REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 147/2010

In the matter between:

HOLLARD INSURANCE COMPANY OF NAMIBIA LTD **APPLICANT**

and

B J DE NEYSCHEN t/a GECKO GUEST HOUSE **RESPONDENT**

Neutral citation: *Hollard Insurance Company of Namibia Ltd v Neyschen ta Gecko Guest House* (I 147/2010) [2013] NAHCMD 325 (12 November 2013)

Coram: GEIER J

Delivered: **12 November 2013**

FLYNOTE : Costs - Party and party - Attorney's fees - For taking instructions to institute or defend proceedings - Tariff item A1 relates to the first consultation which the client has with the attorney - that consultation might take ten minutes and it might take the whole day - but that is only the first stage in the proceedings. It does indeed frequently happen that as a result of that first instruction a summons or a plea and counterclaim can only be issued if all the necessary facts upon which that pleading can be drafted have been ascertained or obtained after investigation or after obtaining outstanding documentation or information in order to ascertain what the correct factual position is - it follows that the final instruction to issue the summons or to draft a plea and counterclaim, in some instances, can only be given after those investigations have been conducted and completed – and through a further and seemingly final instruction in respect of which the Taxing Master should allow a fee - Fee also embracing charge attorney entitled to make for acceptance of responsibility of litigation

Costs - Taxation of - Party and party – attendances relating to case management - constituting necessary attendances - which should generally be allowed.

Costs - Taxation of - Party and party – costs relating to the amendment of summons and particulars of claim - in the absence of a court order directing that a particular litigant is to be liable for the costs occasioned by an amendment – provisions of rule 28(7) to prevail in the determination of whether or not such costs are to be allowed at taxation.

Costs - Taxation of - Party and party – costs relating to filing notices – such costs only to be allowed if filing notice contains information relevant to the further conduct of the case. Practice of utilization of unnecessary filing notices to be discouraged.

Costs - Taxation of - Party and party - Charge for drawing and perusing heads of argument – permissible charge in respect of which successful party would be entitled to be indemnified – not only in circumstances were heads of argument required by the

rules of court but also if required in terms of the aapplicable Practice Directions or if made at the request of the court.

Costs - Taxation of - Party and party – charges of cost consultant for drawing and perusal of bill of costs – charges disallowed - were such charges constituted a duplication of charges –

Costs - Taxation of - Party and party – charges of cost consultant - decision by the court in *Otjozondo Mining (Pty) Ltd v Purity Manganese (Pty) Ltd and Others* not constituting *carte blanche* authority for the allowance of the charges of a cost consultant, in all instances –

Costs - Taxation of - Party and party – charges of cost consultant - the court also taking into account that Part F, of the Sixth Schedule, specifically regulates the allowable tariffs relating to the attendances relating to a bill of costs in opposed matters. The fact that a legal practitioner or his client elect to outsource the task of drawing a bill of costs to a cost consultant, resulting in a much higher disbursement than the fee which would have been recoverable by the legal practitioner under Part F of the Sixth Schedule to the Rules of this Court, should not come at any increased expense to an unsuccessful litigant, certainly not on a party and party scale, especially if one takes into account that an admitted legal practitioner is or should have been capable of performing this task him or herself and were it is a fundamental principle that the taxation of a bill of costs should always ensure that the party ‘who is condemned to pay the costs does not pay excessive costs’.

Costs - Taxation - Review of taxation – relevant documents thereto – to be properly collated, paginated, indexed and bound

Costs - Taxation - Review of taxation – complete mechanical transcript of the record of the taxation important for the factual determination of issues at a taxation review.

JUDGMENT

GEIER, J.:

[1] The applicant in this matter seeks to review a bill of costs taxed on 26 and 30 July 2012.

[2] The applicant, then the plaintiff, had instituted an action against the defendant, (now the respondent), in which it re-claimed the amount of N$174 081.68 which it had paid mistakenly, but in the *bona fide* and reasonable belief that the defendant was entitled to an indemnification in such amount in terms of an insurance claim, whilst defendant was in fact not entitled to such indemnification.

[3] On 24 February 2012, Smuts J granted judgment against the defendant in favour of the plaintiff in the claimed amount together with interest and costs.

[4] Consequently a bill of costs was drawn up, which was subsequently taxed as indicated above.

[5] On 16 August 2012 the taxing master was requested to state a case in terms of rule 48(1), for a decision of a Judge.

[6] The taxing master responded duly by filing a “Stated case in terms of Rule 48 (1)” to which the applicant replied by filing a document titled “Applicant’s contentions in the review against the decision of the taxing master” on 13 September 2012.

[7] No further documents were filed by any party.

[8] The taxing master did not provide any further report and neither party requested to be heard in chambers or for the matter to be heard in court.

GENERAL PRINCIPLES APPLICABLE TO REVIEW A TAXING MASTER’S DECISION

[9] Smuts J in *Shali v The Prosecutor-General*[1], referring with approval to the judgment delivered in *Visser v Gubb*[2], and the authorities collated there, noted that:

‘It has been repeatedly held that a court would not interfere with the exercise of a taxing master’s discretion unless that discretion has not been exercised judicially and has been exercised improperly where for instance facts were disregarded which should have been considered or matters considered which were not proper to have been considered, and furthermore where the taxing master failed to bring his or her mind to bear on the question in issue or has acted upon a wrong principle or where the opinion of the taxing master was clearly wrong.’

[1] *(POCA 9/2011) [2012] NAHCMD 44 (31 October 2012)* para 3 (unreported).

[2] 1981 (3) SA 753 (C) 754H – 755C.

[10] Before the court will thus interfere with the decision of the taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This indicates that the court will not interfere with the decision of 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 the ruling.[3]

[11] Rule 70 of the Rules of High Court confers upon the taxing master the power to award costs "as appear to him or her to be necessary or proper for the attainment of justice or for defending the rights of any party.

[12] The discretion to be exercised by a taxing master must be exercised reasonably and justly on sound principles with due regard to all the circumstances of the case. The test generally employed is that set out by Sachs J in *Francis v Francis & Dickerson*[4] where the learned judge said:

> 'when considering whether or not an item in a bill is 'proper' the correct viewpoint to be adopted by a taxing officer is that a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client…'

THE ITEMS ON REVIEW

[13] The applicant seeks to review:

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[3]See *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* [1984] ZASCA 2; 1984 (3) SA 15 (A) ; *Legal and General Insurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G.

[4] [1955] 3 ALL ER 836 at 840.

(a) items which the taxing master held to fall under different tariff items than those claimed by the applicant and subsequently reduced;

(b) items which were ruled by the taxing master as either pre-litigation costs or unnecessarily as incurred by the applicant and which were taxed off as such;

(c) items which were settled by agreement;

(d) items to which, according to the stated case, no objection was made.

[14] Before dealing with the specific items, which have so given rise to the applicant's dissatisfaction, it should be mentioned that the taxing master indicated that certain items were either reduced or taxed off as a result of the agreement between the parties or that the applicant agreed to a taxing off. The applicant, however, in its written submissions categorically denies this and avers that it merely allowed the taxing master to either tax off or reduce certain items in view of the fact that he (taxing master) held opinions different to those of the applicant's legal practitioner and that the applicant never actually abandoned its objections.

[15] A transcript of the taxation proceedings was however made available to the court and the denials made in this regard will be determined with reference thereto.

Item 1

[16] This item relates to a telephone call made by the client briefly discussing the background of the matter with its legal practitioner.

[17] The applicant's contentions read as follows:

'The taxing master ruled that this is pre-litigation costs. We objected to the said approach by the taxing master on the basis that it is not pre-litigation costs.

It is submitted with respect that the taxing master is clearly wrong with regard to this item.

The legal practitioner did not agree that the item be taxed off but merely said that the objection still remains but seeing that the taxing master held a different view, he may tax same off. It must be emphasized that the objection was not abandoned.

We submit that a litigant, irrespective of whether he is a plaintiff or defendant, is entitled to call his legal practitioner to make an appointment and to briefly discuss the reason for the need of such an appointment. Provision is made therefore in item C 5 of the tariff in the sixth schedule to the Rules of Court. See further: Jacobs v Plascon-Evans Paints (TvL) Ltd 1981 (3) SA 495 (T). This is not a consultation but merely a short formal discussion to make an appointment.'

[18] The taxing master defended his ruling by stating:

'The plaintiff and defendant agreed that this item should be taxed of(f) and the ruling was made accordingly.'

[19] This is also precisely what the record reflects:

' … item 1 you have said that you have no problem,
MS WILLIAMS: No, we agreed that it must go off.
TAXING MASTER: Yes, it will be taxed off. Item 2 …' .

[20] This objection is accordingly not upheld.

Item 2

[21] The record and the bill of cost show that item was allowed. There can be no issue here.

Item 3

[22] This item, relates to a consultation of one hour and thirty minutes, at which the applicant's legal practitioner took instructions from her client, which was only partially allowed.

[23] The taxing master allegedly taxed down the item on two grounds: (i) that it relates to pre-litigation costs and (ii) that the legal practitioner is an experienced lawyer and need not consult the client to take instructions.

[24] From the taxing master's response it appears however that he decided that 'a charge for taking instructions and a fee equal to the specified amount under A1 of the Sixth Schedule to the Rules be allowed and that in addition the fees for the perusal of documents under item 4 also be allowed.'

[25] On behalf of applicant the argument was advanced that :

' … the taxing master's approach was out of proportion as to the issue in question, that the consultation with client is simply to take proper instructions to institute an action against the defendant. It has nothing to do at all with pre-litigation costs and the capabilities of an experienced lawyer. The applicant further submitted that such consultation with client fall under item A2 of the tariff and therefore claimed as such.'

[26] In support of these submissions, the applicant cited *Hirsch v Taxing Master & others*[5], where Kuper J stated:

'It seems to me that the first item, item A1, the instructions to institute or defend any proceedings really relate to the first consultation which the client has with the attorney. At that consultation he tells the attorney what his grievance is and what it is that he would like the attorney to do. That consultation might take ten minutes and it might take the whole day. In the course of that consultation the client has to tell the attorney anything that has happened that he

[5] 1958 (2) SA 632 at 636D-H.

remembers as between himself and the person against whom the litigation is to be brought in order to place the attorney in a proper position to advise him as to the proceedings that have to be launched. But that is only the first stage in the proceedings. It frequently happens that as a result of that first instruction a summons can be issued or a petition launched, e.g., the case that was mentioned of a sequestration proceeding. In all probability all that is required is one consultation with the attorney to give him the necessary facts upon which that petition can be drafted, but in a case such as this or in many cases where investigations have to be conducted in order to ascertain the factual position at the time when the proceedings are to be launched - when investigations are necessary for that purpose - it follows that the final instruction to issue the summons or to draft the petition can only be given after those investigations have been conducted. It seems to me to follow that the instructions to draft the petition which are given after the investigations have been concluded from a further instruction in respect of which the Taxing Master is entitled to allow a fee.'

[27] It was submitted further that:

' … the taxing master in the present matter was properly reminded that this was the initial consultation with the client to take instructions to institute an action by way of a summons. He was furthermore properly informed that even a well experienced legal practitioner must take instructions from his client by way of a consultation and he was referred to the said authority. Despite this, and the fact that the taxing master said that he heard our argument in this regard, he decided without even looking at the particular authority, to tax down the item on the grounds that it is pre-litigation costs and that the experienced legal practitioner need not to consult in this regard. Applicant submits that the taxing master was clearly wrong in coming to his conclusion.'

[28] The record of the taxation reflects the following:

TAXING MASTER: Let Ms Botes … she start off with the administration fee which means she opened (indistinct). With regard to the taking instructions she omit to deal with that.

MS BOTES: Taking instructions is included.

TAXING MASTER: So the consultation,

MS BOTES: Is included in the consultation item.

TAXING MASTER: So there was also, so you could even have a consultation as a separate fee. So seeing that the instruction, taking instruction, did you receive at that stage the documents for perusing?

MS BOTES: The perusal was done a day after. …

MS BOTES: It might be that the documents were supplied at the consultation, but they were not perused during the consultation. They were perused on the next day.

TAXING MASTER: During these discussions was the documents consulted at this stage?

MS BOTES: The documents were not consulted with one by one. The client comes and tells you the big problem, the big picture thereof and he ask you your instructions thereon. You peruse documents

TAXING MASTER: Okay, what if we limited then your consultation in allowing your other fees for perusing?

