

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 58147/2015**

4/5/2017

In the matter between:

**MAISHELA DORAH POTO obo J P**

**1<sup>st</sup> APPLICANT**

And

**KOTSOKWANE ATTORNEYS**

**1<sup>st</sup> RESPONDENT**

**MAPUTLA SELOANA**

**2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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**MOKOENA A.J**

1. The Applicant in this matter is a legal guardian of a minor child J P. She was at some stage represented by the First Respondent in a Road Accident Fund claim. The First Respondent is a practicing attorney.

2. The Second Respondent is a Taxing Master who taxed the Parties bill on 20 July 2015, which bill the Applicant seeks an order to set it aside. No order is sought against the Second Respondent.

3. The First Respondent alleges that after her mandate was terminated by the Applicant, she prepared a bill to be taxed and it was duly served on the Applicant.

4. The Applicant then instructed Strauss De Waal attorneys to represent her during the taxing of the bill. The said attorneys appointed Friedland Hard Solomon & Nicolson to be their corresponding attorneys.

5. It is common cause between the Parties that the taxation of the bill was opposed and as a result was placed on an opposed taxation roll of 05 November 2014.

6. It is also common cause that on 05 November 2014, the taxing of the bill was not finalised and a ruling was made by the then taxing master regarding the appropriate fee that the First Respondent was entitled to charge on hourly rate items and non-hourly rate items.

7. Since it was a ruling, it was binding on the Parties and they were obliged to bring it to the attention of the Second Respondent during a further taxation of the bill which was set down on an opposed taxation roll of 20 July 2015. The Notice of Set-down of the taxation of the bill was duly served on the Applicant's corresponding attorneys on 23 June 2015.

8. On the date of the taxation, the Applicant's attorneys failed to appear to further oppose the bill and the First Respondent proceeded to tax the bill on an unopposed basis; and she failed to bring to the attention of the Second Respondent the earlier ruling of 05 November 2014. The bill was then taxed contrary to that ruling.

9. The Applicant now seeks an order setting aside the allocator and to be granted costs of this application on an attorney and Client scale against the First Respondent.

10. In an explanation for her failure to attend the taxation on 20 July 2017, the deponent to the Founding Affidavit ("Ms Naicker") who is an attorney for the Applicant contends that while on her way to Court to attend to oppose the bill, she received a telephone call from Ms Molapa from the Offices of Friedland Hard Solomon & Nicolson

informing her that one Adele Pretorius has called her Offices to inform her that she was presenting the bill for taxation and that she had neglected to finally enrol the taxation.

11. Ms Naicker went further to state that she thereafter called Ms Pretorius herself about the matter. She said Ms Pretorius informed her that she was off sick the previous week and as a result she could not confirm the taxation scheduled for 20 July 2015. Ms Pretorius also informed her that she will "attain" a new date and revert with same. Based on her communication with both Ms Molapa and Ms Pretorius, Ms Naicker returned to her Office under the impression that the taxation will not proceed.

12. Pursuant to her earlier communication with Ms Pretorius regarding obtaining a new date for taxation, Ms Naicker contends further that she called Ms Pretorius again to enquire about the new date and she was informed by Ms Pretorius that she erred in saying that she was presenting the bill of costs for taxation on that day and in fact the matter she referred to earlier on was actually set down for Thursday and not Monday. According to her, she realised that Ms Pretorius was not referring to her matter.

13. She also contends that when the aforementioned error came to light, she immediately contacted the Second Respondent and the Second Respondent informed her that the bill was taxed by the First Respondent unopposed and the ruling of 05 November 2015 was never brought to his attention.

14. Ms Naicker did not stop there, she contacted the First Respondent and advised her that her failure to disclose the ruling of 05 November 2014, was *ma/a fide*. The Parties could not agree on a way forward.

15. These allegations were not disputed by the First Respondent. Mr Van As for the Applicant then made a submission that they ought to be accepted by the Court as correct. I agree with Mr Van As on his submission as it is based on the rule set out in the *Plascon- Evans Paints Ltd v Van Riebeeck Paints ( Pty) Ltd 1984(3) SA 362( A)* (at para 634F to 635 A-B) as follows:-

*"Where it is clear that facts, though not formally admitted, cannot be denied they*

*must be regarded as admitted (See:- Stellenbosch Farmers Winnery Ltd v Stellenrole Winevate (PTY) Ltd 1954(4) SA(c) 235E-G), If in such a case, the respondent has not avail himself of his right to apply for the deponents concerned to be called for cross- examination under Rule 6(5) (a) of the Uniform Rules of Court..... and the Court is satisfied as to the inherent credibility of the applicant' s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks" .*

16. Ms Naicker is an admitted attorney and an officer of this Court. In the absence of any evidence or facts that suggest to me that her inherent credibility is in question in so far as her failure to attend taxation on 20 July 2015 is concern, I am bound to accept her explanation as correct.

