates, candidates attorneys and pupils and is vested with disciplinary and other jurisdiction over attorneys, notaries, conveyances and candidate attorneys in the Republic.

48. Turning to the regulation of the legal profession, "*legal practitioner"* is defined in section 1 of the LPA as "… *an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively*." Section 2 provides that the LPA "*is applicable to all legal practitioners and all candidate legal practitioners"*, while under section 24(1) of the LPA "*[a] person may only practice as a legal practitioner if he or she is admitted and enrolled to practice as such in terms of [the LPA]."*

49. As far as the right of appearance under the LPA is concerned, section 25 provides as follows –

> " (1) Any person who has been admitted and enrolled to practice as a legal practitioner in terms of this Act, is entitled to practice throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practicing.
>
> (2) A legal practitioner, whether practicing as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.
>
> (3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney…"

50. In terms of section 30 of the LPA

"a person duly admitted by the High Court and authorized to be enrolled to practice as a legal practitioner must apply to the [LPC]… for the enrollment of his or her name on the Roll…"

51. The authority to render legal services is governed by section 33 of the LPA which is to the following effect –

"(1) Subject to any other law, no person other than a practicing legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward-

(a) **appear in any court of law** or before any board, tribunal or **similar institution in which only legal practitioners are entitled to appear;** or

(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.

(3) **No person may**, in expectation of any fee, commission, gain or reward, directly or indirectly, **perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary**, unless that person is a practicing advocate, attorney, conveyancer or notary, as the case may be." (Emphasis added)

52. Lastly, section 93(2) of the LPA penalizes any contravention of the provisions of section 33 and imposes a penal sanction. The effect of this is that if persons, who are not practicing legal practitioners who are admitted and enrolled as such,

undertake any of the activities listed in section 33 (1)(a) and (b) of the LPA, they commit an offence under section 93(2) and are liable to be criminally sanctioned in respect of such conduct.

RIGHT OF APPEARANCE AT TAXATION

53. When the judgment in Bills of Costs was handed down, the legal position in South Africa was that only duly admitted advocates had the right of appearance in the superior courts while they and admitted attorneys had the right of appearance in the lower courts. That is no longer the position. An admitted attorney may now appear in the superior courts after being granted the right of appearance by the registrar under s25(3) of the LPA. But that change with regard to who now has the right of appearance in the superior courts does not affect the position as to who may appear at a taxation before the Taxing Master: both attorneys and advocates have always enjoyed that right.

54. The judgment in Bills of Costs explains in detail why it was considered necessary to restrict such an appearance to qualified lawyers and to exclude non-lawyer parties from that number. In arriving at the conclusion recited at the commencement of this judgment, Galgut AJA considered the common law position, calling in aid the extensive review thereof conducted by the Court *a quo*[14] in that matter.

55. In establishing the point of departure in relation to taxation, the learned Acting Judge of Appeal, cited with approval the *dictum* of the Full Bench of the erstwhile Transvaal Provincial Division in Mouton[15].

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[14] The judgment of the court *a quo*, which is unreported, was delivered by Van Zijl JP and Grosskopff J in this Division.

[15] Mouton and another v Martine 1968 (4) SA 738 (T) at 742A

> "In former times it was the function of the Court, or one of the Judges, to tax the costs of a case. The purpose of the taxation was really two-fold; firstly, to fix the costs at a certain amount so that execution could be levied on the judgment and, secondly, to ensure that the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient, costs in respect of the litigation which resulted in the order for costs. In the Courts of Holland the taxation of the costs was expressly reserved in the order for costs when judgment was pronounced in the principal case… For the purpose of taxation a declaration of costs was served on the attorney of the party who was condemned to pay the costs. It was a document prepared by the attorney and comprised a summary of the case, a specified account of the costs which were to be taxed and the '*na-kosten*' which relates to the costs involved in the taxation. The attorney of the party condemned to pay the costs may challenge the various items of costs claimed in the declaration in the '*dimunitie'* which was a similar sort of document as the declaration and contained the arguments on which the items were challenged. The attorney of the successful party then dealt with these arguments in a "*contra-diminutie*'. The taxation was then done by the Court, or commissioners ordained by the Court to do the taxation, on these documents. The party who was aggrieved with the taxation had a right of 'revisie'…
>
> At the present time the function of taxing bills of costs in lawsuits in the Supreme Court has been assigned to the Taxing Master and he is to be guided in performing the function by these principles which have been enshrined in Rules of Court."