MS BOTES: Why?

TAXING MASTER: Because if you are saying that your documents was only discussed during the consultation and afterwards perused.

MS BOTES: I am not saying that the documents were discussed. I am saying that the big picture was drawn by the client during the consultation which took an hour and a half. The next day the documents were perused. If you continue with the bill you will see that on item number 5 you draw a letter to your to report stating to your client whether he has a case or not and that can only be done after the documents are perused. So no separate fee is done for taking instructions. It could have been a separate fee, but it is not a separate fee. It is included in the consultation.

…

TAXING MASTER: I will take a stand here and then I will not allow this consultation at this stage, because you are taking instruction. You are receiving the documents.

MS BOTES: And you consult.

TAXING MASTER: You consult that time. Before you draft a summons you first have to peruse documents to make out a case and then thereafter you consult.

MS BOTES: No.

TAXING MASTER: Is it not? Is it not like that?

MS BOTES: No. Your client, if I have a problem and I go to a lawyer I consult with my lawyer and I ask him do I have a case or do I not have a case.

TAXING MASTER: Okay, let me come in there. My client calling me and want to institute action (indistinct), but then you, the client submitting the documents, you as an experienced lawyer going through the documents, perusing the documents can see whether there is a case or not. If I see fine that there is a case then you start with the summons.

MS BOTES: That is exactly what happened.

TAXING MASTER: No.

MS BOTES: He came to me (intervention)

TAXING MASTER: No, that is consultation.

MS BOTES: It was a necessary consultation.

TAXING MASTER: I will not regard that as necessary.

MS BOTES: Then I will, please you can, you can disallow it on me, please note my objection.

TAXING MASTER: I will allow your instruction, taking instruction fee at a rate of three hundred and what is it. Two hundred and eighty Namibian Dollars (N$280-00) and then I will allow you the perusing of the documents up to summons stage.

MS BOTES: And not the consultation?

TAXING MASTER: Not the consultation at this stage.

MS BOTES: Okay, then please note my objection.

TAXING MASTER: So I will give you the two eighty Namibian Dollars (N$280-00). So then I will take seven hundred and seventy Namibian Dollars (N$770-00) off there and then I will allow items (indistinct) 4(a), let me go through and see which ones is relevant'.

[29] From the record and applicant's submissions it appears that she took client's initial instructions to institute action proceedings at the consultation in question. Tariff A1 of the 6th Schedule seems to be of application. In this regard the taxing masters ruling is quite correct.

[30] Tariff A1 of the Sixth Schedule allows a fee of N$280.00, which is what the taxing master allowed.

[31] I also can have no quarrel with Kuper J's judgment in *Hirsch v Taxing Master & Others* which correctly reflects the reality of everyday practice. Obviously the first item, Item A1 to the 6th Schedule is applicable to the situation were the initial instructions to institute or defend any proceedings are given by the client to his legal practitioner[6] and thus the tariff item clearly relates to the first consultation which the client has with the attorney[7]. At that consultation he tells the attorney what his grievance is and what it is that he would like the attorney to do. That consultation might take ten minutes and it might take the whole day - but that is only the first stage in the proceedings. It does indeed frequently happen that as a result of that first instruction a summons or a plea and counterclaim can only be issued if all the necessary facts upon which that pleading can be drafted have been ascertained or obtained after investigation or after obtaining outstanding documentation or information in order to ascertain what the correct factual position is - it follows that the final instruction to issue the summons or to draft a plea and counterclaim, for instance, can only be given after those investigations have been conducted and completed. I am thus in agreement with the conclusion that final instructions - to institute or defend any proceedings - can in some instances only be given - after the aforesaid investigations have been concluded – and through a further and seemingly final instruction in respect of which the Taxing Master should allow a fee.

[32] In this regard I need to add, immediately and categorically, that the seniority or degree of experience of a legal practitioner does not - and cannot - constitute a valid ground - per se - not to allow the referred to additional fee necessitated through investigations or the obtaining of additional information before final instructions can be

[6] And were the legal practitioner accepts responsibility for the litigation. See:Vaatz v Law Society of Namibia 1994 (3) SA 536 (Nm) at 541A

[7] In Namibia a legal practitioner practising with a Fidelity Fund Certificate

given in regard to the institution or defending of any proceedings. I consider the necessity of taking proper instructions, from the outset, and thus to consult properly, an essential and fundamental requirement of all legal practice, pertaining to all legal practitioners alike, whether they be junior or senior, experienced or inexperienced. To disallow a tariff item on a bill of costs on such basis alone would be absurd as it would not only fail to give recognition to these demands but would also be totally out of line with the reality and necessity of prudent legal practice.

[33] From the record and the submissions it however appears that the applicant's legal practitioner does not claim any additional fee necessitated through any subsequent investigations required for purposes of giving final instructions to sue and in respect of which Mr Justice Kuper has found that 'the Taxing Master should allow a fee'. It rather seems that she wanted to assimilate the N$ 280.00, allowed for the taking of instructions under Item A1, into a time charge, allowed for necessary consultations under Item A2.[8] Her reliance on the *Hirsch v Taxing Master & Others* case is in such circumstances misplaced and seems rather to support the Taxing Master's ruling, as it would appear that, regardless of whether or not, the initial consultation, (to take instructions), took 'ten minutes or the whole day', (here one and a half hour), it seems that the tariff prescribes a fee of N$ 280.00 for the initial taking of instructions to institute or defend any proceeding. There seems no sense in providing for Tariff Item A1 in the 6th Schedule to the Rules for this purpose and then – in the same breath, so to speak – provide for the circumvention of that Tariff Item by allowing a time charge in terms of Tariff Item A2 - as far as that initial consultation is concerned - by choice. Such intention is not expressed in the rules. Surely the intention of the rule must be given effect to – which seems to be to the effect that the initial fee for the taking of instructions can only

[8]She stated : *" … the big picture was drawn by the client during the consultation which took an hour and a half. The next day the documents were perused … So no separate fee is done for taking instructions. It could have been a separate fee, but it is not a separate fee. It is included in the consultation …".*

be charged in terms of Item A1 unless subsequent attendances are required for this purpose. Although I recognize the potential unfairness in the result, this effect is at least ameliorated by the respondent's permissible ruling to allow an additional perusal charge 'up to summons stage' which seems only proper as, according to Ms Botes, the 'documents were only perused on the next day'.

[34] I therefore cannot find that the taxing master, in this instance, exercised his discretion improperly.

ITEMS : 4 (a), (b), (i), (j), (q), (r), (u) and (w)

[35] This objection relates to the attorney's claimed perusal charges of the motor accident claim form, an identity document, additional 8 photos, the assessor's appointment reports and a letter by the insurance company to the respondent.

[36] There is some confusion regarding this objection. On the one hand it was submitted on behalf of the applicant that these items were impermissibly reduced to a perusal charge of N$ 14.00 per folio under item C1 of the Schedule. At the same time it was also contended that: ' … a perusal fee at N$ 14.00 per folio should have been allowed … ', which insinuates that the applicant's legal practitioner accepts that these items should be taxed under tariff item C1. I agree.

[37] From the bill of costs it appears that N$ 84.00 was claimed for perusal of the motor vehicle accident claim from (three folios) – item 4 (a) – this item was taxed down to N$ 42.00, which is the correct charge for three folios in terms of tariff C1.

[38] The bill of costs reflects that applicant's legal practitioner claimed N$ 28.00 for the perusal of the identity document of Y de Nysschen. This was correctly taxed down to N$ 14.00 in terms of Tariff C1.

[39] In so far as Ms Botes now again contests that the taxing off of a further 8 photo's under item (i) of the bill was impermissible, it emerges from the record that 8 photographs were already allowed under item (d) and that the further 8 claimed under item (i) were not specified, in respect of which the record then reflects that she once this was pointed out to her – agreed to the taxing off of this item.

[40] The bill of costs reflects in respect of the next item (j) that initially N$ 280.00 was charged in respect of the perusal of the 'assessor's appointment reports', (10 folios), and that this item was taxed down by N$ 140.00, reducing it correctly according to the tariff prescribed under Item C1 of the 6th Schedule.

[41] The same can be said in respect of the reduction of the perusal of the 'Duty Register', one folio, from N$ 28.00 to N$ 14.00, the 'Occurrence Register', four folios, from N$ 112.00 to N$ 56.00, the 'Agreement of Loss', two folios, from N$ 56.00 to N$28.00 and the letter by the insurance company to Gecko Guest House, one folio, from N$ 28.00 to N$ 14.00.

[42] I find no cause to interfere with the taxing master's decision relating to the disputed rulings under Item 4.

Items 5 - 12, 18, 23, 25, 38, 41, 53, 59, 78, 92, 94, 98, 100, 106, 108, 137, 139, 144, 146, 148, 157, 161, 163, 170, 172, 178, 180, 188, 190, 204, 206, 211, 213, 237, 239, 244, 246, 253, 258, 262, 269, 271, 282, 284, 298, 300, 304

[43] According to applicant all the above items relate to necessary attendances to serve and file documents, to have documents issued etc, attendance on the Deputy Sheriff with instructions to serve documents and attendances on the registrar to inspect the court file and uplift orders of the court.

[44] With regard to all these items, the taxing master was of the opinion that these items fell within the ambit of B1 and B2 of the tariff and were unnecessary costs incurred by the applicant and as such, were disallowed by the taxing master.

[45] It is convenient to split the consideration of the items:

Ad item 5(12)

a) It relates to a claim of N$ 150.00 for attending on the Registrar to issue summons (30 mins);
b) The taxing master disallowed this item. The record reflects the following exchange:

> 'TAXING MASTER: Okay. (Indistinct) documents. (Indistinct) register suit to issue.
> MS WILLIAMS: Now here you must use your discretion I believe, because practice in my office is that I send my messenger with my summons to come submit here for issuing, I cannot say that she did not come to court, but for the issuing of the document, but I think you can also have regards to the date on which the summons was drafted and then also the date of issuing,

TAXING MASTER: You see you have mentioned something before, the drafting includes the copying, the filing and so on.
MS BOTES: It includes also the delivery. It does not include though Taxing Master the issuing of our document
TAXING MASTER: I understand that the summons must be issued and somebody has to take the summons to the court. But (intervention)
MS BOTES: But then (intervention)
TAXING MASTER: Let us not make it a practice that for each unnecessary cost the other party has to pay. So let us stick to fairness and reasonableness. I will not allow this one hundred and fifty Namibian Dollars (N$150-00) Then each and everybody can come, any party can come and claim for the issuing of a summons. I will not allow that one.
MS BOTES: Okay, just note my objection please.
TAXING MASTER: It will be noted.
MS BOTES: Thank you.'

[46] In defence of this ruling the taxing master, in his stated case, pointed out that these items are similar to fees not allowed in respect of secretaries for perusing a document which needs to be considered by an attorney who has to apply his/her legal mind for consideration. The taxing master relied on the judgment in *Thornycroft Cartage Co v Beier & Co (Pty) Ltd & Another*[9]. This judgment, in my view, does however not support the taxing master contention.

[47] I believe however that the key to this dispute is found in the wording of Tariff Item B1 which provides for a fee, per half hour, of N$210.00 to N$350.00, in respect of the *"Drafting of, settling, copying and delivery of any pleadings, affidavits, witness statements, petitions, summonses and other documents, including instructions to another counsel, an all inclusive fee -"*. (my underlining)

[9] 1962 (2) SA 26 N.

[48] Is it not necessary, for purposes of having a summons issued, that the summons be delivered to the Registrar's office in order to have it issued?

[49] If a legal practitioner is the person performing this task on behalf of a client, I can see no reason why a legal practitioner should not be allowed to charge for such attendance, after all this seems to be within the ambit of Tariff Item B1.

[50] It must also be remembered in this regard that even Ms Williams, Ms Botes' adversary at the taxation, conceded that *" … I cannot say that she did not come to court, but for the issuing of the document … "*.

[51] In my view the taxing master was clearly wrong in disallowing Item 5 (12).

Ad items 5 (13), (14), (20), (21), (24), (25)

[52] The taxing master's stance in respect of these objections is that the applicant's legal practitioner agreed that these items be taxed off.

