REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA01/2023
QUO CASE NO: 5076/2020

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

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.....

DATE 5/2/25 SIGNATURE [redacted]

In the matter between:

SPORTS TAVERN & RESTURANT	**FIRST APPELLANT**
MOAGABO ELIZABETH MOLAPO	**SECOND APPELLANT**
THE SPORT TAVERN (PTY) LTD	**THIRD APPELLANT**

And

THE EXECUTOR ESTATE LATE SANTOS	**DEFENDANT**

JUDGEMENT

MULLER J:

[1] This appeal, with leave of the court *a quo*, emanates from an order granted by Naude-Odendaal J in a review of a determination made by the taxing master in terms rule 48.

[2] The facts underlying the review before the learned Judge are simple and straightforward. It is common cause that the parties are embroiled in litigation during the course of which the appellants instituted a rule 30 application due to the delivery of a replication by the respondent which was out of time. The rule 30 application was enrolled in the unopposed court for 25 March 2021. The respondent delivered a notice to defend on 24 March 2021. The application was then removed from the unopposed roll to enable the respondent to deliver the necessary opposing affidavits. The respondent failed to do so and the matter was again enrolled on the unopposed roll for 27 July 2021.

[3] When the matter was called before Kganyago J on 27 July 2021 legal representatives appeared on behalf of both the respondent and the appellants. After submissions were made by them, the learned Judge ordered that:

> "1. The matter is postponed *sine die*.
>
> 2. Respondents to file answering affidavit within 10 days from the date of Order and applicant to file reply within 10 days if any.
>
> 3. Respondent to pay wasted costs on party and party scale."

[4] The bill of costs issued by the appellants included only one item, the particulars of which are described as:

> "Attendance at court – matter postponed sine die, (day fee in terms of Rule 69): 1 day R20 000.00."

[5] The appellants argued before the taxing master that no provision is made in the rules for unopposed applications or that there is an applicable tariff in connection therewith. The taxing master allowed an amount of R5 400.00 as well as an amount of R594.00 for attending the taxation and affixed an allocator in the amount of R5 994.00. The allocator brought about review by the respondent before Naude-Odendaal J who made the following order:

> "1. Item 1 of the allocator by the taxing master in respect of the fee charged by an attorney for attendance at court is received (*sic*) and set aside.
> 2. The fee allowed for attendance at the unopposed motion court is R292.00 per ¼ of an hour – 1½ are allowed. The amount allowed by the taxing master in respect of Item 1 is substituted with the amount of R1752-00 (1½ hours).
> 3. The attendance fee allowed by the taxing mater of attendance at taxation is accordingly also reviewed and set aside and substituted with a fee of R192.72 for attendance at taxation.
> 4. No order as to costs for attendance at the review."

[6] The appellants in their heads of argument persisted with the view that the attorney was entitled to a day fee of R20 000.00 as wasted costs. The issue this court is called upon to decide is whether the attorney, and who appeared in the high court to move the unopposed application in terms of rule 30, is entitled to the said day fee.

[7] Rule 70 (Item A10 of the Tariff of Fees of Attorneys) provides that the tariff under rule 69 is applicable to attorneys who appear in the High Court. Rule 69 is silent in respect of a

tariff applicable to attorneys with right of appearance in the high court, and who appear in the high court. The appellants rely on the provisions of Item A10 as justification for the day fee charged on the basis that the rule does not prescribe a tariff and do not differentiate between opposed and unopposed applications.

Rule 69(5) states that:

> "The taxation of advocate's fees as between party and party shall be effected by the taxing master in accordance with this rule and, where applicable, the tariff. Where the tariff does not apply, the taxing master shall allow such fees (not necessarily in excess thereof) as he or she considers reasonable".

It follows from the wording of Item A10, read with rule 69, that attorneys who are admitted to appear in the High Court, where there are no tariff prescribed for their appearances in court, are entitled to equal compensation with advocates when they appear in the High Court.[1] What is intended by Item 10A is that the fees of attorneys performing the functions of advocates in the high court are to be determined in accordance with rule 69 in cases to which the rule applies. And the fees of those attorneys appearing in the high court are not limited to the fees recoverable under the tariff in the magistrate's court (unless the court orders otherwise).[2] A taxing master, in such matters is vested with a discretion, in terms of the common law, to determine the reasonableness[3] of the fee charged by an attorney.[4]

[8] It was held in *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another*[5] that reasonableness of the fee is determined by the taxing master in accordance with the following guidelines:

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[1] *Promine Agentskap en Konsultante Bpk v Du Plessis* [1998] JOL 3912 (T) par 9; *Stubbs v Johnson Brothers Properties CC and Others* 2004 (1) SA 22 (N) 27B; *Stevens NO v Maloyi* 2012 JDR 2548 (ECD) par 19; *Ramuhovhi v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC) par 67.
[2] *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W) par 154.
[3] Reasonableness is a value judgment.
[4] *City of Cape Town v Arun Property Development (Pty) Ltd* 2009 (5) SA 227 (C) 237A-H.
[5] 2010 (5) SA 124 (CC).