56. Galgut AJA then dealt with the reception of the Roman-Dutch law into the Cape and its incorporation into the law of the Cape Colony through the Charter of Justice of 1832.

> "The Charter of Justice came into force in 1834 to make provision for the administration of justice '*in our Colony of the Cape of Good Hope'*. Section 14

provided for the appointment of certain officers who shall '*be attached and belong to the said Court*.' Thereafter the appointment of further officers was to be made by the Chief Justice. A taxing officer was thereafter appointed… His duties were to '*exercise and perform all the powers and duties in the Rules contained regarding the taxation of costs'*.

The Taxing Master remained subject to the control of the Court and there is nothing to suggest that the taxation of the bill of costs did not remain an integral part of the lawsuit.

Sections 21 and 22 of the Charter of Justice provided that no person who is not an admitted attorney or advocate was allowed '*to appear, plead or act in the Supreme Court on behalf of any suitor'…*

The Supreme Court Act 59 of 1959 repealed the whole of the Charter of Justice, '*except so much as relates to admission to and the right to practice before the Courts.*'

In the result ss 21 and 22 of the Charter remained in force i.e. the express provision prohibiting persons, who were not admitted attorneys or advocates, from practicing in the Courts remained."

57. Galgut AJA went on to consider whether the common law position, as confirmed under the erstwhile Supreme Court Act, had been affected by any subsequent statutory provisions, in particular the former Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934 and the Admission of Advocates Act, 74 of 1964 and came to the following conclusion at 941H –

"Our attention was drawn to the fact that there is no section in Act 23 of 1934 or Act 59 of 1959 or Act 74 1964 which directly prohibits persons who are not admitted as attorneys or advocates from appearing, pleading or acting in the Supreme Court on behalf of suitors. Despite the lack of such a direct

statement there can be no doubt that persons not admitted to practice as attorneys or advocates may not appear, plead or act on behalf of a litigant or do any of the acts specially pertaining to the professions. That they are so precluded is implicit in s32(5) of Act 23 of 1934 and s9(3) of Act 74 of 1964. These sections respectively make it an offence for anyone who is not an admitted attorney or advocate to hold themselves out as being the one or the other or directly or indirectly performing any act pertaining to the particular profession."

58. Galgut AJA then considered the history of the law precluding non-lawyers from appearing at taxation.

"As shown above non-qualified persons were prohibited from appearing on behalf of others in lawsuits in Holland. This prohibition in due course became part of the administration of justice in South Africa under the Raad van Justisie and in terms of the Charter of Justice. Also, as shown above, in Holland the taxation of bills of costs wasn't an integral part of the lawsuit and, whether such taxation took place before a Judge or a commissioner, a non-qualified person could not appear on behalf of another. It further appears that the common law and practice of Holland was part of the law in South Africa under the Raad van Justisie. The Charter of Justice in ss 21 and 22 retained the provisions prohibiting non-qualified persons from appearing in lawsuits. There is nothing in the Charter which suggests that the taxation of a bill of costs did not continue to be an integral part of the lawsuit. Hence it follows that according to our common law non-qualified persons were prohibited from appearing before the Taxing Master."

59. The learned Acting Judge of Appeal then considered whether the common law position regarding non-lawyers had been altered by statute. After looking at various sections of Act 23 of 1934, Galgut AJA found that it had not been so altered.

