Reportable:	**YES / NO**
Circulate to Judges:	**YES / NO**
Circulate to Magistrates:	**YES / NO**

IN THE HIGH COURT OF SOUTH AFRICA
Northern Cape Division, Kimberley

Case numbers: 973A/2013;
1389/2013;10A/B/2014; 2064/2013

Date heard: **17/06/2016**
Date available: **01/07 /2016**

In the matter between:

NAMA KHOI LOCAL MUNICIPALITY **APPLICANT**

And

MEC: NORTHERN CAPE PROVINCIAL GOVERNMENT **RESPONDENT**

JUDGMENT IN RESPECT OF THE REVIEW OF TAXATION

Phatshoane, J

[1] This is an application for the review of a taxation in terms of Rule 48 of the Uniform Rules brought by Nama Khoi Local Municipality in respect of the four bills of costs presented by Cornelissen Incorporated and taxed on an attorney and own client scale by the Taxing Master. The application initially served before me through a Chamber Bench-book. I referred it to an open Court in terms of Rule 48(6) and directed that the parties file heads of argument; pursuant to which it was set down in the

Motion Court of 17 June 2016. Adv Stanton, for Nama Khoi Municipality and Duncan & Rothman Attorneys, handed in Court a Notice to abide the decision of the Court by Cornelissen Inc.

[2] The four bills of costs in issue are in respect of the following four matters (Case Nos): 973A/2013; 1389/2013; 10A/B/2014; and 2064/2013. Nama Khoi Local Municipality was involved in them either as an applicant or a respondent together with others.

[3] The background to the stated case by the Taxing Master is as follows. Cornelissen Inc instituted action against the Municipality under Case No: 1553/2014 for the recovery of its legal fees in respect of the various matters highlighted above. It later filed an application for summary judgment. The Municipality resisted it on the basis that the bills were not liquid documents and that the remuneration for services rendered was not for "a liquidated amount in money" because it was not readily ascertainable. It was further contended that neither Mr Joshua Losper nor Mr Nevie Aubrey Baartman, who were cited as either the respondents or the applicants in some of the four matters, were authorised to engage the services of Cornelissen Inc. The Municipality, it was contended, had already paid this firm an amount of R3 649 545.31 for the various application and that there was a possible duplication of the accounts.

[4] Cornelissen Inc withdrew the above action and the application for summary judgment. It tendered the defendant's costs of the suit. On 18 August 2015 it served the Notice of Intention to Tax the Bill of Costs on the Municipality and Duncan & Rothman Attorneys.

[5] Mr Johannes Gerhardus Steyn of Duncan & Rothman Attorneys deposed to an affidavit in support of the review of taxation in terms of Rule 48(1). He intimates that he acted on behalf of Nama Khoi Local Municipality in all the four applications as the Kimberley correspondent of Schreuders Attorneys of Springbok. On a cursory inspection of the four files, it

appears that, Cornelissen Inc also acted for the Municipality in the four matters.

[6] On 02 September 2015 Mr Steyn served and filed a notice of objection in respect of the notice of taxation for every item in the four bills of costs. Firstly, on the basis that the tariff in terms of which these bills of costs were drafted was not based on any agreement between Cornelissen Inc and the Municipality. Secondly, that the items as quantified could not be taxed. Thirdly, the taxation was premature and the bills were accordingly non-taxable.

[7] The proper procedure relating to an application for the review of taxation of a bill of costs is to give specific notice of each item objected to and the grounds on which it is sought to bring such items under review. It is not sufficient merely to set out that all the items disallowed by the Taxing Master will be reviewed. The respondents are entitled to know the exact case they have to meet on review. See *S.A. Milk Products Ltd v Furniss Ltd and Others* 1921 WLD 86; *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd)* 1999 (4) SA 503 (W) at 512D-G.

[8] On 17 September 2015 the bills were presented for taxation at which proceedings Duncan & Rothman again objected to the taxation thereof on the aforesaid basis. Mr Steyn says that he suggested that Cornelissen Inc file an application for declaratory order (the terms of which are unspecified) and that the Court be requested to determine whether a fee agreement existed between Cornelissen Inc and the Municipality and if so whether Cornelissen Inc was entitled to costs on an attorney and own client scale.