[53] The record reflects the following:

Re item: 5(13)

MS WILLIAMS: Number 13 I just want to know what is it here that is being reported on' MS BOTES: It is fine if it is disallowed. I do not have a problem with that.

Re item: 5(14)

‘TAXING MASTER; Good. Receive and peruse a letter from client in reply. It is with regard to above (intervention)
MS WILLIAMS: Can I, can I just say that the summons at this stage as indicated at item 14 has already not been issued with the effect that it is a pre-litigation cost. Receive and peruse letter from client in reply. Reply to what?
TAXING MASTER: But that is (indistinct)
MS WILLIAMS: Okay.
TAXING MASTER: (Indistinct) the party party (indistinct) So I will take it off. Drawing a letter to client (intervention)
MS WILLIAMS: As well as the disbursement.’
Re items: 5 (20) and (21)

‘MS WILLIAMS: What are you doing?
TAXING MASTER: I will take it off. Drawing letter to client reports. It is written here own client. That is (intervention)
MS WILLIAMS: As well as the disbursement
TAXING MASTER: So this is allowed.
MS WILLIAMS: I will allow 20, are we at 21 now?
TAXING MASTER: 21
MS BOTES: I will disallow 21 and allow 22, because why do I, I phoned the Deputy Sheriff and then I draw a letter to the (indistinct) (intervention)’
Re items: 5(24) and (25)

MS WILLIAMS: Okay. Draft a letter
MS BOTES: That can be disallowed. That is (indistinct)
TAXING MASTER: Okay. Attend to on (intervention)
MS BOTES: Well that can be disallowed.
MS WILLIAMS: It is attorney client
MS BOTES: It is double’

[54] It would appear that the legal practitioner for applicant did indeed agree to the taxing off of these items. These objections are accordingly not upheld.

Ad items 5 – 15, 87, 88, 137, 139, 159, 160,163, 167, 168, 169

[55] The attendances claimed under these items were formulated as follows : 'Draw letter to client with Power of Attorney for signature' – 'Copies (of Rule 37 Notice) for service and to keep' – 'Printing costs of original (Rule 37 Notice) for Court' – 'attend to serve' (signed case management report?) – 'attend to file'(signed case management report?) – 'copies for service and to keep' (filing notice) – 'printing costs of original for Court' – 'attend to file' – 'copies for service and to keep' – 'printing costs of original for Court' – 'make copies of documents for court' – (plaintiff's discovered documents) –

[56] The taxing master states that he allowed an 'all-inclusive fee under B2 of the 6th Schedule' in this regard.

[57] While the general application of rule B2 of the 6th Schedule seems to be correct it is the 'lumping together' of all the above listed items into an 'all-inclusive fee' that seems to be contrary to the requirements set by the tariff formulation of item B2 which provides for and allows for a charge per folio.

[58] This ruling can accordingly not be upheld and these items, accordingly, have to be taxed afresh.

Ad items 5 - 16, 17, 72, 74,110,111,112,114,

[59] The items in issue are for : 'Telephone call to Registrar to enquire about Summons (not issued yet) – 10 min' –'Telephone call to enquire – 5 min' - 'Telephone consultation with client re: Defendant's whereabouts -15 min' – 'Telephone call to

Tracing Agents to enquire – 5 min' – Telephone call to Defendant re: Suitable date for rule 37 – 10 mins (5 mins allowed) – 'Further telephone call to BD Basson Inc re: Notice of Representation – 5 min' (abortive call – no objection) - 'Telephone call to Defendant re: Rule 37 -10 min' - (duplication agreed by Defendant) –

[60] It appears firstly that in respect of item 110 half of N$ 84.00 was allowed. This cannot be faulted.

[61] The Taxing Master's defence of the remaining items was based on the view that these were for abortive or unnecessary calls to the Registrar's office in respect of which it was not clear whether any delay was actually caused by the issuing (of the summons) by the Registrar's office.

[62] This justification does not echo the applicant's complaint that the respondent taxed these items off because they constituted attorney- client costs.

[63] Whereas I cannot determine from the record that the Taxing Master's ground for disallowing items 16 and 17 is clearly wrong, he clearly fails to provide any ground for disallowing items 72, 74, 111, 112 and 114 in his stated case.

[64] From the record the following however emerges:

'TAXING MASTER: Now you want to assist a tracer.

MS BOTES: Must I not assist a tracer?

TAXING MASTER: Otherwise we will disallow the tracer, because now you are doing (indistinct)

MS WILLIAMS: Moet ons tog nou nie weer laat terug gaan me.

TAXING MASTER: No, no, no I am not going back. I am just pointing out (intervention)

MS BOTES: It is a long bill

TAXING MASTER- But telephone, no, I will not allow this one, "72, because you already appointed tracers

MS BOTES: But if I appointed tracers ne (intervention)

TAXING MASTER: You appointed tracers
MS BOTES: And then additional information comes to light why can that not be allowed?
MS WILLIAMS: It is attorney own client
MS BOTES: But appointing the tracer is not
MS WILLIAMS: Well we have already allowed you,
TAXING MASTER: We allowed you that cost.
MS BOTES: Exactly, so it is the same,
IS WILLIAMS: No, you cannot duplicate and ja (intervention)
TAXING MASTER: Wrote a letter to tracer with Defendant's particulars.
MS WILLIAMS: Again,
MS BOTES: It is disallowed. It is fine. I am not objecting,
TAXING MASTER: 42 taken off. Telephone call to tracer' agents enquire,

[65] This agreement then disposes of the objection raised in respect of items 72 and 74.

[66] Items 111 and 112 seem to relate to the change of Defendant's legal practitioner. In this regard a phone call was seemingly placed with the Defendant's new legal practitioners of record requesting their Notice of Representation and a follow up call made in this regard.

[67] I cannot see how such enquiry, which is eminently reasonable and necessary in the context of litigation could be disallowed, particularly in view of the consequences and impact the filing of a Notice of Representation has for the further conduct of the parties to a case. These items should have been allowed.

[68] As far as item 114 is concerned, the view was taken that this constituted a duplication of the charge already allowed under item 110. It does not emerge from the bill of costs that this is not the case. No basis for any interference was made out in this regard.

Ad item 5 (18) (and (19)

[69] Here the taxing master ruled that the claimed attendance for N$ 150.00, to uplift the summons, was an unnecessary cost incurred in view of the practice that a summons is collected and not uplifted after issuance from the office of the registrar and does not need the legal mind /action by a legal practitioner.The taxing master pointed out that this was similar to a fee not being allowed for a secretary perusing a document which actually needs to be considered by an attorney.

[70] On behalf of applicant it was submitted that to 'uplift' a document at the office or to collect' a document is purely a matter of semantics. Furthermore, the practitioner must make sure that it was done by the registrar's office and need to verify the signature and date stamp. Not anyone can issue a summons etc.

[71] It would appear that a claim for the perusal of necessary documents could have been allowed in this regard under Item C1. This could have been done after upliftment/collection of the summons by a messenger. I can however not see that the Taxing Master was clearly wrong in the ruling made in this regard. I also note that a particular practice has apparently arisen in this regard. I will thus not interfere with this ruling.

Ad Items 5 – (28), (47), (63), (82)

[72] Items 5 – (28), (47), (63), relate to the 'perusal of the deputy sheriff's account – all '1 page'. Item (82) is for drawing a cheque to pay the deputy sheriff'.

[73] The Taxing Master stated in this regard:

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‘The taxing master have no idea of the plaintiff’s objection, but according to the record on submission by the defendant this costs relates to unnecessary costs in the view that if one peruse the deputy sheriff’s return of service you already peruse the account which indicates the amount payable. The taxing master ruled that one document was perused and no separate fee can be charged.’

[74] The response was that:

‘The taxing master ruled that this is attorney/own client costs and that the amount payable to the Deputy Sheriff Is reflected on the return of service. It is submitted that an account or invoice does not exactly reflect the same information as a return of service. The account properly specifies the services rendered and the amount payable for such service and also reflects the VAT payable and the time in which it should be paid. It is two separate documents and therefore perused and dealt with as such. We submit that the taxing master is wrong and should be corrected. “Note 1. Normally the return of service is accompanied by a separate account and therefore the two documents are separately perused. The fact that the account is endorsed on the return of service will not, it is submitted, debar the attorney from charging perusal fees for two separate documents, the principle being that having regard to the dissimilarity of the contents of the two documents different considerations apply to the perusal of each”. See: The Law of Costs and Taxation thereof by Jacobs & Ehlers, 1st ED 1979, item 235 at page 424. This was followed by practitioners for many years as it is two different documents and allowed on taxation by the taxing masters and the courts.’

[75] The record reflects the following:

Ad Item 28:

‘TAXING MASTER: Received and perused return of non-service. –Received (indistinct). I will allow 27.
MS WILLIAMS: Is, on which rate is that? Let me (intervention)
TAXING MASTER: Twenty-eight Namibian Dollars (N$28-00).

MS WILLIAMS: Twenty-eight Namibian Dollars (N$28-00) okay.
TAXING MASTER: Perused Deputy Sheriff's account '
MS WILLIAMS: I do not agree with this perusal, because when you peruse a return of service the account is already indicated on the return of service. It is not two separate documents. It should go off
TAXING MASTER: Okay, that I will take off then. 28,9.
MS BOTES: It should be allowed.
TAXING MASTER: I will allow it, the disbursement … '.

Ad item 47:

'MS WILLIAMS: 47 should not be allowed like I indicated (intervention)
TAXING MASTER: Yes
MS WILLIAMS: Earlier.
MS BOTES: Ja, it is fine.'

Ad item 63

'TAXING MASTER: Yes, point taken off. Receive and peruse return of non-service again, non-service. That sixty-three Namibian Dollars (N$63-00) will be taken off. It is an account. 64 is allowed.'

Ad item 82

MS BOTES: 82 is allowed
TAXING MASTER: 82 is a payment thereof received and perused the plea. Eight folios. Are you agreeing with the plea?
MS WILLIAMS: Ja'

[76] Considering the record it appears firstly that item 82 was allowed by agreement between all parties. There is thus no issue to determine here. It would however appear that Item 5(81) was actually meant.

[77] If one has regard to the underlying bill of costs it emerges that the Taxing Master already allowed a fee for the perusal of the return of service – 2 folios – N$ 56.00. It is also clear that a return of service usually contains a portion headed ‘Description of Fees’ and ‘Fees’. Any perusal of a return of service would thus, normally, include a perusal of the fees specified under this column in the return – which also provides other detail such as an Invoice number, the date of Invoice, the Sheriff’s Vat registration number etc.

[78] It cannot be ascertained from the record whether or not a separate account, over and above that reflected on the return was actually provided and thus perused. In such circumstances the perusal fee allowed under item 27 seems to have included the perusal of the invoice details contained on the face of the return and I therefore cannot detect any basis for interfering with the Taxing Master’s ruling made in regard to Items 5 – (28), (47), (63), (81) and (82).

Ad Items 5 – (30), (42) - (45), (61), (65) - (73), (76), (79), (84), (85), (102), (104) - (106), (128) and (136)

[79] These items are described in the bill of costs as: ‘Copies of Returns of Service for client’ – ‘Draw letter to client to report’ – ‘Receive and peruse letter from BD Basson Inc representing Defendant – Copy for client’ – ‘Draw letter to client with copy and report’ – ‘Draw letter to client to report’ – ‘Draw letter to Tracing Agents’ – ‘Copy of Return of Non Service’ – ‘Draw letter to client with copy and report’ – ‘Draw letter to client to report’ –‘Draw letter to Tracing Agents tracing report’ – ‘Draw letter to Tracing Agents to enquire’ – ‘Draw letter to client to report’ – ‘Telephone consultation with client re: Defendant’s whereabouts’ –‘Copy for client and deputy Sheriff’ – ‘Draw letter to client

to report' – 'Copy for client' – 'Draw letter to client to report' – 'Copy for client' – 'draw letter to client with Notice and attend on Registrar to inspect file' – 'Draw letter to client to report' – 'Copy of signed report to keep'.

[80] The taxing master held that these costs are attorney/own client costs.