> "There is no doubt that the above sections, and others in the Act, are aimed at preventing unqualified persons from setting themselves up, or practicing, as attorneys or doing attorneys' work. The fact that they set out certain acts which are specifically prohibited does not mean that the 'catalogue' (for want of a better word) of prohibitions is exhaustive and therefore it does not mean that, because an act is not included in the catalogue, it is permitted. This is particularly so when one realises that the type of act with which we are concerned was at all times recognised in the Netherlands as being an integral part of the court proceedings and as such part of the functions of the advocate and attorney and that this became part of our common law. If the intention had been to alter the common law that would have been done explicitly."

60. Next, Galgut AJA dealt with the argument that the Taxing Master was merely an administrative official.

> "On behalf of the applicants it was submitted that, whatever the Roman-Dutch practice may have been, it should be accepted that work once conducted by the profession could slip out of its hands. The following examples were given. Persons other than attorneys or advocates have the rights to appear, on behalf of another, before rent boards, liquor boards, Township boards, valuation courts, road transportation boards and the Special Income Tax Court. It was also said that deceased estates were frequently wound up by banks or accountants. In order to compare the tasks of such parties with that of the Taxing Master it was said that the Taxing Master is not a judicial officer, that he is not bound by the rules of evidence and that his rulings are those of an administrative official."

61. After considering various authorities, Galgut AJA concluded as follows on this point.

> "We have seen that taxation is an integral part of the proceedings before the Court. Hence I am unable to agree with the *dicta* in the above cases to the

> effect that he is not a judicial officer and that his rulings are those of an administrative official. His position cannot be equated with the type of board mentioned above or with the executor of a deceased estate. I am not aware that, either in the Roman law or in Holland, the winding up of an estate was the prerogative of the profession. The position in the Special Income Tax Court has been regulated by s83(12) and reg B5 of the Income Tax Act 58 of 1962. The proceedings before the boards and tribunals mentioned above are not purely judicial proceedings and cannot be compared with Court proceedings. Hence this submission does not assist the applicants."

62. Lastly, Galgut AJA dealt with the argument put up that for many years "taxing consultants" who held no legal qualifications had been drawing bills of costs and presenting and arguing them before the Taxing Master. The court found that there was insufficient evidence before it to establish that there was an established practice in that regard.

> "It was argued that the above procedure was now a recognized and established practice; that the practice had a great deal of merit in that it was accepted in the profession; busy attorneys and senior attorneys did not have the time, nor did they wish to attend to the taxation of bills of costs. The [Law] Society, on the other hand, contends that the evidence does not show that such a practice has been established and that, even if this practice has been permitted in some of the Provincial Divisions, it has not been permitted in all the Divisions and it should not be allowed to continue and so become established. There is merit in the Society's contention."

63. For all of these reasons then, the Appellate Division held that only admitted advocates and attorneys had the right of appearance before the Taxing Master.

64. Has the position changed since the decision in Bills of Costs? None of the parties produced any subsequent authority from the Appellate Division, the Supreme Court of Appeal or the Constitutional Court in which that case has been overruled. In

terms of the principle of *stare decisis* we are still bound to follow Bills of Costs. Furthermore, having regard to the analysis of the LPA set out above, I am of the considered view that, in any event, the change in statutory regime which that legislation introduced has not changed the position which the court in Bills of Costs held was in accordance with the relevant statutes of the day.

65. In fact, the position today is arguably even more entrenched by virtue of our constitutional dispensation. As Fedsure makes plain, all organs of State (and in the present circumstances that would include the Taxing Master in the discharge of her functions under the control of the court) are bound by the rule of law and the principle of legality. The Taxing Master thus cannot permit a party to appear before her where such appearance is contrary to the provisions of the law, in this case the LPA.

66. Lastly, there is in my view a trenchant reason why a person such as Ms. Erasmus should not be permitted to appear before a Taxing Master. She has been interdicted from holding herself out as a legal practitioner in circumstances where her uncontested conduct demonstrates dishonesty, deceit and fraud. To permit such a person to participate in a process in which the integrity associated with a legal practitioner is not subject to statutory control of the LPC, or any other form of statutory body, would be anathema to the interests of the legal system and the broader society in general. The Taxing Master should be entitled to assume that a person appearing before her at taxation is a person of integrity whose submissions and argument in relation to the issues raised in the taxation can be relied upon. Furthermore, in the situation (perhaps albeit infrequent) where the Taxing Master might be persuaded to receive evidence on taxation[16], she would want to be assured that the person adducing such evidence was legally trained and knew the rules relating to that function.

