

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GUATENG DIVISION, JOHANNESBURG

SUMMARY

On Monday, 11 March 2024, the Johannesburg High Court handed down Judgment in an application for Judicial review brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The application was brought by Lerato Sibongile Fenyane, the applicant, who sought to review a decision taken by the first respondent (the Taxing Master). The Taxing Master determined that the applicant, despite being admitted as an attorney, lacked the right of appearance as stipulated in section 25(3) of the Legal Practice Act 28 of 2014 (LPA) to appear before them. The central issue before this court was whether the Taxing Master's decision to deny the applicant the right to appear before them because they do not have a right of appearance, was constitutional, lawful, and valid.

The applicant contended that the Taxing Master's decision was subject to review under PAJA. Additionally, the applicant contended that the term "appear," as stated in section 25(3) of the LPA, should be construed solely to mean an appearance before the High Court, the Supreme Court of Appeal, and the Constitutional Court, excluding appearances before a Taxing Master. On the other hand, the first and second respondents maintained that the Taxing Master's decision was justified. Their argument rested on the premise that a Taxing Master is not fundamentally distinct from a court. Consequently, they contended that the provisions of section 25(3) of the LPA should apply to a Taxing Master. The amici submitted that section 25(5)(a)(ii) of the LPA should further be interpreted to allow candidate attorneys to appear before a Taxing Master.

The majority Judgment penned by Dosio J and Adams J ruled that an admitted attorney without a right of appearance may appear before a Taxing Master. However, this only applied to admitted attorneys and not candidate attorneys. The court was of the view that attorneys possess enhanced capability, suitability and expertise because they had gone through the training. The Legal Practice Council considers this expertise when approving

their admission. Furthermore, the court emphasised that the LPA was clear that candidate attorneys are not permitted to appear in superior courts. Their appearance is limited to other courts, boards, tribunals, or similar institutions but not before a superior court or a Taxing Master. On the reasons why the court found that an admitted attorney can appear before a Taxing Master, the court said a Taxing Master is not a Judge. A Taxing Master exercises a quasi-judicial function. A quasi-judicial function cannot hold the same status as a court. This is made clear in section 166 of the Constitution which does not classify a Taxing Master as a court. The court further said unlike a judge, a Taxing Master does not create case law, establish precedent, or rule on the validity of legislation. This is a special distinction between a Judge and a Taxing Master. Therefore, it was incorrect of the respondents to submit that they are not distinctive.

On the term “appear” under section 25(3) of the LPA, the court applied a purposive interpretation, taking into account section 3 of the LPA and the preamble of the LPA and said “appear” simply means an admitted attorney can appear before a Taxing Master to represent a client. The court further held that given the transformative nature of South Africa’s Constitution, and section 39(2) of the Constitution which requires courts to promote the spirit, purport and objects of the Bill of Rights when applying any legislation or when developing the common law, the LPA likewise requires the objects of the Bill of Rights to apply to it in order for the Act to be interpreted in a transformative manner. Similarly, the common law principle relied on from the *Bill of Costs* Judgment ought to be interpreted in light of South Africa’s transformative Constitution and fundamental rights. In conclusion, the court found that the Taxing Master’s decision was invalid and unconstitutional.

Although the court considered this matter even though it determined that PAJA did not apply, the court found that the matter was properly brought in terms of Rule 53 of the Uniform Rules. The court also found that legality applies to a Taxing Master.

In a dissenting judgment Vally J holds that PAJA does not apply in this matter and for that reason this court is bound by the decision of *Bill of Costs*. Vally J holds that because the applicant did not have a right of appearance before the Taxing Master, the application ought to fail.