[81] The applicant raised an objection that it does not fall under such costs. The applicant submitted that the taxing master was wrong because the legal practitioner is entitled to keep the client informed of the progress in his case by way of letters and/or telephone calls and also to receive and peruse letters and any other document from the client with direct reference to this matter. The applicant further submitted that a legal practitioner carries a responsibility throughout the litigation process to keep his client posted on all matters concerning the case. The legal practitioner is therefore entitled to report to the client and this cannot be regarded as pre-litigation costs or attorney/client costs.

[82] For purposes of determining this issue it may be helpful to again recall what attorney and client costs are: The distinction is usefully set out in *Jones & Buckle*[10]:

'These costs are those which the attorney is entitled to recover from his client in respect of disbursements made on behalf of the client, and for professional services rendered by him to his client. They are payable by the client whatever the outcome of the case and do not depend upon any award of costs by the court. 'In the wide sense it includes all the costs an attorney is entitled to recover against his client on taxation of his bill of costs, but in the narrow and more technical sense the term is applied to those costs, charges and expenses as between attorney and client which ordinarily the client cannot recover from the other party. In *Hawkins v Gelb*[11] the court described attorney and client costs in the wider sense as including 'all those costs in

[10]'The Civil Practice in the Magistrates' Courts of South Africa' 8th 8th Ed at p 289

[11] 1959 (1) SA 703 (W)

respect of which the client is indebted to his attorney'.[12] In a proper case he may recover some of these at least from the other party, and any costs over and above those which he may so recover remain part of his indebtedness to his attorney: "This latter portion of his costs, the attorney and client costs in the narrow sense, consists of items for which charges were made by the attorney but which the client cannot recover from the other party, and the difference between certain amounts debited by the attorney and the amount allowed for those items by the taxing master as being an expenditure recoverable from the other party.'" The differences between a bill for attorney and client costs and one for party and party costs are, firstly, that the former, while containing all the items which appear in the latter, may also contain some additional items. Secondly, while the former contains the same amounts as the latter, it may in certain cases indicate bigger amounts for the same items. It is not possible that the bill for party costs may contain items which do not appear on the bill for attorney client costs or that the former may stipulate a higher amount than the latter for the same item.'

[83] Also of assistance is the analysis from Halsbury, (vol 26 section 1308), as cited in the 'Law of Costs' by AC Cilliers:

'Such costs consist usually of fees and disbursements incurred for the solicitor's own information and which are so indirectly connected with the client's case as to justify the Taxing Officer in disallowing them as between party and party, or of counsel's fees in excess of what the Taxing Officer considers it is reasonable for the losing party to pay, or of more than one counsel, or costs prematurely incurred, costs incidental to evidence which is not material, or costs of indulgence – generally speaking, all such costs as are disallowed as between party and party (*Adam v Dada* 1913 NLR 31).'

[84] Finally the cardinal rule – laying down the underlying purpose of a party and party costs order needs to be taken into account. This rule strives to *'determine those reasonable charges and disbursements at taxation that the successful party can fairly claim from the unsuccessful party'*.[13]

[12] At 705

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[85] In this regard it is also of assistance to keep in mind what the Supreme Court has said in the context of the entitlement of the Legal Assistance Centre to costs as a charitable and educational trust which had been established, inter alia, as an entity for the purpose of a Legal Assistance Centre at or by which legal assistance would be given in the public interest and without charge to persons requiring such assistance.

[86] Hannah AJA, delivering the judgment of the full court, formulated the general principles in *Hameva v Minister of Home Affairs, Namibia*[14] as follows:

'The next leg of the argument turned on the legal principles underlying an award of costs in civil litigation. Rule 70(3) of the Rules of the High Court provides:

`(3) With a view to awarding the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party . . . . '

It was not contested by the appellants that a bill of costs is that of the client and not the client's attorney: *City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd and Another* 1973 (1) SA 93 (N) at 97A; *Costello v Registrar of the High Court, Salisbury and Another* 1974 (3) SA 289 (R) at 290F. Indeed the subrule just cited makes that much clear when it refers to a full indemnity for all costs reasonably incurred by the party who has been awarded an order for costs …'.[15]

[87] When considering the list of disallowed items under this heading against this backdrop it seems to me that the Taxing Master erred and misdirected himself when he disallowed the following items as being 'attorney and client attendances':

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[13]*Costello v Registrar of the High Court, Salisbury* 1974 (3) SA 289 (R) at 290

[14]1997 (2) SA 756 (NmS)

[15] At 760

'Receive and peruse letter from BD Basson Inc representing Defendant – (Item 43) - Copy for client' – (Item 44) - 'Draw letter to client with copy and report' – (Item 45) - 'Draw letter to Tracing Agents' – (Item 65) - 'Copy of Return of Non Service' – (Item 66) - 'Draw letter to client with copy and report' – (Item 67) - 'Draw letter to Tracing Agents to enquire' – (Item 69) - 'Telephone consultation with client re: Defendant's whereabouts' – (Item 72) – 'Draw letter to Tracing Agent's with Defendant's particulars' - (Item 73) - 'Copy for client (of Tracing Agent's report/fax) and deputy Sheriff' - (Item 76) – 'Copy for client' - (that is a 'Copy of the Plea') 'Draw letter to client to report' (on the Plea received) – (Items 84 and 85) ' – ' copy for client' and draw letter to client with (Rule 37(1)) Notice and report' and report' -(Items 104 and 105) - attend on Registrar to inspect file' - (Item 106) – 'draw letter to client to report' - (Item 128) – 'copy of signed report to keep' - (Item 136) -

as such items were 'neither fees and disbursements incurred solely for the legal practitioner's own information' – nor can it be said that such fees and disbursements were so 'indirectly connected with the client's case' so as to justify the Taxing Master in disallowing them as between party and party - and in any event – such items also describe situations were costs were reasonably incurred by the applicant in relation to its claim and in respect of which it should be fully indemnified in terms of Rule 70(3) in my view.

[88] It will have been noticed that I considered items (Items 104 and 105), (Item 106), (Item 128) and (Item 136) as incorrectly disallowed. These items seem to relate to Case Management. The case management rules and all attendances relating thereto are obviously now[16] necessary attendances, and in the context of which it is important that legal practitioner's inform their clients about the content of the Rule 37 reports ie. case management reports and pre- trial proposal's which shape the way forward in all civil cases.

[16]Since the introduction of the Case Management System

[89] As far as the remaining items under this heading are concerned – Items 30, 42, 61, 68, 70, 71, 79 and 102 - I cannot say that the Taxing Master exercised his discretion wrongly.

Ad Items 5 – (31) and (127) -

[90] These items are described as : 'Draw letter to client with copies and request for further instructions – 1 ff (3 pages)' and 'Draw letter to Andreas Vaatz & Partners with report for signature – 1 ff (5 pages)' –

[91] In his Stated Case the Taxing Master states that he merely disallowed the disbursements in the view that it was an inclusive fee under G 1 (GENERAL MATTERS) of the Sixth Schedule to the Rules.

[92] In response to this Ms Botes submitted:

'It is difficult to understand why the taxing master regarded these costs (items 31 – 35)[17] as attorney/own client costs. This was a result in respect of a return of non-service of the summons upon the defendant whose whereabouts was unknown at the time of service and the client was informed about that with the proof of non-service and further instructions was *(were)* requested. These items should have been allowed because the client was trying to get a new and proper address of the defendant for service. It is not strange that the taxing master allowed the perusal of the letter in item 36 of the bill wherein the client provided the legal practitioner with a new address for service. By client provided the legal practitioner with a new address for service. By allowing Item 36, the taxing master clearly showed that he was wrong in disallowing items 31-35.'

[93] I could find no submission in respect of item 127.

[17] It should be stated that there was confusion and inconsistence in which the legal practitioner responded to the Taxing Master's Stated Case, which made it difficult to analyse and deal with the parties respective stances

[94] Contrary to Ms Botes submissions and if one has regard to the bill of costs it does actually appear that the Taxing Master allowed both items and merely disallowed the disbursements.

[95] The record also tells a different story in respect of Item 31:

'TAXING MASTER: That is off. Draw letter to client with copies and request for further instructions

MS BOTES: That should be allowed surely.

TAXING MASTER: Let me, is it drawing to client with copies and request for further particulars

MS WILLIAMS: Okay so you have received the (intervention)

MS BOTES: I have got an instruction,

MS WILLIAMS: Okay, you can allow 31, but G(l) indicates that the dispatch, the six Namibian Dollars (N$6-00) should go off

MS BOTES: Why'?

MS WILLIAMS: Because it includes the dispatch of the letter. Just check at G, G(l)

TAXING MASTER: Ms Williams.

MS WILLIAMS: Yes

TAXING MASTER: I will not allow, she is an experienced Lawyer who hold instructions to institute actions

MS WILLIAMS: Ja,

TAXING MASTER: To the best of your client. Now why must you on a party party basis inform, keep informing your (intervention)

MS BOTES: You are asking instructions Mr Taxing Master

TAXING MASTER: No, your issue (intervention)

MS BOTES: You have a return of non-service.

TAXING MASTER: Yes, you just receive, what about you say the peruse Sheriff's account non-service

MS BOTES: Non-service. Non-service.

TAXING MASTER: Now you know the way when you cannot get a*(n)* address for service

MS BOTES: Then you do what?

TAXING MASTER: Appoint a tracer.
MS BOTES: With the instructions of your client, because your client has to pay (intervention)
TAXING MASTER: You are an experienced lawyer.
MS BOTES: Has to pay for the tracer. So you cannot simply appoint a tracer
MS WILLIAMS: Can I just say one thing? It is also not, I believe that it was Mr, is it Erasmus, it is mos ne, Francois Erasmus, ja, that attended to this matter so it is an even more senior attorney.
TAXING MASTER: So I will not allow that one
MS BOTES: Then I please, I object
TAXING MASTER: You, you, that is your point. (Indistinct) must know (intervention)
MS WILLIAMS: (Indistinct)
TAXING MASTER: The process to (intervention)
MS BOTES: But Mr Taxing Master even if you know the process you, we act on instructions of our clients. Cannot simply go and appoint tracers if my client is not willing to pay for the tracers
TAXING MASTER: It can be recovered.
TAXING MASTER: It can be recovered,
MS BOTES: Huh uh,
MS WILLIAMS: All I can say I (indistinct)
TAXING MASTER: It is a disbursement
MS BOTES: By who?
TAXING MASTER: (Indistinct)
MS WILLIAMS: I understand, I understand your argument, but you must understand that the cost allowed here is party party cost. What you are referring hereto now is attorney own client if it should be allowed and that is not the order that was granted,
TAXING MASTER: The (indistinct), that is (intervention)
MS WILLIAMS: I believe 32 should be off as well'

[96] Fact of the matter however seems to be that item 31 was actually allowed on the permissible maximum of N$ 42.00 under G.1. of the Sixth Schdeule. – correctly so in my view - and the disbursement taxed off.

[97] In regard to item 127 the record reflects only this:

‘TAXING MASTER: Number 127.
MS BOTES: That must be a large amount.
MS WILLIAMS: That must be fine. The disbursement must be off. The ten Namibian Dollars (N$10-00) … ’.

[98] The bill of costs then shows that also this item was then dealt with in precisely the same fashion as item 31, in that the maximum of N$ 42.00 was allowed, while the N$10.00 for disbursements was taxed off.

[99] Also here I cannot say that the Taxing Master’s powers were exercised incorrectly.

Ad Items 5 – (32) to (35)

[100] These items seem to relate to four occasions on which letters were drawn to client requesting instructions- The taxing Master disallowed these items as he considered them to be a ‘duplication of costs’.

[101] The applicant included these items in a general response formulated also in respect of 36 other items in which the objections formulated without any precision as follows:

‘Here again, it is submitted that the taxing master is wrong because the legal practitioner is entitled to keep the client informed of the progress in his case by way of letters and/or telephone calls and also to receive and peruse letters from the client with direct reference to this matter. A legal practitioner carries a responsibility throughout the litigation process to keep his client posted on all matters concerning the case. He therefore is entitled to report to the client and this cannot be regarded as pre-litigation costs nor attorney/own client costs. Likewise, the

legal practitioner did not agree to the items being taxed off and stressed that the objections still remain irrespective of the taxing master's decision.

The said services were claimed under items G 1, C 2, D 1, D6 and C 5 of the tariff, respectively and it is submitted that same should be allowed under party and party costs.'

