THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 1086/2018

In the Rule 17 Review of Taxation between:

R H CHRISTIE INCORPORATED **APPLICANT**

and

TAXING MASTER – SUPREME COURT OF APPEAL **FIRST RESPONDENT**

MONTANARI: CHARMAINE HELEN **SECOND RESPONDENT**

In re:

MONTANARI: CHARMAINE HELEN **APPELLANT**

and

MONTANARI: EMILIO PIETRO VALFREDO **RESPONDENT**

Neutral citation: *R H Christie Incorporated v Taxing Master – Supreme Court of Appeal* (1086/2018) [2021] ZASCA 152 (27 October 2021)

Coram: NAVSA ADP

ORDER

1 The review is successful only to the extent reflected in paragraphs 59 to 62 of this judgment.

2 There is no order as to costs.

3 The allocator is remitted to the taxing master to be redrawn on the basis set out in this judgment.

JUDGMENT

NAVSA ADP

[1] This is a review of taxation referred for decision in terms of the Rules of this Court. The bill of costs in question was in respect of an appeal related to divorce proceedings and involved the circumscribed novel question of whether the value of the second respondent's spouse's Living Annuities was to be included in an accrual calculation. The fee relationship between the applicant, R H Christie Incorporated, and the second respondent was between attorney and own client and the taxing master was required to tax it as such.

[2] The appeal process included seeking leave to appeal in the Gauteng Division of the High Court, Johannesburg and then an appeal before the full court of that division, and finally an appeal, following on a petition, in this Court. Z F Joubert SC was instructed to represent, as counsel, the second respondent in the appeal in this Court. The mandate to do so was given on 16 December 2016 at a meeting involving a Director, an Associate, and counsel. The latter flew from Cape Town to O.R Tambo

International Airport for the meeting, which took place at Edenvale. Counsel was retained until finalisation of the argument before this Court on 7 November 2019.

[3] It is uncontested that at the meeting aforesaid an hourly rate of R3 600 for counsel was agreed (excluding VAT). Senior counsel was only involved in the appeal in this Court and not in prior proceedings. The divorce proceedings are pending in the trial court. It appears that the only issue on appeal was the one identified in paragraph 1 above.

[4] The taxing master taxed off a significant amount from counsel's invoices. He disallowed and taxed off disbursements related to travelling and flight costs incurred by the applicant in the prosecution of the appeal. Furthermore, the taxing master taxed off items connected to a condonation application. Lastly, the taxing master disallowed a list of general items which included communications between the applicant and counsel, between applicant and correspondent attorneys, perusal of documentation, communication between applicant and opposing legal representatives, and attendances. I shall, in due course deal with each of the items in question. The matters set out in this paragraph are the subject of the review. Most of what appears immediately hereafter is taken from the stated case.

Counsel's fees

[5] In respect of counsel's fees, item 145 in an amount of R86 857.20 was reduced by taxing off R56 842.20, on the basis that counsel had been allowed the full R39 330 for preparing the heads of argument on item 130, and an additional 10 hours to attend to 18 pages of heads of argument and 3 hours on a practice note. Items 299 and 300 for an amount of R11 385 was disallowed. In relation to item 403 an invoice in an amount of R173 134.80 was reduced by R48 934.80, which was for 20 hours work and a day's fee. The taxing master accepted that counsel's rate was agreed with the second respondent but insisted that what was disallowed was fair.

Travelling costs

[6] In relation to travelling costs under item 138, which involved flying a candidate attorney to Bloemfontein to ensure filing of papers, the taxing master disallowed them on the basis that the disbursement for a flight to Bloemfontein was not 'substantiated'.

The taxing master took the view that the documents that were flown down by someone from the applicant's offices, ought rather to have been sent down by courier for attention by correspondent attorneys. The same pertains to item 195, which was for travelling costs to Bloemfontein to file heads of argument. In respect of item 404, the taxing master stated as follows:

'The flight fee of R53 and the disbursement of R6757.84 was disallowed as there was no need for counsel to fly to Bloemfontein because it was not the day of the hearing and this is not the cheapest way of litigation. The flight was on 4 November while the hearing was on 7 November.'

