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

Case No: 2899/2021P

In the matter between:

STRAUSS DALY **PLAINTIFF**

and

MEMBER OF THE EXECUTIVE COUNCIL, HEALTH KWAZULU-NATAL **DEFENDANT**

JUDGMENT

Mossop AJ:

Introduction

[1] This is a review of taxation as contemplated in rule 48(1) of the Uniform Rules of Court. The defendant is dissatisfied with the decision of the Taxing Master to allow certain items upon taxation by the plaintiff of four bills of costs.

The documents delivered

[2] On 4 May 2021, a notice of review was delivered by the defendant requiring the Taxing Master to file a stated case in terms of rule 48(3). On 31 May 2021, the Taxing Master filed a document referred to as the 'Taxing Master's Report'. I shall assume that this is the stated case referred to in rule 48(1) and I shall refer to this document as 'the first report'. The defendant thereafter delivered its submissions in terms of rule 48(5)*(a)* on 22 June 2021. The Taxing Master's report in terms of rule 48(5)*(b)* was also filed on 22 June 2021, and also on the same day, the plaintiff delivered its

submissions in terms of rule 48(5)*(a)*. The defendant thereafter delivered a response to the plaintiff's submissions.

The nature of the defendant's complaint

[3] Four bills of costs were taxed by the plaintiff before the Taxing Master on 13 April 2021. The complaints of the defendant all relate to amounts allowed by the Taxing Master in respect of the perusal of documents by the plaintiff. In *Thornycroft Cartage Co v Beier & Co (Pty) Ltd and another*[1] the word 'perusal' was said by counsel to mean

'the application of a trained legal mind to the contents of the document in question'.

This definition has been accepted and employed in a number of subsequent matters.[2]

[4] The defendant contends that the perusals in each instance involved a 'bulk perusal'. It contends that where such perusals are allowed, they are generally allowed at a reduced rate. In three of the taxations the defendant claims that the perusal of the record also involved a re-perusal thereof. As with a 'bulk perusal', the defendant contends that a re-perusal is generally allowed at a reduced rate. The defendant finally contends that allowing the perusals at the rate claimed by the plaintiff led to an unfair result.

[5] The plaintiff, a firm of attorneys, asserts that the parties concluded a service level agreement (SLA) with it in terms of which the fees that it would charge for legal services to be rendered to the defendant were disclosed to the defendant and were agreed to by it. The defendant accordingly agreed to pay the fees of which it now complains.

[6] It is evident that the fact of the perusals is not in dispute. The Taxing Master accepted that the perusals had occurred and this has not been challenged by the defendant. It is also not in dispute that the defendant objected to each of the items

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[1] *Thornycroft Cartage Co v Beier & Co (Pty) Ltd and another* 1962 (3) SA 26 (N) at 33F.

[2] *Chemical Formulators and Consultants (Pty) Ltd v Detsave Chemicals (Pty) Ltd* 1976 (1) SA 638 (W) at 642D, and *Vrystaat Mielies (Pty) Ltd v Da Silva and others* [2007] ZAFSHC 114.

mentioned in its notice of review at the taxation, and that it is accordingly entitled to have the decisions of the Taxing Master reviewed.[3]

General principles

[7] A foundational principle of a review of taxation is that the exercise of the discretion of the Taxing Master will, in general, not lightly be disturbed unless it is found that the Taxing Master

'. . . 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 upon wrong principles or wrongly interpreted rules of law, or has given a ruling which no reasonable person would have given, or is clearly wrong. . .'[4]

[8] In *Ocean Commodities Inc and others v Standard Bank of SA Ltd and others*,[5] Rabie CJ re-stated the test to be that

'. . . the 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]

[9] In *Köhne and another v Union & National British Insurance Co. Limited*[6] it was held that:

'. . . the discretion vested in the Taxing Master is to allow costs, charges and expenses *as appear to him* to have been necessary or proper; not those which may objectively attain such qualities, and that such opinion must relate to all costs *reasonably incurred* by the litigant which also imports a value judgment as to what is reasonable. . .'

