IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8539/15

In the matter between:

SANTS PRIVATE EDUCATION INSTITUTION (PTY) LTD Applicant

and

THE MEC FOR THE DEPARTMENT OF EDUCATION OF THE PROVINCE OF KWAZUU-NATAL First Respondent

THE HEAD OF THE DEPARTMENT OF EDUCATION OF THE PROVINCE OF KWAZULU-NATAL Second Respondent

THE STUDENTS OF THE APPLICANT 3rd to 1 289th Respondent

J U D G M E N T

KOEN J:

[1] This is a review of a taxation in which the Applicant seeks to review the decision of the Taxing Master regarding various items claimed in a bill of costs.

[2] The First and Second Respondents filed a notice to abide by the decision of this court, but nevertheless in that notice referred to various principles and authorities on the basis that the Court's attention should be 'drawn to … those submissions'.

[3] The disputed items can conveniently be divided into three categories identified in the Taxing Master's stated case, depending on whether they relate to:

(a) Counsels fees, being items 99, 198, 236 and 338 of the Bill of Costs; and

(b) Fees disallowed for perusal, being items 43 to 97 of the main Bill of costs and items 5 to 62 of the correspondent Bill; and

(c) Fees disallowed in respect of service affidavits, being items 164 to 179 of the main Bill and items 176 to 191 of the correspondent Bill.

[4] The main Bill of Costs relates to fees and disbursements due to Messrs Gildenhuis Malatji Incorporated and the correspondent Bill of Costs to fees and disbursements due to Robyn Wills the local correspondent. These arise in respect of an order which I granted on the 26 November 2013. That order was granted in respect of an application which was brought by the Applicant against the First Respondent, the MEC for the Department of Education for the Province of KwaZulu-Natal and the Second Respondent, the Head of the Department of Education of the Province of KwaZulu-Natal as well as the 3rd to 1289th Respondents, being students of the Applicant. The Applicant's claim was for monies owed by the First and Second Respondents to the Applicant. The matter was defended but eventually an order was granted, the bulk of which in respect of the merits was granted with the consent of the parties. The costs order was not by consent and was granted by me in the exercise of my discretion on costs. The costs order was to the effect that the Applicant was entitled to its costs on a party and party scale.

[5] The fact that there was such a large number of Respondents, other than the First and Second Respondents, inevitably contributed to the volume of the papers. None of those Respondents however took an active interest in the application and the disputes ventilated were therefore essentially between the Applicant on the one hand and the First and Second Respondents on the other hand.

[6] Although the application was initially opposed, the opposition was misplaced (as was soon recognised after proper legal advice had been obtained). The First and Second Respondents had made bursary funds available to enable students of the Applicant to pursue tertiary studies with the Applicant. When the Applicant was not paid it sought to recover these fees directly from the First and Second Respondents on the basis of a *stipulatio alteri* contained in the agreements concluded between the First and Second Respondents on the one hand and the various individual students of the Applicant on the other.

[7] The matter was not particularly complex, being founded on contract, and although there were passing references to constitutional rights such as the right to education in terms of section 29 of the Constitution, the constitutional issues arose really only peripherally.

[8] In this review the case of the Applicant in the main is that the Taxing Master erred in the exercise of her discretion in disallowing those portions of the disputed items which were taxed off. The grounds for those contentions will be considered in more detail when considering the individual items.

[9] It is however important to keep in mind that as a starting point the exercise of the discretion of the Taxing Master will in general not lightly be disturbed unless it is found that he or she:

> '…did not exercise his or her discretion properly, did not apply his or her mind to the matter, disregarded factors or principles which were proper for him or her to consider, or considered others which it was improper to consider, has acted on wrongly interpreted rules of law or has given, or has given a ruling which no reasonable person would have given, or is clearly wrong.'[1]

[10] In *Köhne and another v Union and National British Insurance Co. Limited* [2] it was held that:

> 'The discretion vested in the Taxing Master as to allow costs, charges, and expenses as appears to him to have been necessary or proper, not those

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[1] *Lander v O'Meera and another* 2011 (1) SA 204 (KZD) at para 14.
[2] 1968 (2) SA 499 (N) at 504B.