"The principles guiding the review of a taxation in this court were settled in President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another:

Costs are awarded to successful party to indemnify it for the expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.

A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.

The taxing master must strike this equitable balance correctly in the light of all the circumstances of the case.

The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.

And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling

To these general principles must be appended one of particular importance in this case.... The principle flowing from this is that time charged is not decisive."

The latter principle also applies to the present case with slight modification in that it is not decisive that the rule does not expressly exclude (or prescribe) a day fee.

[9] The taxing master, regrettably, has failed to explain in the stated case what factors had been considered for arriving at the amount allowed by him. It leaves the court in the dark.

It is settled law that when a court reviews a taxation it may exercise a wider degree of supervision. It was held in In *Wellworths Bazaars Ltd v Chandlers Ltd* that:[6]

"The law, as I can conceive it to be, is that in general the discretion of the Taxing Master will not be disturbed unless it is found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider or by considering matters which it was improper for him

[6] 1947 (4) SA 453 (T).

> to consider, or by giving a ruling which the court can see no reasonable person would have given. That is the general principle. But this principle has had engrafted upon it something else, and that is this: There are certain class of case where the point in issue is a point on which the court is able to form as good opinion as the Taxing Master and perhaps, even a better opinion.[7]

The test was refined in *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* [8] to the extent:

> "...that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him...viz that the Court will not interfere with a ruling made by the Taxing Mater 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." [9]

[10] Despite having indicated in the judgment that the taxing master has to apply certain criteria to determine the reasonableness of a fee, the learned Judge was nevertheless of the view that a tariff of R292.50 per 15 minutes should be applied, simply because there was no proof of an hourly tariff applicable to an attorney for appearing in the high court. The learned Judge erred, with respect, in her determination that a tariff of R292.50 per 15 minutes applies which tariff was neither prescribed by rule 69 nor by the provisions of Item A10. Such determination placed an attorney for doing the same work in a different and subservient category to an advocate who is entitled to charge a reasonable fee, without reference to any tariff for time spent in court. There is in my view no rational basis in law to have differentiated between them.

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[7] 457-458.
[8] 1984 (3) SA 15 (A); *Noel Lancaster Sands (Pty) Ltd v Theron and* Others 1975 (2) SA 280 (T) 282D-283D; *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A).
[9] 18F-G.

[11] This court is in as good position as the taxing master to determine the reasonableness of an attorney's fee for his/her appearance in an unopposed rule 30 application which was postponed. Where the dispute relates to quantum of fees allowed by the Taxing Master, courts are reluctant to interfere with the assessment of the taxing master.[10] The decision of the taxing master should only be reversed if the court is distinctly of the view that the taxing master was wrong.[11] In a border-line case the court should not interfere with a decision, even if the court is of the opinion that it might or even would probably have decided differently in the place of the taxing master.[12]

[12] I do not share the view of the taxing master that a fee of R5400.00 is reasonable for an appearance to move an uncomplicated and straightforward unopposed application in terms of Rule 30. If placed in the shoes of the taxing master I would have been inclined to regard a fee of R3500 as being reasonable. The difference between the fee determined by this court as reasonable and the fee arrived at by the taxing master is of such a degree that this court, should interfere on appeal with the determination of the taxing master.[13]

[13] I do, however, share the view of the learned judge *a quo* that the fee of R20 000.00 is egregious overreaching. It is difficult to comprehend that the attorney could have been of the opinion that such a fee is reasonable because the rule is silent in respect of a tariff. A moments' reflection would have revealed to any seasoned practitioner that there is a discernable difference between the work and preparation of an unopposed application (which in all probability was drafted by the attorney who appeared in court) and one where opposing papers and a reply had been delivered.

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[10] *President of the RSA v Gauteng Lions Rugby Club* 2002 (2) SA 64 (CC) par 14.
[11] *Bensusan v Sterling and Mockford NO* 1930 WLD 303; *Schoeman v Phoenix Assurance Co Ltd and the Taxing Master* 1963 (3) SA 742 (E).
[12] *Mahomed v Bezuidenhout* 1948 (4) SA 369 (T) 372.
[13] Section 19(d) Act 10 of 2013.

[14] It also needs to be recalled that Kganyago J specifically ordered that the respondent pays the "wasted costs" occasioned by the postponement of the application which was duly enrolled for hearing on an unopposed basis.[14] The wasted costs in this matter are the costs attended to setting down of the application and the costs in respect of the appearance in the unopposed motion court. The purpose of the costs order is to indemnify the appellants for their expense, within reasonable bounds, for having the application postponed. The costs of the action will only become relevant when the application is finally disposed of.

[15] There is a perception by the public that legal costs are spiraling out of reach. This is also by no means an isolated case. The Constitutional Court in *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*[15] remarked:

> "We feel obliged to express our disquiet how counsel's fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.
>
> No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market related rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear."[16]

[16] It is apposite in this regard that reference be made to the judgment of Wallis JA in *General Council of the Bar v Geach and Others*:[17]

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[14] *Jowell v Behr* 1940 WLD 64, 64.
[15] (CCT76/12 [2012] ZACC 17.
[16] Par 10 -11.
[17] 2013 (2) SA 52 (SCA).