[102] From the record it however emerges that these items were disallowed by agreement:

'MS WILLIAMS: I believe 32 should be off as well
MS BOTES: Ja.
TAXING MASTER: 33 is it duplications or what is going on here?
MS BOTES: It looks like it, ja it can just (intervention)
TAXING MASTER: Up to (intervention)
MS WILLIAMS: Because nothing is (intervention)
MS BOTES: It is only, yes it is different letters, but it can be taken off, it is fine. The client took long with instructions that is why we had to (intervention)
TAXING MASTER: Did you peruse these bills of, drafted by Mr Joubert?
MS BOTES: The letters were written.
TAXING MASTER: No, but did you read (intervention)
MS BOTES: I can show you the letters
TAXING MASTER: Did you peruse it and consult when you tell me that the bill is not properly drafted?
MS BOTES: No, I did not
TAXING MASTER: (Indistinct)
MS BOTES: I perused the document.
TAXING MASTER: You paid him.
MS BOTES: I perused the (intervention)
TAXING MASTER: How much did you pay Mr Joubert?
MS WILLIAMS; Five thousand Namibian Dollars (N$5 000-00)
TAXING MASTER: For (intervention)
[S WILLIAMS: It is indicated the last item on the file, on is bill

TAXING MASTER: Peruse, we read number 36… ‘.

[103] It appears that the rulings made in respect of these items must stand.

Ad Items 5 – (37) to (39), (129) – (131), (174) – (181)

[104] These items are described in the bill as follows: 37. Attend to amend Summons to reflect Defendant’s new address – 10 min -38. Attend on Registrar to initial at changes ~ 30 min -39. Peruse signature – 129. Draw Notice of Intention to Amend – 2 ff (2 pages) - 130. Copies for service and to keep – 2 pages x 2 - 131. Printing costs of original for Court – 2 pages – 174. Consultation with client re: Amendment Draw Particulars of Claim – 1 hour -175. Draw Plaintiffs amended Particulars of Claim – 45 min (5 pages) -176. Copies for service and to keep – 5 pages x 2 -11 – 177. Printing costs of original for Court – 5 Pages - 178. Attend to serve – 30 min -179. Peruse acknowledgment -180. Attend to file-30 min -181. Peruse acknowledgment –

[105] All these items thus relate to certain amendments made to the summons and particulars of claim.

[106] The Taxing Master disallowed these items on the basis of the general rule which governs the costs of applications for amendments to pleadings and documents which states that an applicant, for the grant of the indulgence pertaining to an amendment, is liable for the costs incurred.

[107] Ms Botes on the other hand submitted in respect of items 5 – (37) to (39) that the taxing master regarded these as attorney/own client costs. As the defendant had however moved to another address it became necessary to amend these particulars in both the summons and particulars of claim. The amendments had to be initialed by the registrar and the legal practitioner. This was brought about by defendant’s actions.

[108] Also as far as item 174 was concerned – so it was argued - the client had to amend the particulars of claim as a result of new information that had come to hand through the discovery of documents, and the costs in doing so should be allowed. Only where the client's initial particulars of claim were defective, through his own mistake, would those costs fall under attorney and client costs. As the defendant caused the amendment of client's particulars of claim and he should bear the costs. The same argument was made in respect of Item 175. These items should have been allowed by the taxing master.

[109] Although one can understand the rationale behind the argument and one would have sympathy with the grounds raised on behalf of applicant it is clear that the Taxing Master's ruling will have to prevail in view of the provisions of Rule 28(7)[18] of the rules of court and in circumstances where the court did not order these costs to be for the account of the other party.

Ad Items 5 – (41), (59), (63), (78), (81), (84)

[110] '41. Attend on Deputy Sheriff with Instructions – 30 min - 59. Attend on Deputy Sheriff with instructions – 30 min - 63. Peruse Deputy Sheriffs Account – 1 page – 78. Attend on Deputy Sheriff with instructions – 30 min – 81. Peruse Deputy Sheriffs Account – 1 page – 84. Copy for client – 5 pages.'

[111] In defence of his taxing- off the Taxing Master states :

'The taxing master disallowed this items with fees which duplicates item 40 which makes it an unnecessary cost incurred due to uncertainty on the attendance to the deputy sheriff as it is

[18]'(7) A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party.'

practice that the summonses to the sheriff is left in the pigeon hole at the Registrars' office to be collected.'

[112] On behalf of applicant it was contended:

'The reasoning by the taxing master makes no sense at all. The letter with instructions to the deputy sheriff together with document need to be delivered to the deputy sheriff or be taken to the office at the registrar and placed in the pigeonhole of the deputy sheriff. This is a necessary and reasonable service.'

[113] Here it is to be noted firstly that item 5(40) was for 'Draw letter to Deputy Sheriff with instructions – 1ff (1page)' – which was followed by 5(41) – 'Attend on Deputy Sheriff with instructions – 30 mins'. - It is also clear that also Ms Botes acknowledges that there is a pigeonhole at the Registrar's office where instructions for the sheriff can be and are usually delivered. That seems to be the first 'port of call' as it constitutes a reasonably practical- and cost efficient method to get instructions to the sheriff, in the ordinary course, unless there exist good reasons to deviate from such practice, which should be advanced.

[114] I therefore cannot detect any substance in the submission that: *'The reasoning by the taxing master makes no sense at all.'*

[115] The record of the taxation furthermore also discloses that Ms Botes advanced no argument why the instructions to the sheriff could not, in these instances, have been dropped off at the sheriff's pigeonhole at the Registrar's office.

[116] The applicant's objections in regard to these items in my view fail to show that the Taxing Master had exercised his discretion improperly or failed to bring his mind to bear on the question in issue. His decision in this regard should accordingly stand.

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Ad Items 5 – (50), (51), (53), (54)

[117] These items are :‘50. Draw Filing Notice in respect of original Summons and Retum of Service – 1 ff (1 page) –Copy to keep -1 page -53. Attend to file – 30 min -54. Peruse acknowledgment.’

[118] The Taxing Master understood the applicant’s objection as follows:

‘Plaintiff objects that the taxing master questions the necessity of the filling of the summons at the court. The taxing master ruled that it was unnecessary to draw a filing notice against a charge for the filing of the summons at the court with the same principle towards reference to the following. “The general rule is that all costs that were necessarily incurred by a party in the conduct of his case should be allowed on taxation, but excludes costs that have been incurred by over caution or any other cost –“Jandrell v Stanley 1967(3) SA 24 (T).See “Herbstein and Van WInsen –The Civil Practice of the Supreme Court of South Africa 4 ed 1997 at 702, that costs on a party and party scale are those costs which have been incurred by a party to legal proceedings and which the other party is ordered to pay.’

The response was formulated thus:

‘We submit that this is not attorney/own client costs. The summons and return of service was send*(t)* to the legal practitioner by the deputy sheriff and it was therefore necessary to do a filing notice to file the originals at court. The legal practitioner is responsible to make sure that the court file is in order and that all pleadings and notices are on the file. The question posed by the taxing master was the necessity to file the summons at Court. It is respectfully submitted that the Taxing Master should know better. This item should have been allowed.’

[119] In this regard the following exchange occurred at the taxation:

‘MS WILLIAMS: Yes, that is (intervention)

TAXING MASTER: (Indistinct)
MS WILLIAMS: Yes.
TAXING MASTER: That is in, drawing filing notice in the original summons
MS BOTES: Ja, 40
TAXING MASTER: Drawing filing notice in respect of (indistinct) . Is that the document you filed with the Court? You need, do you need to draft a letter to us?
MS BOTES: A filing notice yes
TAXING MASTER: Why'
MS BOTES: Because where will it be filed otherwise?
TAXING MASTER: No
MS WILLIAMS: No.
TAXING MASTER: There is only a High Court, one High Court in Windhoek,
MS BOTES: That is fine,
TAXING MASTER: You know you are amazing you know.
MS BOTES: It is fine. I also object to that
TAXING MASTER: No, you mention you know where is the High Court and people know here.
MS BOTES: The people know here what to do
TAXING MASTER: Yes
MS BOTES: I am sure they do
MS WILLIAMS: 52 should also go off
TAXING MASTER: (Indistinct) 52 also. 53 also taken off
MS BOTES: The filing, okay no that is fine.
MS WILLIAMS: Attend to file. Peruse acknowledgement I do not (intervention)
TAXING MASTER: To file the summons here at all (indistinct).
MS BOTES: It is fine. Can we continue?
TAXING MASTER: Ja. 54 the perusing thereof
MS WILLIAMS: If we do not allow the filing notice we cannot allow the perusal of, I suppose the filing notice or what?
TAXING MASTER: No, I disallow the whole filing notice
MS WILLIAMS; So 54 is also off. It is off.
MS BOTES: Okay.
MS WILLIAMS: I will allow 55.'

[120] Firstly it should be said that it was not shown that the decision, relating to the attendances in respect of this filing notice, were reviewable in accordance with the applicable principles pertaining to taxation reviews.

[121] Secondly the drafting of a filing notice, in respect of a summons, surely, cannot be a necessary attendance and the related costs incurred in this regard surely cannot correctly not regarded as costs necessarily incurred, particularly as I can think of no reason, and none was advanced, why a summons should be filed under a filing notice when all the necessary information, such as the case number, the signature and date on which it was signed by the legal practitioner and the date when it was signed and issued by the registrar, all appear ex facie the summons.

[122] Thirdly I also cannot think of any reason why the information contained in a filing notice, under cover of which a summons is subsequently filed at court, can of interest to anyone – particularly as a summons - a document which is served by the sheriff – and which attracts a return of service - and where this resultant return then provides all the relevant information required for the further conduct of the case.

[123] Finally, it should be stated that, as of late, a practice has arisen, where simply, any document, that finds its way into a court file, is inexplicably filed under a filing notice, whether this is necessary or makes sense or not. Surely a filing notice will only be a necessary document if any relevant information for the further conduct of a case is contained in it.[19] The practice of the utilization of unnecessary filing notices, which can only serve to increase costs unnecessarily, should be discouraged and thus not be

[19] Such as for instance in the case of filing answering and replying affidavits in motion proceedings or where heads of argument are filed and were the filing notice would contain the information required to determine whether or not the document in questions was filed in- or out of time and thus require- or not require - any further actions such as the bringing of a condonation application for example

allowed on a party and party level. The Taxing Master's ruling cannot be faulted for these reasons in this instance.

Ad Items 5- (159), (108), (137), (139), (146), (148), (161), (163), (170), (172), (188), (190), (204), (206), (211), (213), (227), (237), (239), (244), (246), (269), (271), (298), (300), (304)

[124] This batch of items all relate to attendances described as : 'Attend to file – 30 min' - and 'Attend to serve – 30 min' etc. in respect of the Plaintiff's discovery affavit, the practitioners Rule 37 return, a case management order, a filing notice, a pre- trial proposal, supplementary discovery, a pre-trial order, a request for further particulars, a notice of set down, an index, heads of argument, the ultimate order.

[125] The Taxing Master justified his actions by stating:

'The plaintiff further objects that the taxing master held that this was done by the messengers at the legal practitioners office and thus unnecessary. The taxing master ruled that these items is falls under the specified items under the provisions of Item B2 of the sixth schedule of the Rules which specifically deals with the drafting,settling,copying and delivery of documents'.

[126] I could find no submissions made in reply.

[127] At least in the 'request for a stated case' the following is said in respect to some of these items:

'Item(s) 12. 59. 78.108.137.139.146.148.161.163.170.172.188.190. 204. 206. 211. 213. 227. 237. 239. 244. 246. 269. 271. 298. 300. 304

The Taxing Master ruled that this is done by a messenger at the legal practitioner' offices and therefore taxed the amount off. We objected to this on the basis that the service was necessary and important.'

[128] The record then reveals the following:

Ad item 108 –

'MS WILLIAMS: I, sorry, I, You know with these new case management procedures I am not so sure does those notices does it fall under B(2).
TAXING MASTER: Every notice,
MS WILLIAMS: Okay. Alright, then I will allow the 104 here, sorry.
MS BOTES: 107
MS WILLIAMS: The forty Namibian Dollars (N$40-00) ja it is 107, but then 108, 108 must be off
TAXING MASTER: Yes, I agree,
MS WILLIAMS: 7 can be allowed.'