[10] From the aforegoing, it is apparent that a review of a taxation does not involve a court merely substituting what it subjectively considers to be reasonable for the considered opinion of the Taxing Master, unless the Taxing Master did not exercise

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[3] *Daywine Properties (Pty) Ltd v Murphy and another* 1991 (3) SA 216 (D).
[4] *Lander v O'Meara and another* 2011 (1) SA 204 (KZD) para 13.
[5] *Ocean Commodities Inc and others v Standard Bank of SA Ltd and others* 1984 (3) SA 15 (A) at 18F-G.
[6] *Köhne and another v Union & National British Insurance Co. Limited* 1968 (2) SA 499 (N) at 504B-C.

his or her discretion correctly. In performing her duties, '[a] Taxing Master performs a quasi-judicial function and not an administrative function'.[7]

[11] What is the position when there is a prior agreement on the fees to be charged? Is the Taxing Master obliged to allow those rates agreed upon or does she have the power to vary them or ignore them? The answer is that the Taxing Master is not necessarily obliged to allow those amounts. The plaintiff's contention is that the defendant is bound by the terms of the SLA in which the rates to be charged were agreed to by it. This is not necessarily so:

'The basic rule with regard to costs is that, apart from statutory limitations, all costs awards are in the discretion of the court. The court's discretion is a wide, unfettered and equitable one, which has to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). As a matter of policy and principle a court should not, and must not, permit the ouster of its discretion because of an agreement between parties with regard to costs . . . Because a court exercises its discretion judicially it would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist, depending upon the particular circumstances, for following a different course which might result, on a proper exercise of discretion, in a party being deprived of agreed costs or being awarded something less in the way of costs than that agreed upon.'[8]

[12] Irrespective of whether the attorney's fees are agreed, the fee charged must be reasonable.[9] Based on considerations of public policy, the court retains the right to decide what a fair and reasonable remuneration would be. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreaching, will be unreasonable and consequently unenforceable.[10]

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[7] *Jonker and others v Lambons (Pty) Ltd and another* [2018] ZAFSHC 186 para 4.
[8] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA1045 (SCA) at 1046E-G in the headnote.
[9] *Ben McDonald Inc and another v Rudolph and another* 1997 (4) SA 252 (T) at 256C-D; *President of the Republic of South Africa and others v Gauteng Lions Rugby Union and another* 2002 (2) SA 64 (CC) para 51.
[10] *Goolam Mohamed v Janion* (1908) 29 NLR 304; *Law Society of South West Africa v Steyn* 1923 SWA 47 at 52; *Law Society of the Cape of Good Hope v Tobias and another* 1991 (1) SA 430 (C) at 435B-C; *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC and others* 1998 (3) SA 608 (D) at 612E-F; and *Melamed & Hurwitz Inc v Goldberg* [2009] ZASCA 15.

[13] Thus the mere fact that there is a fee agreement between a client and its attorneys which regulates what fees are to be charged is not a bar to the Taxing Master exercising her discretion to determine whether the fees claimed are reasonable or not.[11]

[14] Considering the issue of the re-perusal of documents, the position is that where a document has already been perused for one main purpose, a full perusal fee in connection with its use for an ancillary issue should not be allowed. An attorney is normally not entitled to a full fee for the perusal of a record which he had already perused and which is accordingly not *res nova*. Normally, 'the Taxing Master is required in such a case to fix a globular remuneration for the additional work involved in a re-perusal of the record'.[12]

[15] In this regard, in *De Villiers v Estate Hunt*,[13] the court remarked that

'It is obvious that the task of perusing the record of a case in which a person has been previously engaged must necessarily be far lighter than it would be to peruse the record of a case with which one had had nothing to do previously.'