> which may objectively attain such qualities, and that such a thing must relate to all costs reasonably incurred by the litigant which also imports a valued judgment as to what is reasonable.'

[11] Further, an award of party and party costs is not aimed at seeking to achieve a full indemnity to the successful party, and is not to be confused with attorney and client costs.[3]

[12] A review of a taxation does not involve simply a substitution of what a Judge may consider to be a reasonable fee, for the considered opinion of the Taxing Master, unless the latter did not exercise her discretion correctly. Not surprisingly then the Supreme Court of Appeal in *Price Waterhouse Meyernel v Thoroughbred Breeders Association*[4] in declining to allow a fee calculated on a time basis and to substitute its own assessment of what would be a reasonable fee said:

> "…Determination of a reasonable fee will, in the light of the arguments raised on behalf of the Defendant before us, involve having regard to fees charged in major cases in this court over the last few years. Unquestionably the Taxing Master is in a better position than we are, on the material before us, to undertake the necessary survey and evaluation."

[13] In *casu*, my position is no different.

[14] It is then in the light of the aforesaid briefly stated general principles that I turn to consider the individual items in the Bills against which the review lies.

COUNSEL'S FEES:

[15] (a) On 9 September 2013 counsel charged an amount of R10 800,00 in respect of 'On perusal of documents received from instructing attorney (08h00 -10h00); on preparing for

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[3] *President of the Republic of South Africa and others v Gauteng Lions Rugby Union and another* 2002 (2) SA 64 (CC) at para 47 and *City of Cape Town v Arun Property Development (Pty) Ltd and another* 2009 (5) SA 227 (C).
[4] 2003 (3) SA 54 (SCA) at 63E – G.

consultation, on consultations and on drafting founding papers (14h00-18h00) (6 hours)' – item 99.

(b) On 11 September 2013 counsel charged an amount of R10 800,00 in respect of 'On amendments and additions to the draft answering affidavit (08h00 -14h00) (6 hours)' – item 198.

(c) On 12 September 2013 counsel charged an amount of R5 400,00 in respect of 'On additions and amendments to the founding papers (12h00-13h00; 14h00-15h00; 18h00-19h00) (3 hours)' – item 236.

(d) On 13 September 2013 counsel charged an amount of R7 200,00 in respect of 'On settling correspondence to the First Respondent and on amendments and additions to the founding papers (09h00-11h00; 12h30-14h30) (4 hours)'.

(e) On 19 September 2013 counsel charged an amount of R9 000,00 in respect of 'On amendments and additions to the founding affidavit and on settling same (08h00-9h00; 12h00-16h00) (5 hours)' – item 338.

[16] It will be apparent from the above that the fees charged were calculated on a time basis at R1 800,00 per hour.

[17] The Taxing Master allowed an amount of R11 234,70 and taxed off R38 013,30 of those four items on the basis that the perusal of documents on the 9 September 2013 should be allowed at 1 hour for the perusal of documents at R1 200,00, that the affidavits could be drafted by the attorney and simply be settled by counsel for which 1 hour was allowed, and that the various attendances on amendments and additions be disallowed as being attorney and client items.

[18] The Applicant is critical of this approach contending that the Taxing Master had erred in believing that the matter was 'not complex' and would therefore reasonably demand a fee of only R1 200,00 per hour and a daily fee, or fee on brief of ten times that amount, in the sum of R12 000,00. The Applicant submits that although on the face of it the matter might appear

simple, it was a complex matter and that counsel should have been awarded a higher fee on brief and a per hour charge.

[19] The Taxing Master's response is that she did not only take into account the complexity/lack of complexity of the issues arising in the application, but that all factors material to the case were taken into consideration, and that she allowed a fee which in her view was reasonable.[5] She also felt that the drafting of affidavits is the function of an attorney.[6] On that reasoning, a fee at an attorney's rate was allowed for drafting.