[9] The Taxing Master taxed the bills and affixed his *allocatur* thereto. On 08 October 2015 he was requested by Duncan & Rothman to provide a stated case for a decision by a Judge in terms of Rule 48(1) why his

decision to attend to and finalise the taxation of the four bills should not be regarded as pre-mature and therefore reviewed and set aside. In his stated case the Taxing Master recorded the following:

"1. On 17 September 2015, the Applicants' Attorneys [Cornelissen Inc] presented an Attorney and own client bill for taxation. The applicants [Nama Khoi Municipality] instructed a local firm [Duncan & Rothman] to oppose the taxation on their behalf.

2. The Applicants' attorneys [Cornelissen Inc] argued that, even in the absence of an agreement to fees, they are entitled to charge fees higher than the fees prescribed in the tariff. The applicants [Nama Khoi Municipality] argued that the tariff on which the bills of costs were drafted is not based on any agreement between the Attorneys and the Applicants. The items as quantified can therefore not be taxed and the Taxation is premature and the bills of costs are not taxable, thus the argument. The Applicant further argued that the Applicants' Attorneys[Cornelissen Inc] should file an application for a declaratory order to determine whether a fee agreement came into existence, and whether the Applicants' attorneys are entitled to attorney and own client fees.

3. After having heard the arguments, a ruling was made that the Bill(s) will be taxed on the prescribed tariff as stipulated in Rule 70, on the Attorney and own client scale. This is the costs that an attorney is entitled to recover from his own client. This does not depend upon an award for costs being made in the attorney's favour.

4. A review notice of taxation in terms of Rule 48(1) has been filed by the Applicant. In short: the Applicant requests the Taxing Master to provide a stated case explaining why his decision to attend to and finalise the taxation should not be regarded as premature and therefore reviewed and set aside.

5. It is common law that the Applicants' attorneys cannot issue summons before he proves the amount by way of a taxed bill.

6. The Applicants rely on the fact that the Taxing Master has no power, nor is it his duty, to hear evidence in order to resolve any possible defences such as that clarity must be obtained from the Court to determine whether a fee agreement came into existence.

7. In paragraph 11 of the affidavit to the notice of review, the Applicants wrongly indicate that the Taxing master proceeded to tax on a party and party scale. This is not correct. As mentioned hereinabove, it was taxed on an attorney and own client scale.

8. The Applicants' Attorneys conceded that there was no agreement; also that the Applicants indicated that they do not know whether an agreement

came into existence. If the Applicants indeed rely on what is stipulated in paragraph 6 hereinabove, this review has been brought under the wrong Rule. (See Rule 53).

9. In the circumstances of this particular taxation and within the boundaries of reasonableness and in the interest of justice, the decision to tax the bills on the tariff as prescribed in Rule 70 was correct. It was done to prevent any injustice to the Applicants' Attorney."

[10] Cornelissen Inc made submissions in terms of Rule 48(5)(a)[1]. Largely these are in support of the ruling made by the Taxing Master. They conceded that no written fee agreement was concluded between them and their client. They further submitted that the taxation was not premature; it was essential to have the bills taxed to dispel any perceptions of overreaching the client and to obtain a liquidated amount or a quantified bill of costs.

[11] In *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) at 73 para13 Kriegler J restated the legal principle on review of taxation as follows:

"It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ in the JCI [*Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111] case. This means:

' . . . 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 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'.

[12] Duncan and Rothman did not clearly define the grounds of objection as required in Rule 48(2)[2]. On perusal of the application and the stated case

[1] Rule 48(5)(a) provides: The parties to whom a copy of the stated case has been supplied, may within 15 days after receipt thereof make submissions in writing thereon, including grounds of objection not raised at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed *mero motu* by the taxing master.

[2] Rule 48(2) requires that the notice calling upon the Taxing Master to present a stated case for a decision by a judge set out the following: (a) identify each item or part of an item in respect of which the decision of the

what appears to be an issue arising for consideration is whether in the absence of a fee agreement between Cornelissen Inc and the Municipality, Cornelissen Inc was entitled to recover the fees from their client on an attorney and own client scale. This contention is captured as follows in the affidavit of Mr Steyn:

> "6.1 The Municipality disputes that Cornelissen is entitled to attorney and own client fees as no fees agreement was entered into in terms of which Cornelissen (sic).
>
> 6.2 **In the absence of any fee agreement, Cornelissen is only entitled to fees on a party and party scale**."

[13] The above statement by Mr Steyn is repeated in para 10.3 of the founding affidavit. It is also apparent from the Taxing Master's stated case that he was not enjoined to determine the validity or otherwise of the fee agreement between Cornelissen Inc and the Municipality. In any event, it is common cause, such an agreement is non-existent.