The court went on further to state that

'I do not, of course, go all the way with the contention of the applicant that because the work had been done once it should not have been repeated. The very fact that it was done some time before and in another connection must almost of necessity make it essential to some extent to repeat it. It will, in other words, be necessary for the attorney to furbish up his existing knowledge, to check it and to bring, it up to date. But neither must he neglect knowledge which he has already acquired. . . '[14]

Finally, in remitting certain items to the Taxing Master, the court concluded that

'He [i.e. the Taxing Master] should, in appraising the amount of work which required to be done, the length of time required to do it and the remuneration which should be paid for it, take into careful consideration how much of it was old and how much new . . . and how far it was necessary --- to take but one example --- to read the whole of documents again right through, when it should already have been known just how much of value they contained and where to look for it. This may be difficult and the result may be somewhat arbitrary, but of it at least this

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[11] *Savanha Construction and Maintenance CC v Phillips and Another* [2020] ZALMPPHC 21.
[12] *Goldschmidt and another v Folb and another* 1974 (3) SA 778 (T) at 783E.
[13] *De Villiers v Estate Hunt* 1940 CPD 518 at 523.
[14] Ibid at 524.

can be predicated with certainty: that result must be a great deal, even a very great deal, less than it was when it was accepted by the Taxing Master that the attorney was entitled to do the work, in his own words, "*de novo*" and this work was treated by the former as being "*res novae*".'[15]

[16] With these principles firmly in mind, I turn now to consider the terms of the SLA and the four bills of costs about which complaint has been made.

The service level agreement

[17] The origin of the disputed bills of cost is to be found in the SLA concluded between the parties on 21 September 2016. In terms thereof, the plaintiff agreed to render various legal services to the defendant at certain agreed rates. The rates at which the services were to be charged at are set out in an appendix to the SLA, marked as appendix 'A'.

[18] Appendix 'A' to the SLA is entitled 'Standard Engagement Terms' and, inter alia:

(a) sets out the hourly rates of attorneys with different numbers of years of post-qualification experience. The most experienced attorney, for example, being an attorney with 15 years' post qualification experience and above, would render services to the defendant at a rate of R1 980 per hour (plus an additional surcharge of 20 percent for every additional five years' experience). The least qualified attorney, with one year's post qualification experience, would charge out at a rate of R850 per hour. Between these two outer limits, the SLA provided different rates for other attorneys with different levels of post qualification experience;

(b) provides that the plaintiff might elect to levy a composite hourly rate at any stage, being a flat hourly rate regardless of the number of professional and other resources involved in the work, in which event the defendant would be charged R3 100 per hour;

(c) deals with the rate to be charged for perusals. It specifically provides that they were to be charged as follows:

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[15] Ibid at 526.

'Correspondence sent or received and documents drafted or perused: 1/8 of hourly rate per folio'; and

(d) defined a folio as comprising 100 words.

The bill in respect of case number 16189/2014P: *Lindani Cleaning and Security Services and others v The Chairperson of the Bid Adjudication Committee and others* (the first bill)

[19] What is sought to be reviewed in the first bill are the following amounts allowed by the Taxing Master:

(a) R749 232, being in respect of a perusal by the plaintiff of 3 440 folios on 2 May 2017 at a rate of R217.80 per folio;

(b) R610 057.80, being in respect of a perusal by the plaintiff of 2 801 folios on 31 May 2017 at a rate of R217.80 per folio;

(c) R606 790.80, being in respect of a perusal by the plaintiff of 2 786 folios on 30 June 2017 at a rate of R217.80 per folio;

(d) R810 216, being in respect of a perusal by the plaintiff of 3 720 folios on 31 July 2017 at a rate of R217.80 per folio; and

(e) R670 824, being in respect of a perusal by the plaintiff of 3 080 folios on 29 July 2017 at a rate of R217.80 per folio.

[20] The basis for the defendant's complaint in respect of the first bill is that:

(a) the volume of documents perused amounts to a 'bulk perusal' which is generally allowed at a reduced rate on a time basis;

(b) the perusals were of a record which is generally allowed at a reduced rate;

(c) the plaintiff had previously perused the record, had charged for such perusals and had been paid for them, and the further perusal amounted to a re-perusal, which was also generally allowed at a reduced rate; and

(d) allowing the perusals at the rate claimed by the plaintiff led to an unfair result.