[20] I am not persuaded that the Taxing Master had exercised her discretion incorrectly or that her discretion in having concluded that a fee of R1 200,00 per hour was reasonable, is on any other legal basis impeachable. A first day or daily fee of R12 000,00 would then be appropriate.

[21] It is significant to note that although counsel's daily rates are invariably taken as ten times their hourly rates Owen Rodgers (now Rodgers J) in "High Fees and Questionable Practices" published in the *Advocate* of April 2012 page 40 at page 41 to 42 argues persuasively for a shift to a system where day rates are no more than 8 times counsel's usual hourly rate. In the same article he also deprecated the use of time as a basis for determining fees for chamber work, stating that it is not always appropriate, but is at most a rational starting point. Wallis JA in the *Advocate* of August 2011 in his paper "Reform of the Costs Regime – a South African Perspective" at page 33 at page 35 asked '…if something can be done to break the near universal reliance on charging by time, particularly by attorneys but increasingly by counsel, …' stating that 'that would be a good thing'.

[22] The Applicant further submits that it would have been reasonable to have allowed counsel 2 hours for the perusal of the documents provided to him as it was voluminous. Nothing has been placed before me as to how

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[5] *Campsbay Residents and Ratepayers Association and others v Augoustides and others* 2009 (6) SA 190 (WCC).
[6] *City Deep Limited v Johannesburg City Council* 1973 (2) SA 109 (W) and *Aloes Executive Cars v Motorland and Another* 1990 (4) SA 587 (T).

voluminous this correspondence would have been. Presumably the correspondence was available and could have been placed before the Taxing Master at the time of taxation, and if not, should have been placed before the Taxing Master by the Applicant. On what is placed before me, I am unable to point to any justifiable basis for interfering with the Taxing Master's determination in this regard.

[23] Regarding the drafting of the affidavit, the Applicant submits that it was necessary to consult with counsel *inter alia* due to the complexity of the matter. The consultation with counsel was necessary to the extent that the papers had to be settled. I reiterate that although no doubt important to the parties, the matter was not, in my view, unduly complex.

[24] As regards the fee of 12 September 2013 and the sum of R5 400,00 the Applicant submits that 'the rewording of the founding affidavit would have been attended to in order to properly organise and set out the merits of the case' and that 3 hours was reasonable in the circumstances having regard to the volume of annexures which needed to be incorporated. Reference is further made to the guiding principle that fees allowed should constitute 'reasonable remuneration for necessary work properly done',[7] that the Taxing Master should take into account the complexity of the matter, the volume of the case, and that the attendance was not an attorney and client one. It seems to me however that the necessary drafting should have been done correctly from the outset. That is when the matter should have been 'properly organised' to 'set out the merits of the case'. Amendments required thereafter, there being nothing before me to suggest the contrary, probably arose from inadequate instructions at the outset and would therefore be an attorney and client item. The position might in fact be different but on what has been placed before me I am unable to conclude that the Taxing Master's decision, that it is an attorney and client item to be taxed off the party and party bill, is impeachable in any way.

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[7] *President of the Republic of South Africa and others v Gauteng Lions Rugby Union and Another* (*supra*) n3 at para 45.

[25] In regard to the fee of R7 200,00 charged for 'settling the correspondence to the First Respondent and on amendments and additions to the founding papers' on 13 September 2013, the Applicant submits that a detailed three page letter of demand needed to be delivered to the First Respondent, hence Applicant instructed counsel to draft the letter 'due the contractual and constitutional issues to be dealt with within same'. There seems to be no reason why the attorney could not have drafted this letter, particularly in the light of the framework of the cause of action having been formulated in the founding papers already drafted on the 9 September 2013. If the luxury of either such letter being drafted or settled by counsel was resorted to, then this should properly be an attorney and client expense.

