CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 91/18

In the matter between:

ANDREW DONALD JONATHAN PENWILL	Applicant
and	
RICHARD DOUGLAS PENWILL N.O.	First Respondent
CHRISTOPHER ANTHONY FRASER McDONALD N.O.	Second Respondent
WILLEM FRANCOIS BOUWER N.O.	Third Respondent
MASTER OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG	Fourth Respondent
TAXING MASTER OF THE CONSTITUTIONAL COURT, BRAAMFONTEIN	Fifth Respondent
SHERIFF OF THE COURT, SANDTON SOUTH	Sixth Respondent

Neutral citation:	*Penwill v Penwill N.O. and Others* [2020] ZACC 17
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Madlanga J (unanimous)
Decided on:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 July 2020.

ORDER

On application for review of taxation of costs arising from this Court's dismissal of Mr Andrew Donald Jonathan Penwill's application for leave to appeal:

1. The sum of R1 504.00 allowed at taxation in respect of item 23 of the bill of costs is set aside and substituted with the sum of R384.00.
2. The warrant of execution issued on 19 October 2018 in respect of the movable property of Mr Andrew Donald Jonathan Penwill is set aside.
3. The notice of attachment issued on 6 December 2018 pursuant to the warrant of execution referred to in paragraph 2 is set aside.

JUDGMENT

MADLANGA J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] Hopefully this is the final round of this sorry saga of bitter litigious feuding between two brothers. At its centre is what Van Oosten J of the High Court of South Africa, Gauteng Division, Pretoria described as a dispute "embedded in rivalry, jealousy, greed and hatred".[1] So bad was the rivalry that it prompted an attorney who was once involved with the family to express his annoyance with both brothers thus, in an e-mail to one of them:

[1] *Penwill N.O. v Penwill* 2016 JDR 1150 (GP) at para 3.

> "Your dishonesty and obsequiousness are the pillars upon which you and . . . your brother have built your wretched lives. You are like two vultures feeding off the corpses of your dead parents. So ugly and distasteful. Conduct becoming of the pond people. Repulsive. There is a special hell for you guys who are mirror images and that is to spend eternity with only one another as company."[2]

[2] Before us is a stated case in which Mr Andrew Donald Jonathan Penwill, who is acting in person, is challenging costs allowed by this Court's Taxing Master. Costs were granted against Mr A D Penwill when this Court dismissed his application for leave to appeal for lack of reasonable prospects of success. The case was stated by the Taxing Master under rule 17(3) of the Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South Africa (SCA Rules).[3] Rule 17 of the SCA Rules

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[2] Id.

[3] These rules were gazetted in Government Gazette Number R1523 of 1998. Rule 17 reads:

> "Taxation
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> (1) The costs incurred in any appeal or application shall be taxed by the registrar who, when exercising this function, shall be called the taxing master, but his or her taxation shall be subject to review in terms of subrule (3).
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> VAT
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> (2) Value-added tax may be added to all costs, fees, disbursements and tariffs in respect of which value-added tax is chargeable.
>
> Statement of case
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> (3) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed mero motu by the taxing master may within 20 days of the allocatur require the taxing master to state a case for the decision of the President, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation, and shall embody any relevant findings of facts by the taxing master.
>
> Contentions of parties
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> (4) The taxing master shall supply a copy of the stated case to each of the parties, who may within 15 days of receipt of the copy submit contentions in writing thereon, including grounds of objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed mero motu by the taxing master.
>
> Report
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> (5) Thereafter the taxing master shall frame his or her report and shall supply a copy thereof to each of the parties and shall forthwith lay the case, together with the contentions of the parties thereon and his or her report, before the President.

is made applicable to this Court by rule 22(1) of our Rules. We are considering the stated case simultaneously with an application in which Mr A D Penwill is seeking several orders. All those orders interlock with the stated case. In the main, Mr A D Penwill is asking for the setting aside of a warrant of execution and notice of attachment issued in respect of his movable property. The other orders are ancillary to this. He wants us to set aside the warrant of execution because he is aggrieved by the very taxation that has given rise to the costs. And, of course, if the warrant of execution falls, so should the notice of attachment as well.