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[16] In Bills of Costs at 945A the Court accepted that this was part of the Taxing Master's function.

67. Consequently, I am satisfied that the Taxing Master correctly refused Ms. Erasmus, as a person not duly admitted to practice as a legal practitioner, the right of appearance before her.

MAY A COSTS CONSULTANT APPEAR TOGETHER WITH A LEGAL PRACTITIONER?

68. I proceed to address the next aspect of the case – the scenario where the costs consultant argues the taxation with an advocate or attorney briefed by the client in attendance. This is the situation which Mr. Katz asked the Court to sanction under s172 (1) (b) of the Constitution, with express reference to the practice permitted in Gauteng, pending that court's determination of an application for declaratory relief.

69. In this regard, Mr. Katz relied on the 2 unreported decisions cited in footnote 13 above which he suggested supported the applicant's case for review. I deal firstly with the decision of Selikowitz J in this Division in Alberts. The matter was an ordinary review of taxation under Rule 48(1) in which the costs of certain appearances before the Taxing Master were the subject of dispute. In the stated case placed before the court the Taxing Master noted that the appellant's attorney did not conduct the taxation but was represented by a costs consultant, whom the Taxing Master held did not have the requisite *locus standi.* There was then a dispute as to whether the taxation was, in law, validly conducted.

70. On this point Selikowitz J held as follows –

> "I am advised by the current Taxing Master of this Court that in practice, in the absence of any objection from the opposing side, and where the attorney is present, cost consultants are permitted to take part in taxation hearings. It is unnecessary for me to rule on this practice as whatever the position, I am satisfied that the objection [to the taxation] cannot be upheld."

The case manifestly affords no support for the argument advanced by Mr. Katz.

71. The case of Middelburg commenced as an urgent application to set aside taxation proceedings on the basis, inter alia, that the costs consultant who appeared at taxation was not a qualified legal practitioner. The applicant contended that this constituted an irregularity in the proceedings which rendered the award of costs reviewable.

72. Spoelstra J observed that the applicant relied on Bills of Costs and Nedperm[17] in which it was held, said the judge, that only duly qualified persons were permitted to appear before a Taxing Master. Spoelstra J sought to approach the matter before him on the basis that it was distinguishable from those two cases because the courts there were not required to deal with a situation where a costs consultant was accompanied by an admitted legal practitioner.

73. Spoelstra J considered, inter alia, Mouton and held that a Taxing Master was not a judicial officer who was bound by the strict rules of evidence. Rather, he said, a Taxing Master was akin to an arbitrator or referee appointed to assist the court in determining what a just remuneration would be for a legal practitioner's services in the particular litigation. Because there was no prescribed procedure for taxation proceedings, said Spoelstra J, there was no good reason to preclude a Taxing Master from permitting a costs consultant the opportunity of making a contribution to the process[18].

74. I regret that I am not persuaded to follow Middelberg which is in any event a judgment by a single judge in another Division. The attempt by Spoelstra J to

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[17] Nedperm Bank Limited v Desbie (Pty) Ltd 1995 (2) SA 711 (W)

[18] "*Daar is geen rede waarom [die takseermeester] 'n person soos 'n kostekonsultant wat 'n kosterekening opgestel het en dit waarskynlik die beste kan toelig, die geleentheid sal ontsê om 'n bydrae te lewer nie. Dit mag vir die behoorlike uitvoering van sy taak selfs noodsaaklik wees.*"

distinguish that matter from, inter alia, Bills of Costs on the facts is not convincing. The court had been approached in Bills of Costs by a company delivering the services of a costs consultancy and asked that it be permitted to act in taxations, without more. In upholding the judgment of the *court a quo* Galgut AJA expressly rejected the contention that the Taxing Master was not a judicial officer whose rulings were merely those of an administrative official. Further, Galgut AJA emphasised the importance of the function of the Taxing Master in the whole litigation process and the necessity to recognise the role of the legal practitioner therein right up to the conclusion of that process.