[26] The fee charged on amendments and additions to the founding affidavit on 19 September falls in the same category as that of the 12th September 2013. The Applicant asks that taking into account 'the complexity of the matter' and the 'volume of the case' that the Taxing Master 'should have ruled more leniently with regard to counsel's time actually spent on preparing and finalising the founding papers.' It is furthermore submitted on behalf of the Applicant that counsel charging a fee based on time actually expended is both acceptable and in the interest of transparency. The plea requesting to be dealt with 'more leniently' presents as one *ad miseraccordiam,* without perhaps regard to the relevant legal principles. Charging a fee based on time actually expended probably does promote transparency, but in the words of Wallis JA in *Advocate* of August 2011 at page 35 is also something that 'our courts have been moaned… as a basis for charging fees, describing it as putting a premium on slowness and inefficiency'.[8] I agree with that sentiment. Ultimately fees charged on a time basis might be a starting point but the amount to be allowed finally should be one constituting 'reasonable remuneration for necessary work properly done.' On what has been advanced in the Applicant's submissions, no basis exists to interfere with the Taxing Master's exercise of her discretion.

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[8] See also *J D Van Niekerk en Genote Ing v Administrateur Transvaal* 1994 (1) SA 595 (A) at 601-2, which was endorsed by the Constitutional Court in *President of the Republic of South Africa and others v Gauteng Lions Rugby Union and another* (*supra*) n3.

[27] Item 198 of the Bill relates to a disbursement in respect of counsel's fees claimed in the amount of R10 260,00 of which R4 446,00 was taxed off and only the balance of R5 814,00 was allowed. The amounts claimed were in respect of:

(a) On 21 October 2013 an amount of R4 500,00 was charged 'On draft affidavits of service and on drafting heads of argument (08h30-11h00) (2½ hours)'; and

(b) On 29 October 2013 an amount of R1 400 was charged 'On drafting heads of argument and preparing for opposed application (15h00-17h30) (2½ hours)'.

The Taxing Master allowed for the heads of argument at R300,00 per page for 17 pages totalling R5 100,00 plus vat, giving a total of R5 814,00.

[28] The Applicant, in respect of the charge on 21 October 2013 for drafting affidavits of service submits that this was a necessary attendance by counsel 'due to the large number of Respondents that the papers needed to be served on'. Reference is made to paragraph 11.3 of the Founding Affidavit where the manner in which the papers were to be served in order to minimize the number of Respondents to be served was dealt with. With that guidance already contained in the papers, it is difficult to see why the service affidavits were required to be drafted by counsel and the terms of what was set out in the affidavit could not simply be followed by the attorney. It is probably so that because of the importance of the matter that the Applicant did not want any hiccup with the hearing of the application, but it nevertheless remains an attorney and client expense. Certainly, to put it more correctly, no basis has been advanced to interfere with the Taxing Master's discretion to disallow the fees for drafting the service affidavits.

[29] The fee allowed for the drafting of the heads on the basis of 'a reasonable remuneration for necessary work properly done' in fact exceeds the amount claimed for the 29 October 2013 based strictly on a time basis. The only issue taken in that regard by the Applicant is the allowance of only R300,00 per page, the Applicant submitting that due to the complexity of the

matter, the time spent on the drafting of same and the volume of the case, a higher fee per page should have been considered by the Taxing Master. The Taxing Master deals with matters of this nature on a daily basis, is best equipped to make a determination in the light of the case as to a reasonable remuneration per page, and no basis has been advanced to interfere with the exercise of her decision in that regard.

[30] Item 236 relates to a disbursement of R26 676,00 which was claimed, of which R12 996,00 was taxed off leaving an amount of R13 680,00. Counsel had claimed the following:

(a) On 1 November 2013 an amount of R5 400,00 was claimed for 'On preparing for opposed application (15h00-18h00) (3 hours)'.

(b) On 4 November 2013 an amount of R18 000,00 was claimed for 'On an opposed application (1 day)'.

[31] The Applicant raises the same considerations of complexity and constitutional issues being raised in this context and contends that the time charged for by counsel was reasonable and should not have been taxed off.

[32] The disbursement in respect of 1 November 2013 was disallowed in its entirety. An amount of R12 000,00 was allowed in respect of the opposed application fee.