Item 421, which comprised motor vehicle travelling costs to Bloemfontein at the rate of R14.22 per km, was disallowed because 'no proof [was] furnished'. The total claimed was R12 027.28, which is more than twice the return cost of travelling by aeroplane. This was reduced by allowing only R4.50 per km. The item was thus reduced by R8 221.18.

Condonation application

[7] The disallowed items in relation to the late filing of the appeal record, were items 151 to 164 and items 171 to 176, which relate to confirmatory affidavits connected with the condonation application. The taxing master recorded that this was disallowed on the basis that the application for condonation was necessary because of a systems failure at the applicant's offices. It involved data losses and data breaches. He noted that the record was required to be filed by the Applicant by 19 March 2019, and that work on this commenced on 17 January 2019, and that only one volume was filed timeously and that the remaining two volumes were filed late, for which the second respondent was not responsible and in respect of which she ought not to be liable.

[8] Items 177 and 178, in respect of copying and arranging and perusing the record of appeal – eight hours were allowed for a candidate attorney instead of the fee for an attorney and the cost of 10 copies, instead of 11, was allowed and R423.50 was taxed off.

General Items

[9] Many items were disallowed which bore on the condonation application, namely, items 221-232, 234 – 242, 264-268, 270-273, 275-277, and items 141 and 142.

[10] Items 4 and 5 were considered a duplication of item 13 – in relation to a letter to counsel. On Item 10, the fee allowed for instructions from client was reduced from R789 to R520.

[11] Item 25 was for a letter to the correspondent attorney. It was considered by the taxing master to be a duplication of item 24 and adjudged to be a case of over-caution.

[12] Item 35 for perusing lodgement letter (57 pages) was reduced to allowing only the letter and the filing page, which the taxing master deemed was all that was required.

[13] Items 49, 50, 51 and 52 comprised; a letter to counsel advising that the petition to the SCA had been lodged timeously; a further email to counsel the same day and two letters on separate occasions on the same day to the correspondent. Amounts were taxed off as unnecessary piecemeal instructions.

[14] In respect of items 65 and 66, the taxing master adopted the attitude that item 65 was for the applicant writing to counsel stating that no further affidavit to an answering affidavit was required, only to be followed a week later by the applicant drawing a replying affidavit, rendering the prior communication as unnecessary and wasteful.

[15] In relation to items 103 and 104, which were in relation to two letters to the second respondent on the same day for communications with the second respondent ‘attaching Court Order’. These were disallowed by taxing master on the basis that they were a duplication of items 95 and 96. The latter items were in respect of communications with the second respondent attaching the court order.

[16] The taxing master had regard to items 108 and 109, which were for letters to counsel on the same day, the first of which attached indices to the record for his attention. He disallowed these disbursements on the basis that the complete record had already been sent to counsel under item 131.

[17] Under item 116, which was for copies, the taxing master disallowed costs relating to an 11th copy which he considered unnecessary. The taxing master took the view that item 117 was in connection with a core bundle which was not proceeded with and disallowed it. The claim was described as 'Attendance to receive letter from Schindler's with attachments to be included in the Proposed Core Bundle'. Items 121 and 122 were disallowed on the same basis. Item 121 read as follows:
'Letter to Counsel advising that the Respondent's attorneys wish to include Certain documentation in the proposed core bundle'.

[18] Items 135, 136 and 137 were in connection with precedents of heads of argument, as examples for counsel to follow. The taxing master questioned why counsel, who is the expert, required these. The items were all disallowed.

[19] Item 205 was for perusal of lodged heads of argument, list of authorities, practice note, condonation application, court stamp and signature, for which an amount of R7 685 was claimed. The taxing master took the view that when Bloemfontein correspondents send proof of service, they only send the necessary pages which were stamped and signed by the court. There was thus no need to send all the items said to be perused.