17. During argument, Mr Ferreira for the First Respondent took issue for the first time with the unsigned affidavit of Adele Pretorius annexed to the Founding Affidavit. He argued that since the Confirmatory Affidavit of Adele Pretorius was not signed, the Applicant has not made out a *prima facie* case for the relief claimed. The unsigned Confirmatory affidavit "confirms" Ms Naicker's averments that her failure to attend taxation on 20 July 2015 was not wilful. Mr Ferreira conceded, however, that the ruling of 05 November 2014 was never presented to the Second Respondent during the taxation of the bill on 20 July 2015. He conceded further that it was not fair and collegial to the Applicant and her attorneys for the First Respondent not to disclose the ruling of 05 November 2014 to the Second Respondent. On that basis alone, it was a sufficient ground for me to come to the conclusion that for justice to prevail the allocator has to be set aside.

18. This brings me to the conduct of the taxing of the bill in the absence of the Applicant's attorneys. When the First Respondent proceeded to tax her bill on an unopposed basis, she was aware of the ruling of the taxing master of 05 November 2014. She did not bring that ruling to the attention of the Second Respondent, instead she proceeded to Jax her bill anew. Her failure to disclose that earlier ruling of 05 November 2014, was to her advantage in that she was allowed to charge fees contrary to that ruling.

19. Mr Ferreira made a submission that the said conduct of the First Respondent was not wilful and was not intended to mislead the Second Respondent. No supporting facts or submissions were made as to why the First Respondent alleges that her said conduct was not wilful and was not meant to mislead the Second Respondent.

20. I find it difficult to accept the submissions made by Mr Ferreira on the basis that Ms Naicker on becoming aware that the First Respondent had proceeded to tax her bill unopposed, she called the First Respondent and raised her concern to her regarding her failure to disclose the earlier ruling to the Second Respondent. The First Respondent did not at that stage inform Ms Naicker that it was a mistake and not wilful. This explanation is also not raised in her opposing papers. It was only raised by her Counsel for the first time during argument.

21. If indeed her failure to disclose the earlier ruling of the taxing master to the Second Respondent was not wilful and or unintended to mislead, the prudent thinking to do was to allow the Applicant to proceed with this application unopposed on the understanding that it has to be re- taxed in compliance with the earlier ruling. Instead she opposed the Applicant's application and caused the Applicant to incur unnecessary costs. I therefore reject the submission made by Mr Ferreira as far-fetched and untenable.

22. Mr Van As brought to my attention that the First Respondent was directed by Judge Holland - Muter AJ on 09 September 2015, to file her condonation application to her late filing of her Answering Affidavit. She does not dispute those allegations and no reasons are provided as to why she disregarded the direction of the Learned Judge. I find such a conduct as a complete disdain to this Court and to the Learned Judge.

23. In my view, the conduct of the First Respondent for her failure to disclose the earlier ruling to the Second Respondent and a display of disdain to this Court and the Learned Judge is very serious and has to be discouraged. Taking into account further that the First Respondent is an officer of this Court and she has an ethical duty to be open and honest with it. I came to the conclusion that to show the displeasure of this Court a punitive costs order is appropriate in those circumstances.

24. For these reasons I made an Order marked X and Order of this Court.

**Attorney for the Applicants:**

STRAUSS DE WAAL ATTORNEYS

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**Counsel for the Applicants:**

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**Attorneys for the Respondents:**

KOTSOKWANE ATTORNEYS

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**Counsel for the Respondents:**

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**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 58147/2015

**BEFORE THE HONOURABLE JUDGE MOKOENA AJ  
ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2017**

In the matter between:

MAISHELA DORAH POTO obo J P

Applicant

And

KOTSOKWANE ATTORNEYS

First Respondent

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**DRAFT ORDER**

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**HAVING HEARD** counsel for the applicant, and having considered the documents filed of record, an order is made in the following terms:

1. The Allocator dated 20 July 2015 under case number 4360/2011 is set aside;
2. First respondent is directed to pay the costs of this application on an attorney and client scale.

**BY ORDER**

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**REGISTRAR**