Background

[3] These proceedings are a sequel to a series of other proceedings. The original fight was between Mr A D Penwill, on the one hand, and his younger brother, Mr Richard Douglas Penwill, and others,[4] on the other. Mr R D Penwill was cited in his capacity as a trustee of the Beverly Trust. The Beverly Trust is a family trust that was established by the late father of the two warring Penwill brothers. The trust was the sole shareholder in a company called D J Penwill Properties (Pty) Ltd. The company, in turn, owned a number of farms which were at the centre of an ugly fight between the Penwill brothers over inheritance.

[4] The conflict concerned the validity of the will of the deceased mother of the brothers. Their father had predeceased her. Mr A D Penwill's failure before the High Court and Supreme Court of Appeal brought him before us on a quest for leave to appeal. This Court dismissed that application with costs for lack of reasonable

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Hearing of review

(6)(a) The President or a judge or judges designated by him or her may—

(i) decide the matter upon the merits of the case and submissions so submitted;

(ii) require any further information from the taxing master;

(iii) if deemed fit, hear the parties or their advocates or attorneys in chambers; or

(iv) refer the case for decision to the Court."

[4] The others were Mr Christopher Anthony Fraser McDonald, Mr Willem Francois Bouwer (both of whom, like Mr R D Penwill, were cited in their capacity as trustees of the Beverly Trust) and the Master of the High Court of South Africa, Gauteng Division, Johannesburg.

prospects of success. Mr A D Penwill then applied for rescission or variation of the order of dismissal. We dismissed that rescission application as well. Undeterred, Mr A D Penwill filed at this Court yet another application alleging that the rescission application was dismissed by the Registrar, and not by the Court. In that bout he joined the Registrar as a respondent. There was no substance in the allegation and we dismissed that application as well.

[5] This Court's Taxing Master subsequently taxed the costs awarded when we dismissed the application for leave to appeal. Mr A D Penwill, who had received notice of taxation, did not attend on the date of taxation. He explains that he was not well. In the notice under rule 17(1) and rule 17(3) of the SCA Rules he challenges certain items in the bill of costs that were allowed at taxation. And it is because the taxation is under challenge that Mr A D Penwill wants the warrant of execution and notice of attachment set aside. This Court ordered that the application for the setting aside of the warrant of execution and notice of attachment, including ancillary relief, be held in abeyance pending the determination of the review of taxation under the stated case.

[6] In the stated case the Taxing Master did not explain the bases on which he had allowed the disputed fees. In respect of the first four challenged items he merely made the same generalisation to the effect that the fees were in accordance with the SCA Rules. That does not say much. As a result, we issued directions requiring the Taxing Master to file an affidavit clarifying how he had arrived at the amounts allowed. That affidavit has since been filed. Insofar as the bases for what was allowed are concerned, this judgment's focus will be on what the Taxing Master says in this affidavit.

[7] The matter is now ripe for the review of the challenged taxation. As is permissible in terms of rule 17(6)(a)(iv) of the SCA Rules and section 173 of the Constitution,[5] we have opted to determine the review as the Court. This approach helps

[5] Section 173 of the Constitution provides:

us avoid the question whether it is constitutionally compliant for a single Judge or fewer Judges than the constitutionally set quorum of eight to determine the review. At the Supreme Court of Appeal the review may be entertained by at least a single Judge.[6]

[8] Only Mr A D Penwill, Mr R D Penwill and the Taxing Master filed affidavits.

[9] We are deciding this matter without an oral hearing.

Stated case

[10] Mr A D Penwill objects to five items in the bill of costs. First, he objects to item 2. This item concerned perusal by the opposing attorneys of the filing sheet and notice of application for leave to appeal comprising 31 pages. The Taxing Master allowed R47.00 per page, totalling R1 457.00. The basis of the objection appears to be that a reasonable fee is R23.50 per page.