[21] I deal firstly with the issue of 'bulk perusals.' In her first report, the Taxing Master makes reference to the defendant's submissions at taxation that Taxing Masters have generally allowed 'bulk perusals' on a time basis and at a rate of 40 pages perused per hour (the 40 pages rule) and that the courts have approved of this. Specifically,

the Taxing Master stated that the 40 pages rule was accepted in *SANTS Private Education Institution (Pty) Ltd v MEC for the Department of Education of the Province of KwaZulu-Natal*,[16] a decision of this division. In the unreported decision of *Van Marle v Kellerman,*[17] a decision that I have not had sight of but to which reference is made in *Van Rooyen v Road Accident Fund,*[18] Roos J apparently held that 'a large batch of documents' might in a particular case be relevant, but not individually important and that a reasonable lump sum, based on the estimated time occupied may be allowed for the examination thereof.

[22] The 40 page rule appears to have been widely implemented. The Taxing Master herself acknowledged its application in this Division but did not consider whether, in the exercise of her discretion, she ought to implement it. Nor did she consider, as an alternative the question of a reasonable lump sum as suggested by Roos J. The reason for this is that the Taxing Master felt herself to be bound by the terms of the SLA.

[23] Turning to the fact that what was perused was a record, I have not been referred to any authority that the perusal of a record warrants a reduced fee. I again hold that the 40 page rule may be appropriate for the perusal of large volumes of documents

[24] As regards the matter of re-perusals, the Taxing Master indicates in her first report that she did not regard the perusals as a re-perusal. She indicated that while the documents had previously been perused and a fee allowed for this, on this occasion the documents were perused for a different purpose: the first perusal was to identify problems and issues relating to a tender review and the further, or second, perusal was to draft the answering affidavit.

[25] By virtue of the fact that the record had already been perused, a second perusal must of necessity amount to a re-perusal. In failing to consider whether the perusals should be allowed at a discounted rate, the Taxing Master erred. On the authority of

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[16] *SANTS Private Education Institution (Pty) Ltd v MEC for the Department of Education of the province of Kwazulu-Natal and Others* [2016] ZAKZPHC 101 paras 49-52.
[17] *Van Marle v Kellerman* (TPD) Unreported case number 8807/1997 (26 October 1998).
[18] *Van Rooyen v Road Accident Fund* [2004] ZAGPHC 7 para 20.

Goldschmidt,[19] the re-perusals ought not to have been allowed at a full perusal rate. As submitted by the defendant, the perusals ought to have been allowed at a reduced rate determined by the Taxing Master in the exercise of her discretion.

[26] The final complaint is that allowing perusals at the rate that the Taxing Master allowed, resulted in an unfair result. On the plaintiff's version, a perusal rate based on one tenth of the relevant hourly rate was charged and not the stipulated one eighth of the relevant hourly rate.

[27] Using as an example:

(a) the first perusal amount claimed in the bill of costs, namely R749 232; and

(b) the rate of the most senior attorney, who would charge at R1 980 per hour plus 20%, which equals R2 376 per hour; and

(c) applying the 40 page rule,

the cost of perusing 3 440 folios would be the number of folios divided by 40 folios per hour multiplied by R2 376 per hour. The answer would be R204 336. The difference between this method of calculation and the folio method employed by the plaintiff is more than half a million rand on this one calculation alone.

[28] Viewed from a different perspective, the defendant contends that by utilising a per folio rate, the plaintiff had charged out, effectively, at a rate of R74 923.20 per hour. This astonishing figure is calculated by the defendant assuming a ten hour workday and that all the work was completed in a day. The latter assumption appears to be well founded, as the bill of costs indicates that the perusal was done on a single day, namely 2 May 2017. The assumption of a ten hour day, however, may be incorrect. The hourly rate of R74 923.20 postulated by the defendant is arrived at by dividing the total amount charged for on that day, namely R749 232, by a working day of 10 hours.