[20] In respect of items 209 and 210, which were for perusing a courier's invoice and attending to pay for it, the taxing master ruled that there was no need to courier to counsel the heads he had already drafted.

[21] Items 211 and 212 involved the sending of heads of argument to the second respondent. These were considered by the taxing master to be duplications of items 206 and 207.

[22] Items 280 and 281 bore on communications with counsel, advising that a date for hearing had not been allocated. That, according to the taxing master, had been catered for by item 287, which was a communication with counsel advising of a date for hearing.

[23] Items 299 and 300 were already dealt with under counsel's fees above. In relation to items 306, 307, 410 to 416 the taxing master insisted that they were not explained or substantiated.

[24] In respect of item 422, for attendance at court for 5 hours, the taxing master indicated that he only allowed 3 hours, which was the actual duration of proceedings in court.

[25] The taxing master listed items 460, 461, 462, 463, 463(2), 464, 467,468, 469,470, 471 and 472 as being unjustified as they related to a time after applicant's mandate had been terminated.

The applicant's contentions

[26] The applicant began by accusing the taxing master of failing to appreciate that he was required to tax the bill presented on an attorney and own client scale, and that he had mistakenly dealt with it on the attorney and client scale. The applicant insisted that the taxing master had erred by concluding that it had treated the second respondent improperly and unfairly.

[27] The applicant was adamant that the appeal involved 'various complexities and was novel in nature. . .', more particularly, because of a 'prior decision of the Supreme Court of Appeal . . .'. The applicant pointed out that 'new law' had been made. It recorded its dismay at the 'enormous reduction' that ensued due to the mistaken 'conclusion' that the matter was not one of great complexity. It was stressed that the second respondent had obtained success due to the endeavours of senior counsel. Reliance was placed on the second respondent's undertaking to pay, on which the first respondent relied, and that he would be required to make good the shortfall. This so, it was contended, was egregious conduct on the part of the second respondent.

[28] The applicant pointed out that no objections had in the past been raised by the second respondent in relation to fees, that fees had been paid at intervals, and that on 19 November 2019, the second respondent had undertaken to pay all amounts due to counsel by the end of January 2020. This, the applicant contended, was an acknowledgement of indebtedness and was a concession that the fees charged were reasonable. The second respondent subsequently terminated applicant's mandate.

[29] It was contended on behalf of the applicant that the taxing master had failed to consider that by virtue of the fee agreement reached with the second respondent, counsel and the applicant were entitled to a full indemnity and thus erred when he assessed reasonableness. The applicant referred repeatedly to the complexity or extraordinary nature of the appeal, which resulted in the incurring of costs beyond what was allowed by the taxing master. Furthermore, so the applicant contended, the Cape Bar had confirmed that the rate charged by senior counsel was reasonable. The disallowance of the fees of counsel was labelled arbitrary and reviewable.

[30] In relation to disallowing the disbursement involving the flight from Cape Town to Bloemfontein in the amount of R 6 757.84 (item 404), the applicant pointed out that this was payment in advance for counsel to have flown from Cape Town to Bloemfontein and that he did so to attend at the hearing of the matter and contended that the disallowance of this amount was incomprehensible.

[31] In connection with the disallowance of the flight costs for someone from the applicant's office to file documents in Bloemfontein, under items 138 and 195, the applicant contended that the record would not have been filed timeously if a courier had been used and that the applicant had acted in the second respondent's best interests.

[32] In respect of the application for condonation, the applicant submitted that it was necessary to protect the second respondent's interest and that the applicant itself was not to blame for the system's failure at its office. It was contended that at least the costs of preparing and filing the bundles should be allowed.

[33] The applicant pointed out that items 4 and 5 were not a duplication of item 13. It explained that the communication was to alert counsel to the judgment handed down by the high court, which was attached for counsel's attention. This, they stated, was separate from item 13, which was in relation to the notice of motion and founding affidavit, which was sent to counsel for settling and correction.