> "Overreaching involves an abuse of the person's status as an advocate, to take advantage for personal gain of the person who is paying them. Advocates enjoy considerable advantage in setting a fee. They know what standards are applicable to the charging of fees; they know what work has been done on the brief and what time and effort has gone into that work; they know in broad terms the fees charged by advocates of comparable seniority and ability for similar work. This creates what economists call information asymmentry between the advocate and the client and even the attorney, one of whose functions is to ensure that the advocate does not claim or be paid unreasonable fees"[18]

These remarks are well grounded and are applicable to attorneys who appear in the high court. When it was put to the representative of the appellants that the fee which was charged is unreasonable and amounts to overreaching, he argued that it is not. He contended that the difference lies in the attorney and client fee that the attorney charges his client.

[17] Making the high court accessible to attorney's widened access to the high court, but not necessarily cheaper. An attorney who acts as an advocate in the high court is also subject to the rules applicable to counsel. Such attorney bears a heavy responsibility because, unlike in the case of an advocate, there is prior to taxation no internal scrutiny of his/her fees by the instructing attorney pertaining to the reasonableness of the fee.

[18] A taxing master bears the responsibility in unopposed matters, where applicable, to determine the reasonableness of the fees charged by legal representatives. Taxing masters are at the coalface. They are privy to the bill of costs and supporting documents and are eminently best suited to determine whether a legal representative has *prima facie* overreached. The time has come to make it obligatory for a taxing master to report such

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[18] Par 132.

legal representatives to the registrar who must report them to the Legal Practice Council to take further steps, if it is deemed necessary.

[19] It is to be noted that rule 69 has been amended as from 12 April 2024. A new Rule 67A was also introduced at the same time. The appeal, notwithstanding the amendment, has to be considered in terms of the applicable law as at 17 February 2022, which is the date of the *allocator* fixed by the taxing master.

[20] The question of costs remains. The appellants requested that they be awarded the costs of the appeal. I do not agree. I have alluded to the fact that the appellants in the heads of argument asked for the allocator to be amended to R20 000.00. The legal representative of the appellant argued that that the appellants accepted the reduced amount set by the taxing master. That was not the position as I have indicated. Although the appellants are successful in the appeal they should not benefit from the fact that this appeal is the result of a fee charged that was wholly unreasonable from the very start and their persistence that it was reasonable despite the finding of the court *a quo,* that it was not.

[21] It is also deemed appropriate to forward the judgment to the Legal Practice Council for consideration and to take steps, if necessary. In the result the following order is made.

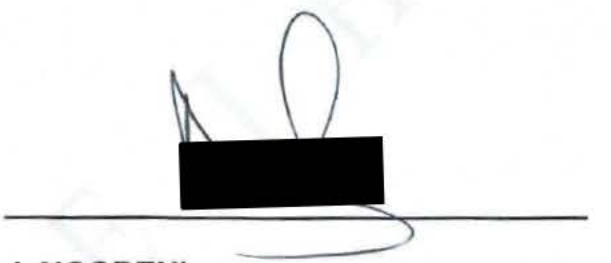
ORDER

1. **The appeal is upheld.**
2. **The order dated 24 October 2022 is set aside.**
3. **The allocator of the Taxing Master dated 17 February 2022 is amended to the extent that the amount of R3 500.00 is substituted for the amount of R5 400.00 and the amount of R385.00 is substituted for the amount of R594.00 in respect of the attendance of the taxation: Grand Total R3 885.00.**
4. **There is no order as to the costs of the appeal.**
5. **A copy of this judgment is to be brought to the attention of the Registrar and is to be forwarded to the Legal Practice Council: Polokwane for consideration and appropriate steps, if deemed necessary.**

G.C MULLER

JUDGE OF THE HIGH COURT,

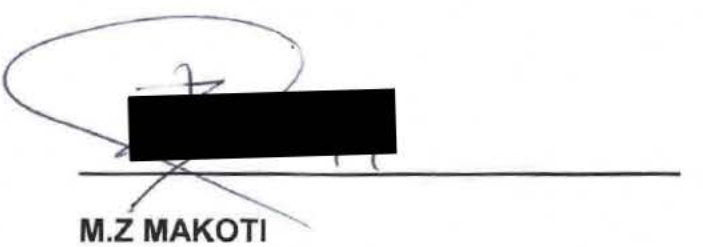
LIMPOPO DIVISION, POLOKWANE



J. NGOBENI

JUDGE OF HIGH COURT

LIMPOPO DIVISION, POLOKWANE



M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPELLANTS : L.M MABOTJA

INSTRUCTED BY : MAKWELA & MABOTJA ATTORNEYS

FOR THE RESPONDENT : ADV M.J KLEYN

INSTRUCTED BY : EHLERS LAW INCORPORATED

DATE OF HEARING : 24 JANUARY 2025

DATE OF JUDGEMENT : 05 FEBRUARY 2025.