[29] Irrespective of whether a ten hour day is correct or not, it is irrefutable that the plaintiff contends that over a 24 hour period it allegedly performed work that entitled it

[19] See fn 11.

to be paid R749 232. How this is possible has not been explained by the plaintiff. That the amount claimed is outrageous brooks no dispute. It is entirely unreasonable.

[30] The plaintiff indicates that it was entitled to the amounts claimed because the defendant agreed to the rates and was obliged to remunerate it 'strictly' in accordance with the SLA.

[31] An objective consideration of the amounts claimed and allowed for perusals in this bill of costs leaves one aghast at the amounts allowed. The amounts claimed for a second perusal of the record are simply unjustifiable and cannot be construed as being reasonable. The Taxing Master appears, however, to have had no qualms about allowing the amounts claimed.

[32] Having acknowledged the 40 page per hour perusal rule, it appears that the Taxing Master paid no further attention to it. She ought to have done so. She ought also to have considered the application of a lump sum. It appears to me that the Taxing Master accepted that the plaintiff was entitled to the amounts claimed by it because there was an agreement that permitted that. She was incorrect in this regard as well. She was required to consider whether the fees claimed were reasonable. She did not do so. In so finding, it appears to me that the Taxing Master did not properly exercise her discretion: indeed, it is probable that she did not even consider that she had a discretion. In such circumstances, intervention by this court is warranted. As was stated in *Kloot v Interplan Inc and another*[20]

'The Taxing Master has a discretion to be judicially exercised in allowing or disallowing or reducing the various items of a bill of costs. That discretion must be exercised reasonably and justly on sound principles and with due regard to all the circumstances of the case. In exercising his discretion he should ensure that the unsuccessful litigant is not oppressed by having to pay an excessive amount of costs and accordingly, although the Court does not have a free hand to interfere with a Taxing Master's discretion on review, where he has failed to exercise . . . judicially or properly or failed to bring his mind to bear upon the question, intervention is demanded.'

[20] *Kloot v Interplan Inc and another* 1994 (3) SA 236 (SE) at 238H-I.

[33] In my view, the amounts allowed for perusal should have been allowed:

(a) at a discounted perusal rate to be determined by the Taxing Master in the exercise of her discretion arising out of the re-perusal of the documents; and

(b) with reference to the 40 page rule, alternatively a reduced lump sum rate, and not the method employed by the plaintiff.

The bill in respect of case number 1188/2015P: *Compass Waste Services (Pty) Ltd v The MEC for the Department of Health for the Province of KwaZulu-Natal* (the second bill)

[34] What is sought to be reviewed in the second bill are the following amounts allowed by the Taxing Master:

(a) R634 015.80, being in respect of a perusal by the plaintiff of 2 911 folios at a rate of R217.80 per folio;

(b) R581 526, being in respect of a perusal by the plaintiff of 2 670 folios at a rate of R217.80 per folio;

(c) R835 263, being in respect of a perusal by the plaintiff of 3 835 folios at a rate of R217.80 per folio; and

(d) R674 091, being in respect of a perusal by the plaintiff of 3 095 folios at a rate of R217.80 per folio.

[35] The basis for the defendant's complaint in respect of this bill of costs is that:

(a) the volume of documents perused amounts to a 'bulk perusal' which is generally allowed at a reduced rate on a time basis; and

(b) allowing the perusals at the rate claimed by the plaintiff led to an unfair result.

[36] The facts and circumstances relating to the second bill differ slightly to those pertaining to the first bill as the perusals charged for here were first time perusals and not re-perusals.

[37] I repeat my previous views on 'bulk perusals'. The Taxing Master again asserts that the plaintiff was entitled to the fees charged because there was an agreement in place that defined the amounts that were to be charged. There is, again, no

acknowledgment from her that she has a duty to determine whether the amounts charged were reasonable. She is obliged to do so. The Taxing Master states

'In this present case, the perusal fee was charged according to the agreement entered into by the plaintiff and the defendant and thus the taxing master has no discretion to deviate from the agreement and treat the documents as a batch.'

The Taxing Master is incorrect in this regard for the reasons previously explained.