[33] The Taxing Master was clearly not of the view that preparing for the opposed application on the 1st November 2013 was justified. Preparation had previously been done, counsel had drafted the papers and the heads of argument and had prepared for the opposed application. Such preparation as might have been necessary could be adequately compensated by the fee for the opposed application.

[33] As regards the opposed application's day fee of 4 November 2013, reference has already been made to the contention of Mr Owen Rodgers earlier in this judgment. The application did not take the full day, but that is immaterial. The fee allowed was on the basis of 10 times what the Taxing

Master considered to be a reasonable hourly rate for counsel in a matter such as the present, taking into account all the relevant factors. No basis has been advanced that would justify interfering with the Taxing Master's determination.

[34] Item 338 relates to a disbursement claim of R86 184,00 in respect of counsel's fees of which R61 269,30 was taxed off and R24 914,70 (including vat) was allowed. This disbursement relates to various amounts claimed for the period from 6 November 2013 to 26 November 2013. Submissions were only advanced in respect of the fees claimed for 6 November 2013, 7 November 2013, 12 November 2013 and 13 November 2013. In view of no submissions having been advanced in respect of the other components taxed off or portions that were taxed off, those will not be dealt with in this judgment.

[35] On 6 November 2013 Counsel claimed an amount of R15 300,00 for 'On drafting replying affidavit (13h00-21h30) (8½ hours)'. The Taxing Master allowed a fee for drafting the replying affidavit on a page basis mainly for 30 pages in the sum of R11 040,00. The Applicant submits that 'given the detailed issues of the matter and contentions which had to be responded to counsel should have been awarded his fees at the rate of at least R300,00 per page and not at an attorney's rate.'

[36] The Taxing Master's attitude to the nature and complexity of the matter and the need for counsel to draft the affidavits, has been dealt with earlier and will not be repeated. It has not been shown that the Taxing Master exercised her discretion incorrectly in that regard as to warrant her decision being interfered with.

[37] On 7 November 2013 counsel charged R9 000,00 in respect of 'On email to instructing attorney, on perusal of clients comments on replying affidavit and on settling replying affidavit (13h00-17h00; 20h00-21h00) (5 hours)'. The Taxing Master allowed an amount of R1 200,00, being 1 hour for finalizing the replying affidavit including the perusal of the Applicant's comments.

[38] Applicant submits that 'given the length of and important issues which needed to be dealt with in the replying affidavit, that the Taxing Master did not apply her mind to all factors of the matter and taxed off an unreasonable portion of his fees', and that counsel should have been awarded 'at least 3 hours to consider the Applicant's detailed responses to complex issues as well as finalising the affidavit.'

[39] The details of the email and the nature thereof could and should have been placed before the Taxing Master if of particular significance. There is nothing that has been placed before me to suggest that her assessment of the position and the fee allowed flowed from an incorrect exercise of her discretion. Accordingly, there is no basis to interfere with the fee she determined.

[40] On 12 November 2013 counsel charged R9 900,00 in respect of 'On heads of argument (16h00-18h00; 21h00-24h30) (5½ hours)'. This is after he also on 8 November 2013 charged for heads of argument in the sum of R3 600,00. An amount of R7 500,00 was taxed off.

[41] The Applicant submits that here counsel was only awarded '1 hour for continuing to work and prepare his heads of argument on this date' and that being in respect of 'multifaceted and potentially far reaching issues which were raised in the matter.' The Applicant contends that counsel should have been awarded at least 3 hours to condense and summarize his argument into concise heads of argument and that the Taxing Master should more especially have taken into account that counsel is to be 'fairly compensated for his preparation and presentation of argument'.

[42] It does not appear that counsel was only awarded 1 hour, but that in fact that he was awarded for 2 hours at R1 200,00. Having regard to the extent of the heads of argument, the learned Taxing Master found the fee of R2 400,00 to be more appropriate. Nothing has been advanced to suggest that she exercised her discretion in that regard improperly other than the suggestion that the fee that she allowed did not adequately compensate

counsel. I reiterate what is said earlier in this judgment, namely that the Taxing Master is best placed to determine a fee on what is reasonable having regard to the extent and magnitude of the heads of argument concerned. That does not mean that her decision can never be challenged, but a review of taxation does not entail a fresh determination of what is a reasonable fee. It is a review, but only if the Taxing Master's determination can be shown to have been made from an incorrect exercise of her discretion.

