CASE NO.: A 385/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OTJOZONDU MINING (PTY) LTD **APPLICANT**

and

PURITY MANGANESE (PTY) LTD **1ST RESPONDENT**
THE TAXING MASTER OF THE HIGH COURT OF NAMIBIA **2ND RESPONDENT**
THE SOCIETY OF ADVOCATES OF NAMIBIA **3RD RESPONDENT**
THE LAW SOCIETY OF NAMIBIA **4TH RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 4 October 2011
Delivered on: 14 October 2011

JUDGMENT

SMUTS, J.: [1] This is a review of the decision of the taxing master to disallow two items claimed in a bill of costs. The items in question are instructed counsel fees and the costs of the costs consultant in preparing the bill of costs.

[2] The applicant was successful in litigation comprising two separate applications against the first respondent. Those applications were set down together by agreement

for a period of three days, namely 5, 6 and 7 October 2009. Those applications are described in more detail in this review application. The first application was for an interdict to restrain the first respondent from mining outside the perimeters of its mineral licence upon an area covered by the applicant's mineral licence. This application is conveniently referred to in these papers as the unlawful mining application.

[3] The second application raised contraventions of the Agricultural Land Reform Act (ALRA) by the first respondent. This latter application was referred to as the ALRA application. It was voluminous and would appear to raise complex questions to the extent that the Chief Justice granted leave to the applicant to engage senior junior counsel (of 27 years standing) from outside the Republic of Namibia under s85 of the Legal Practitioners Act, 1995 (the Act).

[4] Both applications were opposed by the first respondent. In the weeks preceding the hearing dates, detailed heads of argument were filed on behalf of the applicant. After these were filed and shortly before the hearing, the first respondent withdrew its opposition to both applications.

[5] The applicant points out that the issues raised in the ALRA application have not been previously determined. As a consequence, instructed counsel remained on brief to argue the application.

[6] The unlawful mining application proceeded and was determined on the first day of the set down, namely 5 October 2010. The parties were however informed on that date that the presiding judge (Damaseb, JP) was not available to hear the second application on 6 October 2009 because he formed part of a panel of judges in an appeal in the Supreme Court on that day. The second application then proceeded on 7 October 2009. As had been anticipated, Damaseb, JP required instructed counsel to present argument in support of the application before granting it. The applicant succeeded in both applications and its success was accompanied by a costs order.

[7] The applicant's instructed counsel had reserved himself for five days for the applications. These five days were from 4 to 8 October 2009 inclusively. They included a day of preparation on 4 October and an additional day of 8 October by reason being out of town.

[8] His fee was N$15 000 per day which was within the parameters of the then applicable guidelines for counsel who are members of the Society of Advocates of Namibia for counsel of his standing. Counsel invoiced the applicant in the sum of N$75 000 for those five days on the basis of his preparation and appearances, having thus reserved himself for five days.

[9] The parties agreed that the bill should be taxed in the basis of the costs including one instructing and one instructed counsel. The taxing master however disallowed those fees.

[10] The applicant correctly accepted that it would not be entitled to the additional day (in respect of 8 October for being out of town) and confined itself in this application to 50% of a day fee in respect of preparation on 4 October – thus claiming fees representing a total of 3 and half a days at N$15 000. The applicant contends that counsel's fees in the sum of N$52 500 should thus have been allowed by the taxing master who had instead permitted instructed counsel charges at a half hourly rate (of N$350) as reflected the tariffs contained in the sixth schedule to the Rules (the schedule) for actual time in court.

[11] In disallowing counsel's fees, the taxing master was of the view that counsel was not entitled to any fee for a reserved day and was furthermore not entitled to charge a day fee at all, even on the days when counsel did in fact appear in court. The applicant points out that the taxing master considered that counsel is obliged to and is confined to charging fees in accordance with the hourly rate provided in the tariff in the schedule for the actual number of hours of an appearance. The applicant disputes the correctness of that approach. This is the primary issue raised in this review.

[12] The taxing master accordingly only allowed instructed counsel's fees with reference to the hourly rate as set out in the tariffs in the schedule. No fees were allowed for the additional day (of 8 October). As I have said, the applicant rightly does not take the issue with this. No fees were allowed for preparation on 4 October 2009. Day fees were refused for 5, 6 and 7 October 2009. In this application the applicant only

seeks half a day fee in respect of preparation on 4 October 2009 and day fees in respect of 5, 6 and 7 October 2009.