75. But there is a more fundamental reason for declining to follow Middelberg. It has to be asked what purpose is achieved by permitting the costs consultant to run the taxation *qua* lawyer with a legal representative merely in attendance. What is the intended function of the legal representatives in such circumstances? Are they mere spectators or are they intended to be some sort of legal watch-dog to ensure that the costs consultants discharge their function properly? Would they be entitled to intervene in the event that the costs consultants over-stepped the mark and made misleading or dishonest statements or claims to the Taxing Master? Could they as practitioners be held liable for sanction by the LPC for the dishonesty of, or irregularities committed by, the costs consultant?

76. In his address to the Court Attorney van Rensburg referred to the judgment in Brener[19] and submitted that the presence of Ms. Meyer (and before her Mr. van Niekerk) was a mere sham. I agree. The facts are that Ms. Erasmus ran the taxation on behalf of Mr. v[...] R[...] and in her own words in the founding affidavit said that Ms. Meyer held no more than a “watching brief”. Their presence at the taxation enabled Ms. Erasmus to pay lip-service to the ruling in Bills of Costs and to enable her to avoid the restrictions imposed under the interdict ordered by the Gauteng High Court

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[19] Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd 1989 (4) SA 503 (W) at 518I; 519D

77. To be sure, the facts of this case demonstrate the folly of the argument in favour of the alleged legitimating presence of the legal practitioner. When the Taxing Master refused to permit Ms. Erasmus to address her and appear on behalf of Mr. v[...] R[...] in the taxation, Ms. Meyer was left high and dry. She had no inkling of what was required of her and was unable to step in and continue challenging the bill of costs. A postponement was the only option. That demonstrates that the whole exercise was a sham.

78. And, in this case, the sham had serious consequences. Mr. v[...] R[...]'s right to challenge his wife's bill of costs was left in the hands of an admitted fraudster who shamelessly ignored the substance of the order of the Gauteng High Court and purported to discharge the professional duty reserved for a duly admitted legal practitioner by taking along an unsuspecting young advocate who had no idea of either Ms. Erasmus' shady past, or of what was required of her as a legal practitioner at a taxation.

79. In the circumstances, I am of the view that the decision in Bills of Costs, considered in the light of the LPA, precludes a costs consultant who is not a duly admitted legal practitioner from representing a party at a taxation in the company of such a practitioner. I turn now to consider Mr. Sirkar's second point – the sharing of fees.

CODE OF CONDUCT

80. The LPA incorporates Rules, Regulations and a Code of Conduct which are applicable to all legal practitioners. The latter is intended to serve as the prevailing standard of the code of conduct for practitioners and sets out the rules and standards relating to ethics, conduct and practice which are to be enforced by the LPC through its relevant structures.

81. Mr. Sirkar referred the Court in particular to Item 12 of the Code of Conduct which deals with the sharing of fees.

> "12.1 An attorney or a firm shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation or any partnership (express, tacit or implied), the result or potential result whereof is to secure for him or her or it the benefit of professional work, solicited by a person who is not an attorney, for reward, whether in money or in kind; but this prohibition shall not in any way limit bona fide and proper marketing activities…"

82. It was thus submitted that when an attorney pays a costs consultant who is not an admitted legal practitioner, a fee for her appearance at the taxation, and seeks to recover that fee from the client, Item 12.1 of the Code is breached. I agree with this submission and I did not understand Mr. Katz to challenge it in reply. The only party who is entitled to claim the fees stipulated in the Tariff of Fees promulgated under Rule 70 is the attorney[20]. The use of a costs consultant at taxation whose services are sought to be recovered under this Rule thus amounts to a proscribed sharing of fees.