Ad item 137 and 139

MS WILLIAMS: Can I just have that? 137 (intervention)
MS BOTES: No I (intervention)
VIS WILLIAMS: Must also be off
TAXING MASTER: Yes, agree. Perusal thereof.
MS BOTES: Allow.
MS WILLIAMS: You can allow that
TAXING MASTER: Ja this is a filing notice.
MS WILLIAMS: 139 (intervention)
MS WILLIAMS: Must be off.'

Ad item 146 and 148

‘TAXING MASTER: I can allow it. Attempt to serve.

MS WILLIAMS: What, what are they selling? Getting a copy which you, which the Registrar’s office placed into my pigeonhole.

TAXING MASTER: Ja we (intervention)

MS BOTES: I am not saying it is served to you. It can be disallowed.

MS WILLIAMS: No, but Mr Joubert thinks it is.

TAXING MASTER: Ja, he is now in the old practice still.

MS WILLIAMS: 147 you are not perusing anything acknowledged by them,. .

MS BOTES: It is the same thing, it can be off the, I just said that

One is (intervention)

MS BOTES: I think I clearly said that

TAXING MASTER: 148 (intervention)

AS WILLIAMS: Must be off.

TAXING MASTER: And 149

MS BOTES: And 150 also.’

Ad items 161 and 163

‘MS BOTES: Can be off. 160 off. You take 161 off

MS WILLIAMS: 150

TAXING MASTER: 161 already taken off. 162 allowed.

MS BOTES: 162 should be allowed. 163 you take off

TAXING MASTER: Yes

MS BOTES: I always object to that yes

TAXING MASTER: (Indistinct)

MS BOTES; The perusal thereof. 164 should be allowed. Sorry, (indistinct)

TAXING MASTER: Ja, I allowed it, that seven Namibian Dollars (N$7-00) and (intervention) …’.

Ad items 170 and 172

‘TAXING MASTER: 170 will also be taken off. 171 allow, 172 taken off, 173 allowed. Consultation with client with regard to (intervention)
MS WILLIAMS: No.’

Ad items 188 and 190

‘TAXING MASTER: Then we attend to the service.
MS WILLIAMS: It must be off
TAXING MASTER: Okay and then 189 the perusal of which document? Which folio is it now?
MS WILLIAMS: What, 189, peruse the signature.
TAXING MASTER: Ja.
MS WILLIAMS: Peruse acknowledgement.
MS BOTES: Perusing, it is fine.
TAXING MASTER: Ja,
MS BOTES: Yes, yes
MS WILLIAMS: But what, what are you perusing now? I have just discovered my documents.
MS BOTES: The index, the index, the index.
MS WILLIAMS: Ooh.
TAXING MASTER: (Indistinct)
MS WILLIAMS: Okay seven Namibian Dollars (N$7-00)
TAXING MASTER: Seven Namibian Dollars (N$7-00)
I will allow it. The drawing (intervention)
MS WILLIAMS: 190 must be off
TAXING MASTER: Alright. 190 up to 192
MS WILLIAMS: Now you are perusing what again?
TAXING MASTER: The (indistinct) filing (intervention)
MS BOTES: Seriously the signature.
MS WILLIAMS: But did we not just allow it? But (intervention)
MS BOTES: It is two signatures that you allow.
MS WILLIAMS: Okay, ugh.

TAXING MASTER: The drafting of the index.'

Ad items 204 and 206

'TAXING MASTER: Draw letter to client with affidavit for signature.
MS WILLIAMS: That is the same. There has already been an affidavit.
MS BOTES: It is fine if it goes off.
MS WILLIAMS: As well as the disbursement.
TAXING MASTER: Attend to the service thereof.
MS BOTES: No all those, (intervention)
TAXING MASTER: All the 207 (intervention)
MS BOTES: Until 207 must come off.'

Ad items 211 and 213

'MS BOTES: Until 207 must come off
TAXING MASTER: Is taken off yes
MS BOTES: Also 208. Also 209. Also 20, wait, ja or until 215.
TAXING MASTER: Received and perused (intervention)
MS BOTES: 215 Mr Taxing Master
TAXING MASTER: 200 and, you, you say (intervention)
MS BOTES: Off
MS WILLIAMS: Must be off
MS BOTES: Yes'

Ad item 227

'TAXING MASTER: The perusing of the court order I will allow it
MS WILLIAMS: Sorry, is that one standing over for or what is (intervention)
TAXING MASTER: Which one?
MS WILLIAMS: What, 227, what are you doing (intervention)

^AXING MASTER: 227 is (intervention)
AS BOTES: it is off
TAXING MASTER: Taken off
MS WILLIAMS: Okay. ‘

Ad item 237 and 239

‘MS BOTES: 235 off, (intervention)
TAXING MASTER: Off
MS BOTES: 236 off, 237 off, 238 allowed, 239 off. Allowed.
TAXING MASTER: Okay.’

Ad items 244 and 246

‘MS WILLIAMS: 242 off, 243 off, 244 off
MS BOTES: 245 allowed.
MS WILLIAMS: Allowed.
MS BOTES: 246 off.’

Ad item 269 and 271

‘TAXING MASTER: 267, 268 must be off
MS WILLIAMS: As well as 269
TAXING MASTER: 269 will be off.
MS WILLIAMS: Seven is allowed I believe
TAXING MASTER: Seven, the perusing I will allow. The attending, that is also
MS WILLIAMS: The attendance on the file must be off. I do not know what (intervention)
TAXING MASTER: Yes 271. Perusing of the acknowledge, (indistinct) other party drawing. Okay 273.’

Ad items 298, 300 and 304

'TAXING MASTER: 298, all these things is relevant to 3, up to 301 you can allow. We take off the main item. We cannot allow that, the children.
MS WILLIAMS: 302
TAXING MASTER: (Indistinct) 302 attend court to (indistinct) and not (indistinct)
MS WILLIAMS: Ja, that is fine with me.
TAXING MASTER: Are you okay with it?
MS WILLIAMS: Yes
TAXING MASTER: Take one hour
MS WILLIAMS: Draw letter to client to report. With all respect the client, their manager was in court to listen to the Judgment and (intervention)
MS BOTES: (Indistinct) Namibian Dollars, seriously.
MS WILLIAMS: (Indistinct) a letter to (indistinct) intervention)
MS WILLIAMS: No, no, no, you, it is unnecessary.
MS BOTES: I do not want the forty-two Namibian Dollars
MS WILLIAMS: Okay.
TAXING MASTER: If you are agreeing on it. Attend to uplift the court order to get the court order pigeonhole. Are you happy?
MS WILLIAMS: It must be off. Peruse order. Ugh yes please. Copy for client. It is attorney own client cost
TAXING MASTER: Peruse the order, we grant it neh.'

[128] The record then proves that - contrary to the allegations that - *'We objected to this on the basis that the service was necessary and important',* - that no such objection was actually raised at the time in respect of any of these items.

[129] If the Taxing Master thus held the view – (which seems to be the case, as this must be inferred from his response reflected in the Stated Case) - that the additional attendances - relating to the filing or serving the plaintiff's discovery affidavit, the

practitioners Rule 37 return, a case management order, a filing notice, a pre- trial proposal, supplementary discovery, a pre-trial order, a request for further particulars, a notice of set down, an index, heads of argument, the ultimate order – had to be disallowed in view of the fact that the fees - charged for the drafting of these items - which were allowed under Tariff Item G1 - are 'all inclusive fees' – then this line of reasoning seems to be supported by the wording of the tariff which provides :

'1. Drafting of, settling, copying and delivery of any pleadings, affidavits, witness statements, petitions. summonses and other documents, including instructions to another counsel, an all inclusive fee per half an hour … '. *(my underlining)*

[130] The Taxing Master's ruling in respect of these items should for these reasons stand.

Ad items: 5(56), (57), (90), (91), (92), (94), (97), (98), (100), (125), (126), (134), (135)

[131] The Taxing Master noted here:

'The plaintiff objects that the taxing master disallowed these items under the wrong proviso of the Sixth Schedule or under a wrong approach.

The taxing master in this instance draw*(s)* the plaintiffs attention to the proviso of B 1 and B 2 of the sixth schedule of the Rules and which malke a distinction between the items referred to under D 1 and D 6 of the schedule.

The items/documents under items Bl and B2 is specific and it further reads that drafting of ,settling, copying and delivery thereof are inclusive to each fee per item. The copies referred to under D 1 merely refer to copies made for any other document which is not related to the drafting of such document My example hereto will be like received an e- mail, faxes, invoices, preprinted documents, etc or other document necessary to the case.'

[132] The response to this – (13 items)- had to be extracted from submissions made in regard to some (56) items, namely items : 9; 10;30;44;51; 52; 56; 57; 76; 84; 87; 88; 90; 91; 97; 125; 126; 130; 131; 134; 135; 159; 160; 167; 168; 169;176; 177; 185; 186; 193; 194; 209; 210; 218; 222; 229; 235; 236; 242; 243; 251; 252; 256; 257; 267; 268; 274; 275; 276; 279; 280; 281; 296; 297; and 306.

[133] It was stated in this respect that:

'The taxing master had taxed off all the disbursements in items 9; 10;30; 44;51; 52; 56; 57; 76; 84; 87; 88; 90; 91; 97; 125; 126; 130; 131; 134; 135; 159; 160; 167; 168; 169;176; 177; 185; 186; 193; 194; 209; 210; 218; 222; 229; 235; 236; 242; 243; 251; 252; 256; 257; 267; 268; 274; 275; 276; 279; 280; 281; 296; 297; and 306.

His reasoning for this was that these costs are included in items B 1 and B2 of the tariff.

We submit that the taxing master misdirected himself by regarding these costs as part of the fees and not disbursements. We submit that it is actual disbursements such as photocopies and printing costs for the copies of the court. These items were claimed under items D1 and D6 of the tariff, respectively and should be allowed as such. The word 'copying' referred to in B1 and B2 of the tariff relates to time spent at the photocopy machine or fax machine and not to actual disbursements.'

[134] The actual items around this part of the dispute are described as:

56. Copies for service and to keep – 2 pages x 2 - 57.Printing costs of original for Court – 2 pages – these two items relate to item 55. - Draw Notice of Bar – 2 pages –
Re a Rule 35 Notice (item 89) – item 90. Copies for service and to keep pages x 2 91- Printing costs of original for Court – 2 pages -

94.-Attend to file-30 min

Re :Draw Notice to Registrar re: Close pleadings – 2 pages – item 97. Copies for service and to keep – 2 pages x 2 -98. Attend to serve – 30 min
100. Attend to file-30 min

Re: Draw joint Case Management Report- (item 124) – 125. Copies for service and to keep – 4 pages x 2 and item 126. Printing costs of original for Court – 4 pages;

Re: Receive and peruse letter from Andreas Vaatz & Partners with signed report -1 ff (1page) (item 132) – items 134. Copies for service and to keep – 2 pages x 2 and - 135. Printing costs of original for Court – 2 pages'.

[135] The Taxing Master applied Tariff Items B1 and B2. They read:

'B. DRAFTING AND DRAWING

1. Drafting of, settling, copying and delivery of any pleadings, affidavits, witness statements, petitions, summonses and other documents including instructions to another counsel, an all inclusive fee - per half an hour - 210.00 to 350

2. Taking instructions to, and drafting of, copying and delivery of any notices or formal documents, including powers of attorney, resolutions, notices of intention to defend, notice of bar, notices of representation, notices of withdrawal. Notices of intention to except, Rule 34, 35, 36, 37, 42, 45, 46 or 47 notices or Rule 48 notices or notices of set down and indexes per folio - 35.00 to 50.00;

[136] Applicant wants Tariff Items D1 and D6 to be applied which provide:

'D. EXPENSES OR DISBURSEMENTS

1. Photocopies - per copy - 1.40

….

6. Any disbursements not otherwise provided for - the actual costs thereof;'

[137] I have already indicated above that the disputed items relate to a 'notice of bar' – a rule 35 notice regarding the close of pleadings – a rule 37 notice and attendances relating to a case management report – also in terms of Rule 37.

[138] It emerges that these items fall squarely within Tariff Item D2.

[139] What is more: the items listed in D1 to D6 are expressly made subject to the qualification that:

> 'the following fees apply for expenses and disbursement, unless a higher fee is provided.' *(my underlining)*

[140] Quite clearly the fees applied in terms of Tariff items B1 and B2 are higher.