[13] The taxing master's ruling was based upon the approach of Parker, J in *Kaese v Schacht and Another (Pty) Ltd*.[1]

[14] In the *Kaese* matter, Parker J referred in some detail to the fusing of the legal profession brought about by the Act in 1995. In his discussion of the changes brought about by that Act, he concluded[2] that in terms of the rules there are only prescribed tariffs for all legal practitioners whether they are instructing or instructed counsel and that practitioners must present their charges according to the tariffs prescribed in the rules of court. Parker, J then referred to the latest prescribed tariffs contained in the schedule (introduced in 2006) and accepted a contention made that fees cannot be charged on a day basis but must be charged on a half hour basis in accordance with the tariffs as set out in the schedule. Parker J premised his approach upon the equality of the legal practitioners and that tariffs should apply to all practitioners. This underlying premise is in my view correct. Subject to the qualification set out below, it not only accords with the Act but also follows from the eloquent exposition of the changes brought about by the Act by Maritz JA in *Afshani and Another v Vaatz*[3]. But that premise

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[1] Case number A 319/2007, unreported, 5 November 2009

[2] In paragraph 24

[3] 2007 (2) NR 381 (SC) at 385-388, par 11-21

does not in my view mean that counsel is confined to fees charged with reference to the hourly tariffs set out in the schedule. Parker, J proceeded to conclude from this premise of equality that practitioners are however restricted to charging the hourly (or half hourly) rates set out in the tariff listed under items 1, 2, 3 and 5 of the of the schedule and that the charging of a day fee would not be competent. I am in respectful disagreement with this conclusion. I decline to follow it as it is in my view clearly wrong for the reasons which follow. The approach of Parker J, with respect, overlooks item 4 of the schedule read with the rules as amended in the context of the practice of law in the Republic of Namibia.

[15] The schedule was promulgated in September 2006. The relevant portion of the schedule deals with the tariffs of fees of counsel for litigious work. It was promulgated pursuant to rule 70 of the rules. Under the heading, "consultations, appearances, conferences and inspections", item 1 provides for a set fee for taking instructions to institute and defend any proceedings. Items 2 and 3 then provide for a tariff at a half hourly rate in respect of necessary consultations[4] and the provision of advice on the merits or proceeding or on evidence[5]. Item 4, which was not referred to in the judgment of Parker, J, relates to fees for:

> *"Preparation for any appearance in court, not otherwise provided for, heads of argument and any such appearance"*

The fee applicable for attendances of this nature is not set as an hourly tariff but is rather stated as follows:

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[4]Item 2
[5]Item 3

" any fee which the taxing master considers reasonable, due regard being had to the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute, the seniority of counsel employed, the fees ordinarily allowed for like services and other factors which the taxing master considers relevant."

[16] Item 4 thus expressly permits and contemplates the taxation of fees for the attendances listed, with reference to what the taxing master considers as a reasonable fee, taking into account the further factors set out there. Counsel would accordingly plainly not be limited to charging at the half hourly rates specified as against item 2, 3 and 5. (Item 5 refers to any other necessary attendance such as a Rule 37 conference, proceeding to court and inspections in loco, settlement negotiations and attendances on the Registrar). A fee, calculated or determined with reference to a day (a day fee) which is how advocates had prior to the Act charged out their services specified in item 4, is thus not excluded by the schedule. On the contrary, when read with rule 69(4), this item would in my view expressly contemplate that.

[17] Item 4 is furthermore to be read with rule 69(4) which was introduced in 1996 after the passing of the Act. I pause to point out that rule 69 contemplates that counsel may employ another counsel and, on occasion, more than one other counsel. Counsel is defined as meaning an admitted legal practitioner.

[18] Rule 69 which deals with the fees of counsel generally includes rule 69(4). It was also not preferred to by Parker J. It provides:

> *"The taxation of the fees for counsel employed by another as between party and party shall be allowed by the taxing master as he or she considers reasonable, due regard being had to the other provisions of this sub-rule, the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute, the seniority of counsel employed, the fees ordinarily allowed for like services prior to the promulgation of this rule and any other factors which he or she considers relevant."*

[19] This sub-rule thus in my view clearly contemplates the taxation of fees for counsel employed by another counsel to include those ordinarily allowed for like services prior to the fusion of the profession. Whilst the statutory distinction between attorneys and advocates came to an end and their professions were fused when the Act came into operation, with a single controlling body governing them, the Act however permits practitioners to structure their respective practices in different ways which can give rise to implications when it comes to the taxation of fees. Rule 69(4), read with item 4 of the schedule, does precisely that by contemplating that reasonable fees of counsel engaged by other counsel may be taxed with due regard for the factors referred to, including fees ordinarily allowed for like services prior to the Act.

[20] The provisions which permit practitioners to differently structure their practices have resulted in a referral practice of the kind conducted by advocates in the past being

continued by legal practitioners who choose to do so after the Act came into operation. This position was succinctly summarised by Maritz JA in *Afshani* matter as follows:

> *"Exemption from holding a fidelity fund certificate may be granted to practitioners who practise for gain on their own account but who do not, in the conduct thereof, accept, receive or hold moneys for or on account of any other person – much as advocates have practised prior to the promulgation of the Act. Hence, although the legal professions have been fused into one, many legal practitioners voluntarily opted to structure the mode of their practices, within the permissible ambit of the Act, more or less along the same lines as advocates and attorneys have done before. Within the sphere of civil practice one nowadays finds legal practitioners who take instructions directly from clients but only attend to the more formal side of litigation and instruct other legal practitioners to attend to the forensic aspects thereof (the former sometimes referred to as 'instructing counsel'); those who do not take instructions directly from clients but only from other legal practitioners representing them and who mainly render services of a forensic nature (generally referred to as 'instructed counsel' or, informally, called 'advocates') and, lastly, those legal practitioners who take instructions directly from clients and who render both formal and forensic services in civil litigation to them. Although, de jure there may only be one legal profession, law is in reality practised by legal practitioners in a number of diverse styles under one regulatory and protective statutory umbrella. This diversity of practice, especially in civil litigation, further compounds the construction and application of the rules relating to fees and costs as they apply to the taxation of the costs in question[6]."*