[11] The Taxing Master said that the applicable tariff under Part C 3(a) of rule 18 of the SCA Rules provides for R53.00 per page for the perusal of any application, affidavit or any other document not provided for elsewhere. It seems that this is not provided for elsewhere. The Taxing Master explained that he allowed taxation at R47.00 per page because in the bill of costs the claimed fee was in accordance with the old tariff which was R47.00 per page. The Taxing Master concludes that had the billing attorney charged the current tariff, a higher amount would have been allowed. On the other hand, the "tariff" of R23.50 relied on by Mr A D Penwill has no cogent basis. Therefore, he has no cause for complaint. If anything, he should consider himself lucky.

[12] Second, Mr A D Penwill takes issue with item 4. This was the perusal of the High Court judgment by the opposing attorneys. R1 316.00 was allowed for 28 pages.

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[6] Rule 17(6)(a) of the SCA Rules.

On this as well he contends that a reasonable fee is R23.50 per page. According to the Taxing Master, the applicable tariff – but under Part C 1(a) of rule 18 – is R53.00 per page. An amount of R47.00 was allowed because that is what was claimed. Yet again, I take the view that there is no basis to set aside what was allowed.

[13] Third, Mr A D Penwill is contesting item 23. This was for perusal by the opposing attorneys of an affidavit drawn by Mr R D Penwill, who is an advocate of the High Court, in opposition of the application for leave to appeal. On this, R1 504.00 was allowed for 32 pages. In drawing the affidavit, Mr R D Penwill – although also a litigant – was assisting the Beverly Trust in his capacity as counsel. The opposing attorneys had claimed, and were allowed, R47.00 per page. Mr A D Penwill argues that this affidavit ought to have been drawn by the opposing attorneys and that, therefore, these attorneys cannot charge in respect of work for which they were "subsidised" by Mr R D Penwill. The Taxing Master avers that he relied on Part C 3(a) of rule 18. As indicated earlier when dealing with item 2, Part C 3(a) provides for R53.00 per page for the perusal of any application, affidavit or any other document *not provided for elsewhere*. The Taxing Master then allowed R47.00 per page because on this as well that is what was claimed.

[14] Part C 3(a) cannot apply to the perusal of an affidavit drawn or settled by counsel briefed by that attorney if there is specific provision for the perusal of that type of affidavit. It is Part C 3(c) that makes that specific provision. Part C 3(c) provides for a tariff of R12.00 per page and it applies to "[a]ttendance on and perusal of an application or affidavit composed or corrected by counsel". It is less likely that an attorney would know that counsel on the opposing side "composed or corrected" an affidavit drawn in furtherance of her or his client's case. On the contrary, she or he would know for a fact that an affidavit drawn in furtherance of her or his client's case was drawn or settled by counsel. It makes sense, therefore, that Part C 3(c) applies to the scenario where an attorney is perusing an affidavit drawn or settled by counsel instructed by that attorney. And it makes sense why the tariff applicable to this scenario should be much lesser. The attorney is perusing an affidavit that concerns a case of which she or he is familiar;

her or his own client's case. That should be contrasted with the opposing side's case. Without suggesting that perusal of the attorney's client's affidavits and other documents does not require care, the perusal of documents relating to the opposing side's case, which the attorney knows little or nothing about, takes and requires much more. It makes sense, therefore, that the tariff for the perusal of the other side's documents should be higher.

[15] This Court in *Gauteng Lions Rugby Union* endorsed the principle that—

> "the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . [T]he Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling."[7]

[16] As much as courts afford a Taxing Master a wide margin for the exercise of discretion in taxing bills of costs, that can never allow a misinterpretation or misapplication of the applicable law. Set tariffs form part of that law. I am satisfied that on item 23 the Taxing Master was clearly wrong in that he applied a wrong tariff. If he was not, it is difficult to conceive of other scenarios to which Part C 3(c) would apply. Therefore, the Taxing Master ought to have allowed R12.00 under Part C 3(c). Thus instead of R1 504.00, a total of R384.00 ought to have been allowed. That is made up of 32 pages at R12.00 each.