[141] It emerges that the Taxing Master applied the correct tariff items.

Ad items 5 (115) and (119)

[142] The items are described in the bill as follows:

> '115. Telephone call to Andreas Vaatz & Partners re: Notice of Representation – 10 min
>
> 119. Telephone call to Andreas Vaatz & Partners re: Rule 37 Conference - 10 min'

[143] Here the Taxing Master states:

'The plaintiff objects that the taxing master held that these items are attorney/own client costs. The taxing master does not agree with these objections as the calls were only limited towards the time aspects and plaintiff agreed thereon.'

[144] Again – the applicant's submissions had to be painstakingly extracted from submissions made in regard to 93 other items – and in respect of which it was submitted that :

'The taxing master held that these costs are attorney/own client costs. We raised an objection that it does not fall under such costs. It must again be stressed that the practitioner did not agree that the amounts be taxed off but stated that the objections still remain irrespective of the taxing master's decisions to tax it off.
With regard to attorney/own client costs, the reviewing judge is referred to paragraph 37 of the Law of Attorneys' Costs and Taxation thereof by Jacobs and Ehlers, 1st Ed. 1979 at page 47.

See stated case at p2 referring to item 5, p3 referring to items 13,14, 20, 21, 24 and 25.'

[145] It will at first glance already have been ascertained that the Taxing Master did not regard these costs as 'attorney/own client' costs, as was submitted, but that he allowed both of these items in part.

[146] This is also borne out by the record:

Ad item 115

'MS WILLIAMS: Which one are we taking off now?
MS BOTES: 114.
MS WILLIAMS: okay, eighty-four okay.
TAXING MASTER: Taken off. Telephone call to Andreas Vaatz (indistinct) (intervention)

MS WILLIAMS: I say take off forty-two Namibian Dollars (N$42-00) there. I can, ten minutes is too long
TAXING MASTER: No, but (indistinct)
MS BOTES: Ja, it is different. This one goes to Andreas Vaatz, it is them.
TAXING MASTER: No, the discussion between the lawyers must (intervention)
MS BOTES: The proper lawyers yes. So, she says five minutes must go off. So forty-two Namibian Dollars (N$42-00) must go off
TAXING MASTER: Okay. If you allow it no problem…'.

and

Ad item 119

'TAXING MASTER: Telephone call to Andreas Vaatz, part of the Rule 37 Conference.
MS WILLIAMS: I say take off forty-two Namibian Dollars (N$42-00)
MS BOTES: That is fine'.

[147] In addition it does indeed appear that Ms Botes agreed that these items be decreased.

[148] In such circumstances no ground to interfere with the Taxing Master's decision has been shown.

Ad item 5 (120)

'Draw letter to Andreas Vaatz & Partners re: Rule 37 for 13/10/11 – 1 ff (1 page)'

[149] The record reflects that only MS WILLIAMS and the Taxing Master participated in the discussion on this item :

'MS WILLIAMS : Draw letter to Rule 37. I will allow forty-two Namibian Dollars (N$42-00) , but two Namibian Dollars (N$2-00) must go off, because G(1) of our tariffs includes dispatch. TAXING MASTER: And 40, 121 also.Client preparation for Rule 37 conference.'

[149] The stated case reflect this response:

'The plaintiff objects that the taxing master held that this disbursement Is attorney/own client costs.
The taxing master ruled that this is an inclusive fee under G 1 of the sixth schedule to the Rules.'

[150] No answering submission was found nor was this item included in the Request for a Stated Case.

[151] It would appear therefore that the Taxing Master incorrectly reacted to this item and probably got the numbering wrong.

[152] No ruling is thus made in this regard.

Ad items 5(122), (123) and (142)

[153] These items are described in the bill as:

122. Prepare for Rule 37(4) – 1 hour - 123. Attend Rule 37 Meeting – 1 hour 30 min 142. Attend Court re: Case Management Conference – 45 min

[154] The Taxing Master justified his rulings as follows:

'ITEM 122

The plaintiff objects that the taxing masters' approach is that preparation and attendances was exorbitant.

The defendant submitted that the legal practitioner dealt with the matter at that stage was one of the most senior practitioners and well experienced in the preparing the Rule 37 procedures with due regard to the perusing and consultation at an earlier stage. It was agreed by both that the time be limited to half an hour. The ruling was made accordingly.

ITEM 123,142,

The plaintiff objects that the taxing masters' approach is that preparation and attendances was exorbitant.

The plaintiff and defendant agree on the reduction of time on these items as well as the fees.'

[155] The applicants response to this was found intermingled with items 152:153:156:174: 175: 182:195:199: 202: 225: 226:234: 249: 255:286. See stated case at p 7-8:

'With regard to all these items, the taxing master has reduced the time spent for these services and only allowed a minimum fee.

The applicant objected to this on the grounds that the time so spent was reasonable and necessary in the circumstances and also did not agree to the reducing or taxing off of these items.'

[156] The record reflect this exchange:

'TAXING MASTER: And 40, 121 also. Client prepare, preparation for Rule 37 conference MS WILLIAMS: Okay now I cannot say how long they prepared so you will have to say here. I made a note here Mr Taxing Master. You will have to decide how much time does it take for you

experienced attorney half an hour is sufficient, because time is also allowed for the meeting that follows and then also for the drafting of the notice,

TAXING MASTER: Yes, you can proceed,

MS WILLIAMS: So I say give them tax of three hundred and fifty Namibian Dollars (N$350-00) and make it a half an hour.

TAXING MASTER: So you say half an hour

MS WILLIAMS: For preparation,

TAXING MASTER: Prepare. Three hundred and fifty Namibian Dollars (N$350-00) . Which bank are you?

MS BOTES

MS WILLIAMS: FNB.

TAXING MASTER: This one here

MS WILLIAMS: Ja, I must run.

TAXING MASTER: (Indistinct) must be far

MS WILLIAMS: I know.

MS BOTES: I have another, I also have another appointment at 16:00. So I cannot continue past 16:00

MS WILLIAMS: Ja' no, no, we will, I trust we will finish.

MS BOTES: Okay.

MS WILLIAMS: Attend Rule 37 meeting. I say allow one hour

At seven hundred Namibian Dollars (N$700-00)

TAXING MASTER: You were in court

MS WILLIAMS: Because on my account to my client I also charge for one hour. I checked it actually

TAXING MASTER: You, you charge one hour

MS WILLIAMS: It, you must also remember you go for, to court for many cases on one day. So that is why I am saying allow one hour, not one hour thirty minutes.

MS BOTES: What has that have to do with my call?

MS WILLIAMS: That is why I am saying I am saying that you cannot ask for one hour, oh is this (intervention)

MS BOTES: We have been through the Rule 37. That was the Rule 37 that was held at your offices, because Mr Vaatz, did Mr Vaatz handle the matter first?

MS WILLIAMS: Huh um, no. No, no, no I actually (intervention)
MS BOTES: It was, it was me and you,
MS WILLIAMS: Oh ja.
MS BOTES: And we were sitting in that small office
MS WILLIAMS: Okay, okay. I still say (intervention)
MS BOTES: I will say an hour, not (intervention)
MS WILLIAMS: An hour ja
MS BOTES: Not the thirty minutes
TAXING MASTER: So you want to take (intervention)
MS BOTES: Three fifty Namibian Dollars (N$350-00) off
TAXING MASTER: Okay. Okay. Drawing a joint case management report…'.

and

'MS WILLIAMS: For the meeting where you meet with me. That was allowed at half an hour. Now you want to, you, and then thereafter then you drafted the document. Now you want to be allowed a further fee for preparation for case management
MS BOTES: Yes.
….'
MS WILLIAMS: Okay, I will accept it. Attend court case management conference.
TAXING MASTER: Conference
MS BOTES: I am fine if you make it thirty minutes
MS WILLIAMS: Okay so it is three hundred and fifty Namibian Dollars (N$350-00) off
TAXING MASTER: Yes .'

[157] With the greatest respect to counsel's submissions that the reduction of the items was objected to at the taxation on the grounds that the time spent was reasonable and necessary in the circumstances, the record, embarrassingly, does not bear this out.

[158] On the contrary the record actually shows that these items were reduced by agreement.

[159] All parties also agreed, in principle, that a legal practitioner would, legitimately, be entitled to charge- and the client be indemnified, for all these attendances - relating to the Rule 37 procedures - set by the rules of court - and to have same incorporated in a party and party bill of costs. This is clearly the correct approach. If the parties' legal practitioners then, in addition, and at taxation, agree on a specific period of time - for purposes of quantifying the charges relating to these necessary attendances - and the taxing Master then endorses such agreement in his *allocatur* - as he did in this case - no basis for any interference by a reviewing court has been shown.

Ad items 5 (152), (153), (155), (156) and (157)

[160] These items all relate to discovery:

'152. Consultation with client on discovery of documents – 2 hours - 153. Draw Discovery Affidavit and Schedules 45 min (6 pages). – 155. Peruse clients documents for purposes of discovery (including photos) (45 ff (59 pages) – 156. Consult with client, traversing Affidavit – 30 min – 157. Attend on signature and ad jurat – 30 min –'

[161] The Taxing Master held the view that:

'The plaintiff objects that the taxing master's approach is that preparation and attendances was exorbitant.
Item 152-The defendant submit that one hour is reasonable, because the documents were already peruse under item 4 in considering the claim and drafting of the claim the plaintiff agrees that N$ 700-00 can be taxed off in item 152.
Item 153 –The defendant submits that the attendance was by a senior practitioner and have already a consultation now has to draft the document and the secretary does the typing. The taxing master ruled on that point that the time of half an hour be taxed off as part of the work was

ITEMS: 155,156 The plaintiff objects that the taxing master held that this disbursement is attorney/own client costs.
The defendant raised the objection that the plaintiff peruses their own discovery documents whilst already allowed a consultation with regard to discovery. The plaintiff agrees that it is not correct to peruse the documents again and agree that it should be disallowed
Having heard this argument the taxing master ruled and disallowed these items.
ITEM 157
The plaintiff objects that the taxing masters' approach is that preparation and attendances was exorbitant.
The plaintiff's *(legal practitioner)* herself suggested that the fee is incorrect and should be allowed under G 6 of the sixth schedule to the Rules. The taxing master ruled and reduced the tee to N$210- as specified under this item.'

[162] The counter argument ran thus:

'With regard to all these items, the taxing master has reduced the time spent for these services and only allowed a minimum fee.
The applicant objected to this on the grounds that the time so spent was reasonable and necessary in the circumstances and also did not agree to the reducing or taxing off of these items.'

[163] The record shows:

'TAXING MASTER: Consultation with client on discovery of documents
MS WILLIAMS: I submit that you can allow one hour, because there is already, you know when we started here at 4 there is already perusal of documents you know, because you are considering the claim and the drafting of the particulars of claim. Now these documents referred to in 4 are also part of the documents that are going to be discovered. (Indistinct)
MS BOTES: Seven hundred Namibian Dollars (N$700-00) can go off.
MS WILLIAMS: Ja.
MS BOTES: I am not (intervention)

TAXING MASTER: You agree on,
MS BOTES: Seven hundred Namibian Dollars (N$700-00) can go of
MS WILLIAMS: Yes
TAXING MASTER: That seven hundred Namibian Dollars (N$700.00) (indistinct). Draw discovery affidavit
MS BOTES: That should be allowed,
TAXING MASTER: Takes you (intervention)
MS WILLIAMS: Okay,
TAXING MASTER: Forty-five minutes
MS BOTES: Yes
MS WILLIAMS: I think no, but it is Mr Erasmus that attended to this matter so I submit that it should be half an hour, because he is a senior practitioner. He already has a consultation, now he has to draft as well or he draw it and then his secretary types it. I think that it should be half an hour
MS BOTES: No. Where, is there a discovery affidavit? Plaintiff's discovery affidavit.
TAXING MASTER: Where is (intervention)
MS BOTES: 25
TAXING MASTER: Is it 25?
MS BOTES: Ja, sorry, sorry, 25
TAXING MASTER: (Indistinct)
MS BOTES: Yes it is that one.
TAXING MASTER: Is it for Lizelle Coetzee?
MS BOTES: Yes
TAXING MASTER: So he draft, he already had the facts on the table,
MS BOTES: Okay,
TAXING MASTER: A one and a half folios document, it will take him (intervention)
MS BOTES: Not only that. Just page, the rest of the document are include,
TAXING MASTER: (Indistinct)
MS BOTES: That is included in the discovery affidavit yes
TAXING MASTER: These ones?
MS BOTES: This is included yes
TAXING MASTER: That is copies.