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[20] The relevant extract of Section E (entitled "Bill of Costs") of the Tariff promulgated under Rule 70 reads as follows:

"*In connection with a bill of costs for services rendered by an attorney, the attorney shall be entitled to charge:*

> *(1) For drawing the bill of costs, making the necessary copies and attending settlement, 11 per cent of the attorney's fees, either as charged in the bill, if not taxed, or as allowed on taxation.*
>
> *(2) In addition to the fees charged under item 1, if recourse is had to taxation for arranging and attending taxation and obtaining consent to taxation, 11 per cent of the first R10 000,00 or portion thereof, 6 per cent of the next R10 000,00 or portion thereof and 3 per cent on the balance of the total amount of the bill.*

83. I must immediately point out that it is permissible for an attorney to appoint a third party (which may include a costs consultant who is not an admitted attorney) to draft a bill of costs. However, when that occurs the attorney must prepare a certificate that is to accompany the bill of costs in which the attorney certifies that the bill of costs has been properly perused and found to be correct and, further, that every description in such bill, with reference to work, time and figures is consistent with what was necessarily done by the attorney.[21] This function accordingly does not constitute a sharing of fees.

84. In my view, the certification by the attorney of a bill drawn by a non-lawyer party (such as a costs consultant) is an important requirement: it is indicative of the trust that is reposed in the legal practitioner pursuant to his/her professional responsibility as such. No such trust and/or responsibility can be expected of a costs consultant who is not an admitted legal practitioner.

85. In the circumstances, granting the relief sought by Ms. Erasmus under s172(1)(b) is in any event a breach of the Code of Conduct of legal practitioners, a code which has statutory force and which whose breach no Court will sanction.

ADMINSTRATIVE ACTION

86. As noted at the outset of this judgment, Mr. Katz relied on the seminal judgment of Nugent JA Grey's Marine for the definitive approach to the interpretation of "administrative action" under PAJA. I cite only the most relevant passages therein.

> "[21] What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of

[21] See in this regard item 3(a) of the aforesaid Section E.

qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:

> '*Administrative action means any decision of an administrative nature made… under an empowering provision [and] taken… by an organ of State, when exercising a power in terms of the Constitution or a provincial Constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person in which has a direct, external legal effect…*' "

[22] At the core of the definition of administrative action is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity…

[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the

bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." (Internal references omitted)

87. As regards the process of taxation itself, there is a comprehensive system for the review of a Taxing Master's decision set out in Rule 48. This Rule, broadly speaking, requires a party who is unhappy with a taxation ruling to file a document calling on the Taxing Master to draw up a stated case which is then placed before a judge for adjudication after the parties have been afforded the opportunity to comment thereon. Such adjudication may encompass reviewing the matter in chambers, with or without legal representatives present, or referral to open court for argument. At the end of the process, the judge may make an appropriate order, including an order for costs in the review.

88. In Visser[22] the approach of the court under Rule 48 was described as follows.

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue… The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he

[22] Visser v Gubb 1981 (3) SA 753 (C) at 754H - 755C

was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

89. In Legal & General[23] the Appellate Division held that a review of taxation was not strictly a review in the sense of a court interfering with the exercise of an improper discretion on the part of the Taxing Master. Rather, the powers of a court are wider than the customary grounds to which the power of review is limited at common law and, for example, a court reviewing a taxation may set aside the Taxing Master's decision if s/he had not exercised their discretion improperly.[24]

90. In Brener[25] it was held that Rule 48 could not be used to attack a decision by the Taxing Master to refuse a party the right of appearance at taxation and it was suggested that a point of that nature was to be taken as a point *in limine* or not at all. But if, for example, a party wanted to object to a Taxing Master's decision on the basis of, say, bias or interest in the cause, I would think that the wide interpretation which has been placed on the powers of the court of review under Rule 48 would be sufficient to enable a party to take the point. It seems to me therefore, that there is little necessity, if any, for a review under PAJA.