[17] Fourth, Mr A D Penwill objects to item 26. That concerned making 29 copies of the filing sheet, opposing affidavit and its annexures in respect of which R5 655.00 was allowed for a total of 2 262 pages. The Taxing Master allowed R2.50 per page; clarification is coming shortly. The basis of the objection is that this was excessive and that a reasonable amount should not have exceeded R1.00 per page. As a self-chosen

[7] *President of the Republic of South Africa v Gauteng Lions Rugby Union* [2001] ZACC 5; 2002 (2) SA 64 (CC); 2002 (1) BCLR 1 (CC) at para 13.

benchmark, Mr A D Penwill drew attention to the fact that Jetline, a commercial entity, charges R0.40 per page for documents that are more than 2 000 pages. We are left in the dark as to why the Jetline rate should apply to the taxation of a bill of costs. In response, the Taxing Master states that the applicable tariff for copying prescribes R3.50 per page. He allowed R2.50 per page because that is what the billing attorney charged. According to the Taxing Master, R2.50 per page is the old tariff. On this as well, Mr A D Penwill must consider himself lucky. His challenge is unfounded.

[18] Fifth, Mr A D Penwill challenges item 48. The bill of costs describes the fee under this item as "provision for payment" of counsel's fee for work done by Mr R D Penwill in his capacity as counsel for the Beverly Trust. For this Mr R D Penwill had marked a fee of R45 000.00. The Taxing Master deducted from that amount R12 500.00. Initially Mr A D Penwill did not challenge the quantum of Mr R D Penwill's fees. He raised what I would term technical objections. He claimed that reference in the item to "provision for payment" was an indication that Mr R D Penwill was never really paid. That being the case, there was no basis to want Mr A D Penwill to indemnify his brother for fees that were never paid. Also, Mr A D Penwill contended that his brother had no authority from the Beverly Trust to represent it. Mr R D Penwill produced proof of authority from the trust. And he also responded – quite correctly – that there was no substance in the point about "provision for payment". Later, Mr A D Penwill challenged the quantum of the fee, claiming that it was excessive.

[19] There is no set tariff in respect of this item. The Taxing Master justified the amount allowed on the basis that, in the exercise of his discretion, it was "fair and reasonable". This Court has previously stated that "[i]n some instances, for example, where the dispute relates to the quantum of fees allowed by the Taxing Master, the courts are slow to interfere with the Taxing Master's assessment".[8] That is true of this instance. I can conceive of no reason, and none that is cogent has been suggested, why

[8] Id para 14.

the Taxing Master's assessment should be faulted. In the result, what the Taxing Master allowed on this item must stand.

Matters held in abeyance

[20] As I stated in the beginning, in addition to the review of taxation, Mr A D Penwill wants us to set aside the warrant of execution. The execution is meant to satisfy the debt arising from the costs allowed at taxation. Mr A D Penwill is asking for the setting aside of the warrant of execution because he is aggrieved by the very taxation that gave rise to the intended execution. The warrant of execution cannot stand. That is so because it was issued in respect of an amount that is now going to change, given what I hold in respect of the challenge to item 23. The issuing of the notice of attachment was a consequence of the existence of the warrant of execution. The notice too cannot stand.

Costs

[21] Mr A D Penwill has succeeded in getting us to reduce the amount allowed at taxation and, therefore, in warding off execution. But, because the bulk of the allowed amount has been left intact, it seems fair that there should be no order as to costs.

Order

[22] The following order is made:

1. The sum of R1 504.00 allowed at taxation in respect of item 23 of the bill of costs is set aside and substituted with the sum of R384.00.
2. The warrant of execution issued on 19 October 2018 in respect of the movable property of Mr Andrew Donald Jonathan Penwill is set aside.
3. The notice of attachment issued on 6 December 2018 pursuant to the warrant of execution referred to in paragraph 2 is set aside.