[34] In relation to item 35, which it will be recalled was for perusal of 57 pages, the applicant contended that it was necessary to ensure that the correct documents were filed and that it was work performed by the applicant for which it should be entitled to remuneration.

[35] The applicant responded to the taxing master denying items 49,50, 51 and 52, referred to in para 14, because he considered it unnecessary piecemeal communications, by stating that it shows the extent of the work done on the second respondent's behalf.

[36] On items 65 and 66, dealt with at para 15 above, where the taxing master would not allow the costs of what he considered unnecessary and conflicting communications, for which the second respondent should not be held liable, the applicant submitted that the work that was done was to protect the second respondent's interests.

[37] In respect of items 103 and 104, which the taxing master disallowed because it was considered a duplication of items 95 and 96, the applicant contended that that they did not only concern the court order but were an update regarding the compilation of the record.

[38] There was no retort to the taxing master's reasons for disallowing items 108 and 109, and 116, referred to in paras 16 and 17 above.

[39] With regard to items 117 and 118, which related to interaction with the opposing attorneys, the applicant pointed out that it was common practice that all correspondence from opposing attorneys must be perused and considered. The attachment received from the opposing side comprised 90 pages. The applicant

insisted that these costs were justified even if the concept of a core bundle had been abandoned.

[40] There was no response to the disallowance by the taxing master of items 135-137, which were costs related to providing counsel with precedents of heads of argument.

[41] In connection with item 205, which the taxing master largely disallowed on the basis that the perusal ought to have been limited to a perusal of only the pages that were stamped for proof of service, the applicant submitted that perusal was necessary to ensure that the correct documents were filed.

[42] In relation to items 209 and 210, involving the perusal of a courier's invoice and attending to pay for it, which were disallowed on the basis that there was no need to courier to counsel a set of heads of argument which he already had, there was no specific response.

[43] In relation to items 211 and 212, which were disallowed on the basis that it was a duplication of items 209 and 210, there was no response by the applicant.

[44] Regarding items 280 and 281, advising counsel that a date for hearing had not been allocated, which were disallowed on the basis that counsel had later been advised of a date of hearing and that costs had been awarded under item 287, the applicant contended that they were distinguishable in that the latter item attached the notice of set down.

[45] In connection with items 306 and 307, disallowed on the basis that there was no proof or substantiation, it was submitted on behalf of the applicant that that the courier's invoice had been provided and that it was in relation to the appeal record being sent to counsel.

[46] Items 410-416 were disallowed on the basis that they had not been substantiated and proved. It was contended that these items pertained to correspondence with the correspondent and opposing attorneys and that they were

clearly identified as such in the bill. It was submitted that had the taxing master required proof of the correspondence he could have asked for it.

[47] In relation to item 422, which was for time in court on the day of the hearing and in relation to which the taxing master allowed only three hours, instead of five, the applicant indicated that the additional two hours included waiting time.

Second respondent's contentions

[48] It was submitted on behalf of the second respondent that she found herself in an impecunious position, which the applicant was aware of, and thus should have been more conscientious and diligent in relation to incurring costs. She had made payments to the applicant in respect of high court proceedings, so it was said, with a layperson's understanding of her right to challenge fees and disbursements. She only became aware of this right after the applicant's mandate was terminated and after she was so advised by her present legal representatives, and consequently appointed a costs consultant for advice.

[49] In relation to the condonation application, the second respondent was adamant that it was totally unreasonable to lay those costs at her door. She pointed out that the applicant had been ordered to file the appeal record four months hence, it was against these circumstances that the raising of fees for the condonation costs must be viewed.