The bill in the matter of *LK Security Solutions (Pty) Ltd v Member of Executive Council, Health, KwaZulu-Natal* (the third bill)

[38] What is sought to be reviewed in the third bill are the following amounts allowed by the Taxing Master:

(a) R649 915.20, being in respect of a perusal by the plaintiff of 2984 folios at a rate of R217.80 per folio; and

(b) R257 857.20 being in respect of a perusal by the plaintiff of 1 184 folios at a rate of R217.80 per folio.

[39] The basis for the defendant's complaint in respect of this bill of costs is identical to that raised in respect of the first bill of costs, namely that:

(a) the volume of documents perused amounts to a 'bulk perusal' which is generally allowed at a reduced rate on a time basis;

(b) the perusals were of a record which is generally allowed at a reduced rate;

(c) the plaintiff had previously perused the record, had charged for such perusals and had been paid for them, and the further perusal amounted to a re-perusal which was also generally allowed at a reduced rate; and

(d) allowing the perusals at the rate claimed by the plaintiff led to an unfair result.

[40] I point out that the perusal rate is not specified in this bill of costs, but it is a matter of some simplicity to determine it by dividing the amount claimed by the number of folios perused.

[41] The reasoning advanced when considering the first bill is of equal application to this bill and is not repeated.

The bill in respect of case number 10514/16P: *Vusa Isizwe Security Services (Pty) Ltd v HOD: KwaZulu-Natal Provincial Government: Department of Health and two others* (the fourth bill)

[42] What is sought to be reviewed in the fourth bill are the following amounts allowed by the Taxing Master:

(a) R579 783.60, being in respect of a perusal by the plaintiff of 2 662 folios at a rate of R217.80 per folio; and

(b) R405 979.20, being in respect of a perusal by the plaintiff of 1 864 folios at a rate of R217.80 per folio.

[43] The basis for the defendant's complaint in respect of this bill of costs is identical to that raised in respect of the first bill of costs, namely that:

(e) the volume of documents perused amounts to a 'bulk perusal' which is generally allowed at a reduced rate on a time basis;

(f) the perusals were of a record which is generally allowed at a reduced rate;

(g) the plaintiff had previously perused the record, had charged for such perusals and had been paid for them, and the further perusal amounted to a re-perusal which was also generally allowed at a reduced rate; and

(h) allowing the perusals at the rate claimed by the plaintiff led to an unfair result.

[44] It follows, as with the previous bill of costs, that the reasoning advanced when considering the first bill of costs is of equal application to this bill and is not repeated.

Analysis

[45] It appears to me that the Taxing Master misconstrued her position, duties and discretion arising out of the fact that the SLA had been concluded between the parties. She appears to have concluded that the rates outlined in the SLA would inevitably have to be applied because both parties agreed to them. She accordingly failed to use her discretion to consider whether the amounts charged were reasonable in the circumstances of the matter, particularly in the light of the fact that three of the bills of cost related to re-perusals of documents. She therefore did not apply her mind to the matter and disregarded factors or principles which were proper for her to consider. These failures mean that the court must intervene.

Order

[46] In my view the review must accordingly succeed. I therefore grant the following order:

1. The taxation of the four bills of costs taxed by the Taxing Master on 13 April 2021 at the instance of the plaintiff only insofar as they relate to the perusals forming the subject matter of these review proceedings, and which perusals are identified in the notice of review dated 3 May 2021, be and are hereby set aside;

2. The four bills of costs are referred back to the Taxing Master who must tax the perusals forming the subject matter of these review proceedings and which perusals are identified in the notice of review dated 3 May 2021 *de novo* in accordance with this judgment; and

3. The plaintiff is directed to pay the defendant's costs.

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MOSSOP AJ

APPEARANCES

Attorneys for the plaintiff	:	Strauss Daly Inc 9th Floor, Strauss Daly Place 41 Richefond Circle Ridgeside Office Park Umhlanga
Attorneys for the defendant	:	State Attorney Care of Cajee, Setsubi Chetty Inc 195 Boshoff Street Pietermaritzburg