91. Reverting to Grey's Marine, I consider that the ruling of the Taxing Master in this matter that Ms. Erasmus did not enjoy the right of appearance before her, did not constitute the exercise of the type of public power considered by Nugent JA. Given the legal position set out above, there was no question of the Taxing Master exercising any form of discretion on an issue which is purely a question of law – either she was permitted under the LPA, considered in the light of Bills of Costs, to appear or not. I accordingly agree with the submission by Mr. Ngombane that this matter did not involve the exercise of administrative action under PAJA. For that reason alone the relief sought in the notice of motion cannot succeed.

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[23] Legal & General Assurance Society Ltd v Lieberum N.O.and another 1968 (1) SA 473 (A) at 478G

[24] City of Cape Town v Arun Property Development (Pty) Ltd 2009 (5) SA 227 (C) at 232H-G

[25] At 519D

92. But if I am wrong on that score, I do not believe that the applicant has established any reviewable error under the sections of PAJA pleaded in the notice of motion. Under s 6(2)(e), Mr. v[...] R[...] is required to establish that the Taxing Master's decision to preclude Ms. Erasmus from appearing on his behalf was taken

> "(i) for a reason not authorised by the empowering provision;
>
> (ii) for an ulterior purpose or motive;
>
> (iii) because the relevant considerations were taken into account all relevant considerations were not considered;
>
> (iv) because of the unauthorized or unwarranted dictates of another person or body;
>
> (v) in bad faith; or
>
> (vi) arbitrarily or capriciously."

93. In my view, the founding affidavit fails to establish any of these criteria. In argument, Mr. Katz suggested that the Taxing Master had blindly followed the dictates of her superior in breach of s6(2)(e)(iv) but the facts do not sustain such an inference. On the contrary, the Taxing Master says that she held the view that Ms. Erasmus did not have right of appearance and consulted her senior ("management") on that score. The view adopted by both members of the High Court staff is in accordance with the law.

94. The second ground of review relied upon in the notice of motion was that the ruling that Ms. Erasmus was not entitled to appear at the taxation was "action" which resorted under s6(2)(f)(ii) of PAJA in that it –

"(ii) [was] not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator."

95. In light of the finding above of the illegality of Ms. Erasmus' claim to an entitlement to represent Mr. v[...] R[...] at taxation (whether alone or in tandem with Ms. Meyer) there can be no question of any absence of rationality in the ruling. The Taxing Master acted within the confines of the law and that is the end of the matter on this ground.

CONCLUSION

96. In the light of that which is stated above, I am of the view that Mr. v[...] R[...] has failed to make out a case for the relief sought in the notice of motion and that the application falls to be dismissed.

97. As regards the question of costs, as I have said, neither of the intervening parties nor the LPC asked for costs. As regards the Taxing Master, there is no reason that costs should not follow the result.

98. Lastly, there is the issue of the conduct of Ms Erasmus which led to the interdict granted by the Gauteng High Court. Prima facie that conduct evidences criminal behaviour on her part, whether under the common law or the LPA. The papers before us do not indicate whether any criminal proceedings have been initiated or contemplated against Ms Erasmus. In light of the serious allegations made, and Ms Erasmus' admissions in relation thereto, this Court is duty bound to

refer the matter to the local Director of Public Prosecutions for consideration of the appropriate steps, if any, to be taken against Ms Erasmus, whether locally, in Gauteng or elsewhere.

ORDER OF COURT

Accordingly, it is ordered that:

A. The application for review is dismissed.

B. The applicant is to pay the first respondent's costs of suit herein.

C. The Registrar of this Court is directed to furnish a copy of this judgment to the Director of Public Prosecutions, Cape Town.

GAMBLE, J

I AGREE:

***pp* THULARE, J**

I AGREE:

***pp* WATHEN-FALKEN, AJ**

APPEARANCES:

For the applicant:	Mr. A. Katz SC and Ms. C. Tait Instructed by Maurice Philips Wisenberg Attorneys Cape Town
For the first respondent:	Mr. S. Ngombane

	Instructed by State Attorney Cape Town
For the first and second intervening parties:	Mr. L.J. Van Rensburg Instructed by Van Rensburg & Co Cape Town
For the intervening Amicus Curiae	Mr. S. Sirkar Instructed by Herold Gie Cape Town