[6] Paragraph 4

[21] Maritz JA went on to state that the High Court Rules seek to specifically take cognisance of the diversity of styles of practice and differentiates – without discriminating – amongst legal practitioners for the purpose of the taxation of fees. This, in my view, is achieved in rule 69(4) read with item 4 of the schedule.

[22] Not only does the Act thus permit a referral practice of the kind practised by legal practitioners more or less along the same line as advocates had done before, but the rules would in my view furthermore contemplate the taxation of fees (reasonably charged by practitioners practising along those lines) as were ordinarily allowed for similar services prior to the promulgation of rule 69(4). Fees of that kind include day fees and, in certain circumstances where justified, reservation fees.

[23] Whilst the tariffs in the rules apply to all legal practitioners, there is however specific provision in rule 69(4) for the taxation of the fees of counsel employed by another and to contemplate those ordinarily allowed for similar service prior to fusion. This differentiation would apply to all practitioners employed by another whether they

practise with or without fidelity fund certificate. It is not inconceivable for practitioners to conduct a specialised forensic practice and accept referrals from other practitioners and do so in a practice with a fidelity fund certificate (and not as a member of the Society of

Advocates.) The provisions of rule 69(4) would apply to all practitioners similarly situated who are employed by another practitioner to perform the services referred to in item 4. What is of importance is the similarity of services by counsel employed by other counsel and not the nomenclature necessarily used by the practitioners in question.

[24] As I have sought to demonstrate, the rules not only do not limit practitioners to the half hourly rates specified in the schedule but permit and in my view contemplate the taxation of day fees. The taxing master, in following approach of Parker, J to the contrary, in my view reached his conclusion based upon a wrong principle. It follows that the disallowance of counsel's fees in the circumstances of this application falls to be set aside.

[25] The approach I have followed would also accord with the fundamental principle applicable to the taxation of fees embodied in rule 70, namely that an award of costs should provide for a full indemnity for all costs reasonably incurred by a successful litigant. This is also in accordance with the basic purpose of taxation as reaffirmed by Maritz, JA in *Afshani* as being the creation of a "*legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings...*"[7]

It would thus be for the taxing master to have regard to the work actually done by practitioners and have regard as to what would ordinarily be allowed for like services prior to the promulgation of the rule 69(4) and take into account the further factors listed

[7] At paragraph 27

in rule 69(4) and item 4 of the schedule, in determining what is a reasonable fee in the specific circumstances of each case.

[26] Having set aside the disallowance of instructed counsel's fees in respect of the attendances for 4 to 7 October 2009, it would seem to me that this would be a proper case to correct the ruling. The applicant has referred to then applicable guidelines of the Society of Advocates in respect of counsel's fees for such work and the rate applicable, taking into account the seniority of the counsel in question. The reasonableness of those guidelines has not been placed in issue. Indeed none of the respondents has filed an answering affidavit. A full day fee for 5 and 7 October should in my view have been allowed. A fee representing half a day in respect of preparation for 4 October 2009 would also seem reasonable and should have been allowed. A reservation fee for 6 October 2009 should also be allowed, given the fact that the court was not available that day. In expressing this view, I wish to make it clear that the reasonableness of each claim for reservation fees would need to be separately determined and justified with reference to the specific facts and circumstances of each case. The mere fact that counsel has agreed to be reserved for a certain period would not necessarily mean that the extent of the reservation is reasonable. It also follows that counsel's fees for the items in question should have been taxed in the sum of N$52 500, as is contended by the applicant.

[27] There remains the question of the costs of engaging a costs consultant. These are the costs relating to the preparation of the bill of costs. They were disallowed. No

basis was put before me as to why the applicant should be precluded from recovering those charges. I can think of none. I accordingly set aside the decision to disallow those costs as well.

[28] The applicant did not seek the costs of this application. It is follows that my order is not accompanied by any costs order.

[29] In the result, the order I make is:

(a) The taxing master's disallowance of instructed counsel's fees for attendances 4 to 7 October 2009 is set aside. Such fees should be allowed in the sum of N$52 500.00.

(b) The taxing master's disallowance of the costs of the costs consultant for drawing the bill of costs is set aside and such costs should have been allowed.

(c) No order is made as to the costs of this application.

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SMUTS, J

ON BEHALF OF THE APPLICANT: **MR T. BARNARD**

Instructed by: **KOEP & PARTNERS**

ON BEHALF OF THE RESPONDENTS: **NON-APPEARANCE**