[14] A Taxing Master has a discretion to award costs as appears to him or her to have been necessary and proper. In *Botha v Themistocleous* 1966 (1) SA 107 (T) at 111 it was held that a Taxing Master is virtually in the position of an arbitrator or referee appointed to assist the Court in determining what the just remuneration should be for an attorney's services in any particular case. Proof to his satisfaction means that he should satisfy himself on such evidence as may be reasonably necessary for the purpose of ascertaining whether a fair probability exists that the services were actually rendered. The Taxing Master discharged his obligation and awarded costs on an attorney and own client scale as he deemed meet in the circumstances of this case. In *Ben McDonald Inc*

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taxing master is sought to be reviewed; (b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the taxing master; (c) contain the grounds of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and (d) contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof.

and Another v Rudolph and Another 1997 (4) SA 252 (T) at 256 the Court defined attorney and own client costs as follows:

> "These are costs allowed on taxation of an attorney's bill to his own client. They include all costs except when unnecessarily incurred or of an unreasonable amount. Costs incurred with the express or implied approval of the client are presumed to have been reasonably incurred and where the amount has been agreed upon it is presumed to be reasonable. It will, however, be open to the client to show that he was misled or acted under a misapprehension when granting his approval."

[15] In *Mahomed v Mahomed* 1999 (1) SA 1150 (E) at 1152C-E it was held that:

> "Rule 48(2) does provide for a hearing of sorts: it states that the Taxing Master shall lay the papers before a Judge, who may then decide the matter upon the case and the contentions submitted to him, together with any further information which he may require from the Taxing Master; the Judge may also hear the parties or their advocates or attorneys in Chambers. **However, such hearing relates to and is limited to proceedings in terms of Rule 48. The Judge's competency therefore does not extend beyond reviewing the taxation**." (my emphasis)
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> See also *Brener NO v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (formerly D'Arcy Masins Benton & Bowless SA (Pty) Ltd)* (Supra) at 519C-D

[16] Belatedly in heads of argument by the Municipality an attempt is made to raise lack of authority or mandate by Cornelissen Inc to have acted on behalf of the Municipality. In support of the contention that I should review and set aside the Taxing Master's ruling to tax the bills due to lack of a mandate, Ms Stanton, for the municipality, relied on the following dictum in *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C) at 682F-I paras 24-25:

> "[24] Whilst it may be the duty of a Taxing Master to interpret the effect of an agreement recording an undertaking to pay taxed costs (see *Miller v Edenburg and the Taxing Master* 1938 TPD 445) a decision regarding the validity or otherwise of the agreement in which the obligation to pay the costs that are to be taxed is sourced, in my view, falls outside the ambit of a Taxing Master's powers and functions: it is an aspect that should be decided by the Court.
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> [25] If the Taxing Master, in arriving at the conclusion to apply the non-litigious scale of the Law Society, did in fact make a decision on the legality of the agreement of 9 January 1998, he clearly acted beyond his competence. If he

did not make any decision regarding the legality/illegality of the said agreement and proceeded with the taxation, as is common cause he did, well knowing that a dispute existed as regards whether the taxation was to take place pursuant to the terms of the written agreement or an oral mandate, he was in error. In either event, after the Taxing Master has affixed his *allocatur* to the bill of costs, the taxation could be brought on review in terms of Rule 48(1) (if the dispute falls within its ambit), or the common law or the illegality of the said agreement on which the taxation was based could be raised as a defence in the trial (see *Lubbe v Borman* [1938 CPD 211] (supra)) in which the amount that is payable in terms of the taxed bill of costs is claimed."

[17] As already alluded to, the review of taxation was not predicated on Cornelissen Inc's lack of mandate to act on behalf of the municipality. *Berman & Fialkov* supra is therefore distinguishable. In my view, the question of lack of authority may be raised as a defence in a subsequent action, should such a course be pursued. The municipality did not demonstrate that the Taxing Master's decision was wrong. I can conceive of no reason to upset same. It follows that this review must fail.

[18] Even though Cornelissen Inc filed notice to abide they made written submission in terms of Rule 48(5)(a). They should not be out of pocket. The upshot of this is that costs should follow the success. In the result I make the following order.

ORDER:

1. **The application to review and set aside the Taxing Master's decision to tax the four bills of costs under Case Numbers: 973A/2013; 1389/2013; 10A/B/2014; and 2064/2013 is dismissed with costs.**

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MV PHATSHOANE J

On behalf of the applicant: Adv A Stanton (instructed by Duncan & Rothman Attorneys)