[50] In relation to counsel's fees being reduced, the second respondent pointed out that certain items had to be read together. Item 29 comprised an amount for 4 hours in an amount of R 16 560. Item 130 related to counsel's invoice in an amount of R39 330, which comprised 8.85 hours. Item 300 related to 2.75 hours, in an amount of R11 385. Item 299 was the applicant's costs in relation to the perusal of counsel's invoice. In respect of item 403, counsel levied an invoice in an amount of R173 134.80, which encompassed a further 31.82 hours of preparation. Counsel had already been compensated for items 29, 130 and 145 for preparing, drafting, and settling papers and heads of argument. The taxing master in considering item 403 took the view that a globular amount of 20 hours preparation time was warranted. It was for this reason that items 299 and 300 were taxed off and item 403 was reduced by R48 934.80, allowing 20 hours preparation time plus counsel's day fee.

[51] In relation to item 145, counsel's invoice included items related to the condonation application, which it was contended were correctly disallowed. A further fee in relation to the heads of argument was allowed, allowing counsel to be compensated for 10 hours on heads of argument, which was over and above the further 20 hours preparation time allowed at Item 403. In relation to the payment for counsel's flight catered for in item 404, the second respondent contended that no proof had been supplied.

[52] In respect of flying a candidate attorney to Bloemfontein to attend to the filing of a volume of the record, the second respondent allied with the taxing master, by stating that it was unwarranted and amounted to over-caution. That duty ought to have been seen to by the correspondent attorney.

[53] In relation to the costs related to Mr Christie driving to Bloemfontein, the second respondent noted that no prior proof of disbursement was provided at the time of taxation. Subsequently, on review, it was confirmed that Mr Christie drove to Bloemfontein. However, the taxing master, in ensuring that what was allowed was fair and reasonable, had allowed a lesser rate allowing a total of R3 806.10.

[54] In sum, the second respondent submitted that it is trite that all disbursements and fees occasioned by duplication, and/or overcaution, and/or extravagance and not in the most cost-effective manner, are not recoverable even as between attorney and own client.

Conclusions

[55] What test is a court to apply when it is considering whether to interfere with a ruling by the taxing master? Where he or she has acted mala fide; or from ulterior purpose or improper motives; or has not applied his mind to the matter or exercised his discretion at all; or if he disregarded regulatory prescripts, a court will be bound to

interfere. A court will interfere if it is satisfied that the taxing master was clearly wrong.[1] Of course, the court will only interfere when it is in the same or better position than the taxing master to determine the issue.[2] This Court has stated it will only interfere when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate his ruling.[3]

[56] In relation to an attorney and own client bill the law is settled. As far as expenses are concerned, that which has been specifically agreed, expressly and impliedly, may be recovered. That too, is qualified. A taxing master has a discretion to disallow certain expenses where an attorney has overreached his client or has been negligent or mala fide.[4] Overreaching means, in the context of an attorney and client relationship, inter alia, the extraction of a fee that is unconscionable or excessive.[5] As stated in *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*,[6] our legal system does not allow a taxing master to draw, tax and allow a bill of costs that will impose an unjust liability on a costs debtor.[7] It is against the principles referred to in this and the preceding paragraphs that the present review must be adjudicated.

[57] The applicant confuses the agreement of an hourly rate for counsel with the question of whether the expenses were normal or usual or, whether the expenses fell within what might have been authorised.

[58] Prior payment of accounts, without objection by an uninformed litigant who was struggling to pay the fees presented, is not to be regarded as a bar to testing whether there was over-reaching or the imposition of an unfair liability for cost. In this case, the taxing master was aware that he was presented with an attorney and own client bill. It must be said that there was no 'conclusion' by the taxing master, as submitted on

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[1] *Legal & General Assurance Society Ltd v Lieberum N O and Another* [1968] 1 All SA 398 (A); 1968 (1) SA 473 (A) at 477A-478H; *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) at 18F-G.
[2] *Legal & General* fn 1 above at 478H.
[3] *Ocean Commodities* fn 1 above at 18G.
[4] *Muller v The Master and Others* [1992] 4 All SA 470; 1992 (4) SA 277 (T) at 283I- 284G.
[5] Ibid at 284G.
[6] *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123; [2003] 3 All SA 617 (W).
[7] Ibid para 108.

behalf of the applicant that the matter was not one of complexity, but more about that later.