[43] On 13 November 2013 counsel charged an amount of R4 500,00 in respect of 'On amendments and additions to the heads of argument (11h00-13h30) (2½ hours)'.

[44] The Applicant submits that 'due to the complexity of the matter, further consideration should have been given to the time and effort spent by counsel to prepare and complete the succinct argument in his heads.' No basis was advanced to conclude that the Taxing Master exercised her discretion incorrectly or improperly in this regard. The considerations, to which reference is made, have already been dealt with earlier. The time spent on the heads of argument overall was obviously a starting point, but ultimately based on her experience in matters of this nature, a fee was allowed by the Taxing Master on a page basis for drafting the further heads of argument. There is nothing before me to show that she exercised her discretion improperly in doing so.

[45] The review in so far as it relates to the disallowance of certain of counsel's fees therefore must fail.

PERUSALS:

[46] Items 43 to 97 of the main Bill relate to individual charges for perusing annexures FA 1 to FA 55 to the Founding Affidavit. The Taxing Master determined that these documents had to be perused as bulk and taxed off an amount of R4 949,40.

[47] The Applicant contends that it was necessary for these annexures to be perused by the Applicant's attorneys in order to familiarise themselves with the manner in which they had been incorporated into the founding affidavit to have a full and extensive understanding of the matter, as opposed to them being allowed on a time basis. Again, referring to alleged 'the volume of the papers and complexity of the matter', the Applicants submits that the perusal should have been allowed on a per page basis.

[48] The importance of annexures are not underestimated. The drafter of the founding affidavit should however have incorporated the material parts of the annexures in the text of the signed affidavit. It is a trite principle of our law that a case must be presented in the founding affidavit and that a court cannot be expected to trawl through a mass of annexures to determine on what part of those annexures reliance might be placed. The annexures annexed to the affidavits are therefore only of secondary or supportive value, and although some, such as specimen agreements would be more significant, they should be easily identifiable by comparison with the allegations in the affidavit. Whereas a perusal of the founding affidavit would be clearly warranted, the Taxing Master's decision that the annexures should be perused in bulk, cannot be said to have been improperly exercised. The review must accordingly also fail in respect of these items.

ITEMS 164 TO 169 OF THE MAIN BILL AND ITEMS 176 TO 191 OF THE CORRESPONDENCE BILL:

[49] Items 164 to 169 relate to the perusal of various emails and affidavits relating to service, drafted by counsel. These could and should have been drafted by the attorney, specifically in the light of the contents of the founding affidavit, which would have rendered any separate perusal of affidavits drafted by counsel unnecessary.

[50] In respect of the perusal fees charged by the instructing attorney of the various affidavits to be filed and served, the Applicant contends that 'the correspondent attorney was entitled to ensure that the papers were in order

and positively served' and hence that the 'attendances relating to service affidavits' should not have been taxed off entirely.

[51] Perusals were allowed by the Taxing Master on a time basis of 40 pages per hour in respect of items 43 to 97.[9] Items 164 to 179 of the main bill and items 176 to 191 of the correspondent bill were disallowed as 'being unnecessary incurred and not reasonable as it did not take the matter any further'.

[52] No basis has been advanced for interfering with this determination. The review in respect of these items must accordingly also fail.

[53] The Applicant has not sought any costs. The First and Second Respondents did not oppose the review nor ask for costs. Indeed the First and Second Respondents elected to abide by the decision of this court. In the circumstances I do not propose to make any order in respect of costs.

[54] The review of the taxation of the items referred to in the Notice of Review of Taxation is accordingly dismissed.

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KOEN J

Date of Judgment: 13 September 2016

[9] See *Oshry and Lazar v Taxing Master and another* 1947 (1) SA 657 (T).