[59] First, I deal with the items in respect of which the taxing master clearly erred. Item 404, which related to counsel flying to Bloemfontein to argue the matter, the taxing master erred in relating the date of the payment to the date of the appearance. There is nothing to gainsay the assertion that it was paid in advance to enable counsel to fly to Bloemfontein. Or indeed, that counsel argued the matter in Bloemfontein on the day of the hearing. The taxing master's report does not engage on this aspect. That item was clearly wrongly disallowed.

[60] Second, in relation to items 4 and 5, the taxing master clearly erred in not distinguishing items 4 and 5 from item 13, as explained on behalf of the applicant. These items too ought to have been allowed.

[61] Third, items 306, 307, and 410-416, in my view were too readily rejected by the taxing master. I am persuaded that if he had doubt about whether they were properly incurred he could have called for the correspondence and other documentation. These items ought to have been allowed.

[62] Fourth, in relation to item 422, it does appear that the taxing master was too rigid in allowing only two hours for the attendance on the day of the hearing. The two additional hours comprising waiting time do not appear excessive. In my view, in this regard too, the taxing master erred. This item should have been allowed.

[63] I now turn to the other items disallowed. Essentially, the biggest complaint and sense of grievance on the part of the applicant appears to be that there was a lack of appreciation, on the part of the taxing master, of the complexities involved in this matter, the enormous effort expended by counsel, and that new law was created. The matter on appeal was a narrow one. It involved a consideration of whether a prior decision of this Court was applicable, whether it was distinguishable on the pleadings or the facts, or whether it ought, in any event, to be departed from. It called for a decision on the narrow aspect identified at the commencement of this review. This Court is frequently faced with novel questions and in the light of our Constitutional

order, has not infrequently been constrained to depart from prior decisions. The taxing master allowed fees which catered for a sufficient time to prepare to present argument on the circumscribed issue and any complexities that might arise. The total fee for counsel, before a substantial part was disallowed was, even in the circumstances of the novel identified issue, excessive. The applicant's submission that there had been no complaint lodged with the Cape Bar is not useful. The second respondent explained that as a layperson she did not know of her rights to challenge the bill of costs until so advised by her present attorneys. The agreed hourly rate does not extend an open-ended invitation to unlimited hours to be spent on the case.

[64] I cannot conclude that on this latter aspect the taxing master acted wrongly. Neither am I persuaded that the costs related to the flights by persons from the applicant's office, to file papers personally, rather than have the local correspondent deal with it, are justified. In this regard too, the taxing master cannot be faulted. Neither can he be accused of being unfair in relation to the costs associated with the condonation application. The circumstances that led to the delay were not of the second respondent's making and there had been ample time for time-limits set by the rules of court to be met. If any client were, in those circumstances, to be asked in advance whether he or she should pay the substantial costs for such a mishap, including the cost of counsel's assistance in that regard, the answer would be obvious. It is unacceptable that the second respondent should bear such costs on the asserted basis that on an attorney client scale there should be full indemnity for costs.

[65] In relation to the other contested items, I find that the taxing master's reasoning and conclusions are such that on the stated authorities they cannot be faulted. In the light of the conclusions reached, it appears to me to be fair to make no order as to costs.

[66] I make the following order:

1 The review is successful only to the extent reflected in paragraphs 59 to 62 of this judgment.

2 There is no order as to costs.

3 The allocator is remitted to the taxing master to be redrawn on the basis set out in this judgment.

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M S NAVSA

Acting Deputy President

Appearances:

For the applicant:	L van Schalkwyk
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Instructed by:	R C Christie Incorporated
For 2nd respondent:	T Abbotts
	Hammond Pole Inc, Boksburg.