MS BOTES: No, this you type. You have to look at each document and you list each document and you number each document.
MS WILLIAMS: An attorney does not type, his secretary types
MS BOTES: Regardless that is also included up to there. That is included.
MS WILLIAMS: It is your call Mr Taxing Master
CAXING MASTER: I will allow you half an hour there. Take three fifty Namibian Dollars (N$350-00) off
MS WILLIAMS: That is minus three fifty Namibian Dollars (N$350-00) off
….

TAXING MASTER: Then peruse Plaintiff's documents for a purpose.
MS WILLIAMS: How many things did I discover, photos. Documents for photographs? Let us say (intervention) Sorry meneer ek kyk net gou.
MS BOTES: Yes you discovered a lot of documents
MS WILLIAMS: No, perused Plaintiff's documents for purposes of discovery.
,MS BOTES: Wait, wait, wait
MS WILLIAMS: You are perusing your own documents. This is nonsense. I thought you are perusing my documents here. We have already allowed a consultation with regards to discovery, now you want to go and peruse again. That is not allowed. With all respect.
TAXING MASTER: She want to refresh her mind,
MS WILLIAMS: No, that is, that, we have already allowed (intervention)
MS BOTES: I it is fine. I do not mind if it is disallowed. It does not read correct if you peruse it again.
TAXING MASTER; Ja, yes, yes, I agree with you.
MS WILLIAMS: It must be minus six thirty Namibian Dollars (N$630-00) .
TAXING MASTER: As long as you have a consultation with a client (indistinct) affidavit. Which affidavit (indistinct)?
MS BOTES: The discovery affidavit
…
TAXING MASTER: So you drafted the document in 153. Now it is only for your client to sign the document
MS BOTES: No not, it is not for signing.

TAXING MASTER: Consult with client. (indistinct) you have 157 where your client signed.
MS BOTES: So you explain to your client what he is signing.
TAXING MASTER: But you have already have consultation with the (intervention)
MS WILLIAMS: Exactly. That is my argument. It must be off. Do you agree Mr Taxing Master?
TAXING MASTER: Attend to the signature
MS WILLIAMS: (Indistinct) you are right.
TAXING MASTER: (Indistinct)
MS BOTES: I think the fee, the fee is not correct. It should not be three fifty Namibian Dollars (N$350-00) think it must be two hundred and ten Namibian Dollars (N$210-00) with another taxing master
MS WILLIAMS: It must be two hundred Namibian Dollars (N$200-00) off. It has been allowed in the past. (intervention)
MS BOTES: Yes, (intervention)
TAXING MASTER: No, I, I (indistinct) (intervention)
MS BOTES: Another taxing master it was allowed and it was under general. Yes.
TAXING MASTER: Decisions by Taxing Master in the past is not applicable now. That is what also, that was my discussion even (intervention)
MS BOTES: Okay,
MS BOTES: At G(6).
TAXING MASTER: So I will say, you make reference to (intervention)
MS BOTES: If I refer to G(6) it says any other fee not otherwise provided for. Now attendance and the signature and (indistinct) is not, is not (intervention)
TAXING MASTER: (Indistinct)
MS BOTES: Specifically provided for me. So I would say two hundred and ten Namibian Dollars (N$210-00) should be allowed.
TAXING MASTER: Exactly.
MS WILLIAMS: Which means that it is how, no, no, no (intervention)
MS BOTES: Hundred and forty Namibian Dollars (N$140-00) is off,
MS WILLIAMS: How much is three fifty Namibian Dollars (N$350-00) minus one fifty Namibian Dollars (N$150-00)?
TAXING MASTER: One twenty Namibian Dollars (N$120-00), two hundred and ten Namibian Dollars (N$210-00)

MS WILLIAMS: But what is the fee that is being allowed here?
MS BOTES: Two hundred and ten Namibian Dollars (N$210-00)
MS WILLIAMS: On which tariff?
MS BOTES: G(6). ‘

[164] It emerges firstly that there was agreement in regard to the reduction of the fee claimed under item 152. It therefore cannot be said that the taxing master simply reduced the time spent for these services and only allowed a minimum fee at a whim.

[165] As far as item 153 is concerned the record shows that there was disagreement in regard to the time that should be allowed for the drawing of the discovery affidavit and that the Taxing Master was thus requested to make a ruling in this regard. He made the ruling in that he disallowed 15 minutes from a claim made for 45 minutes. No basis for any interference on review is disclosed in my view by these circumstances.

[166] There was consensus in regard to items 155 and 156 where the record reflects Ms Botes’ concession - after Ms William’s objection – when she (Ms Botes) stated: ‘It is fine. I do not mind if it is disallowed. It does not read correct if you peruse it again, to which the TAXING MASTER responded; Ja, yes, yes, I agree with you.’

[167] In regard to item (157) – (attend on signature and ad jurat) – the parties were in agreement that Tariff Item G 6 was applicable. Tariff Item G 6 allows for a fee between ‘N$140.00 to N$ 210.00’. The record shows that the maximum amount of N$210.00 was allowed. There cannot be any complaint in this.

[168] No basis was shown in such circumstances as to why these rulings should be upset.

Ad item 5 (182)

[169] The bill of costs reflects that here the amount of N$350.00 was claimed in respect of *'Attend on Registrar to check file – 30 min'*.

[170] The Taxing Master merely states that the parties agreed that this matter be taxed off, which he accordingly did.

[171] On behalf of applicant Ms Botes submitted that:

> 'This item was summarily taxed off by the taxing master for no acceptable reason. In terms of item A 5 of the tariff, a legal practitioner is entitled for a necessary attendance at the registrar's office. In this instance the file was inspected to see that the pleadings thus far is on the court's file before the documents are to be indexed. It is submitted that the attendance was necessary and the item should be allowed. There was no agreement that it should be taxed off as we maintained our objection despite the taxing master's ruling.'

[172] The record then reflects the following:

> 'MS WILLIAMS: Okay- Attend on Registrar to check file
> TAXING MASTER: What. Okay, is it for case management for indexing?
> MS BOTES: It is for indexing
> TAXING MASTER: (Indistinct) the next document
> MS BOTES: Okay for the next, is that for indexing, so what, with the system you have to go two days before, or a day before to ask for the file, you fill in the form, you ask for the file, it is collected and only then after can you actually check the file
> MS WILLIAMS: No but, but 182 at that, if what you are saying now, that is the first step, you are not checking the file there already, you are filling in the form.
> MS BOTES: Yes
> MS WILLIAMS: Then 183 is (intervention)
> MS BOTES: Is actually we attend the court
> MS WILLIAMS: The date on which the file is available

MS BOTES: That is fine. That is fine. That is fine, it makes sense
MS WILLIAMS: So three fifty Namibian Dollars (N$350-00) must be off
MS BOTES: Yes, Carol, three fifty Namibian Dollars (N$35000) must be off. 183 should be allowed (intervention) .'

[173] It immediately appears that there never was a 'summary taxing off for no reason' as was alleged.

[174] The exchange between the legal practitioners actually revealed an inaccuracy in the bill of costs, in that the bill did not take the governing practice[20], relating to the requesting of a court file, into account before same is made available to a legal practitioner for any purpose, such as for indexing. That is also the reason why Ms Botes – correctly so - in my view – had to concede - as she did - by saying : *"That is fine. That is fine. That is fine, it makes sense."*

[175] In these premises I can detect no basis on which the Taxing Master's ruling should be overturned.

Ad items 5 (294) and (295)

[176] The items are:

'294. Receive and peruse Filing Notice with Defendant's Heads of Argument – 10 ff [5 pages) - 295. Draw Plaintiffs Heads of Argument – 36 ff(18 pages)-4 hours' .

[177] The Taxing Master states:

'The plaintiff objects that the taxing master disallows these items on the basis that it was not necessary and objects to this approach.

[20]In terms of which a legal practitioner, on the day before. completes a written request for a court file, which is then made available to him/her on the next day

The defendant submits that ordinarily fees in respect of counsels' heads of argument constitute attorney and client costs. See- Law of Costs – Cilliers par 4.06.This was a trial and not necessary to file heads of arguments and by requested by Mr Erasmus (plaintiff) that's matter stood down. Costs for drafting and perusing should not be allowed. That was a trial and there was no need to file heads of arguments it is only when it is an application case and it was on the request of the plaintiff. Heads was requested for closing argument.

The taxing master quotes the following from Jacobs & Ehlers "The distinction must be clearly drawn between those circumstances where the Rules of Court require heads of argument and those where the Rules of Court do not."

See- *Port Elizabeth Local Road Transportation Board's case at 402 A and Minister of Water Affairs v Meyburg* 1966 {4) SA 51 (E)

Having heard the submissions the taxing master ruled that these items and fees be disallowed.'

[178] In response it was pointed out that:

'The taxing master was of the opinion that the perusal and drawing of heads of argument was not necessary in this matter and therefore disallowed same. We objected to this after having informed him that the court requested heads of argument and welcomed it after the parties informed the court that it will prepare proper heads of argument. The fact that the court requested the filing of heads of argument, it is submitted that the perusal of defendant's heads of argument should be allowed. See: *Port Elizabeth Local Road Transportation Board & Others v Liesing* 1968 (4) SA 401 (E). In this matter, Heads of argument are not required by the Rules of Court, but the fact that the court requested that it be filed, warrants a fee for such service and should therefore be allowed. '

[179] At the taxation the argumentation ran thus:

‘MS WILLIAMS I just want to say something, because I read up regards to, they say it is, I wrote from this thing. Ordinarily fees in respect of Counsels’ Heads of Argument constitute attorney and client cost

MS BOTES: But that is not Counsel.

MS WILLIAMS: Ag nee man, hou tog op.

MS BOTES: What do you mean Counsel?

MS WILLIAMS: Ja, but you did not, you, (intervention)

MS BOTES: Counsel is the advocate

MS WILLIAMS: What I am saying is this was a trial to start vith in the first place. It was not necessary to file Heads of Argument. It was at the request of Mr Erasmus that that was done and also why the matter stood down. Go 0ns kyk gou gou. Ja, I got it from you. Heads of Argument constitute attorney and client cost.

TAXING MASTER: (Indistinct)

MS WILLIAMS: That is not what I say. That is what Cilliers say.

TAXING MASTER: So Speak on behalf of Cilliers so that we can hear what he said,

MS WILLIAMS: Ja, . I am reading where he says: ‘’Ordinarily fees in respect of Counsels’ heads or argument constitute attorney and client cost.” So what I am trying to say is that the cost for drafting of the Heads of Argument as well as the receipt of the perusal of my Heads of Argument and the copies and so on should not be allowed, because it is attorney own client cost according to Cilliers

TAXING MASTER: So the instructed Counsel drafted the Heads of Arguments

MS WILLIAMS: Is that, (intervention)

TAXING MASTER: No, that is my question,

MS WILLIAMS: No, no, no it is Mr Erasmus that drafted the Heads of Argument

FAXING MASTER: Okay,

MS BOTES: And you drafted the Heads of Argument

MS WILLIAMS: Ja.

MS BOTES: Okay.

MS WILLIAMS: But it is a trial. It is a trial

TAXING MASTER: No Heads of Argument must it not be filed?

MS WILLIAMS: No it should not be filed. It is a trial of a matter. You do not need to file Heads of Argument. Only when it is an application case then you, then the rules require that you file and what I am saying is it was at the request of Mr Erasmus that the Heads of Argument were filed.
TAXING MASTER: Okay,
MS WILLIAMS: Because it closing argument then he said no, but he wants it to stand down so that he can prepare some Heads. So what I am saying is it is attorney client costs
TAXING MASTER: Let me see whether I can find something from mine
MS WILLIAMS: Huh uh, nie nou nie.
TAXING MASTER: Let me see what say, perusal of application, perusal of Heads of Arguments, (indistinct) let me see what it says here, 17 on my paragraph 142. Paragraph 142 (indistinct) what is this Jacob Ehlers. 142, paragraph 142 the attorney fee in regarding with to perusing Heads of Arguments in a party and party bill of cost no charge shall be claimed for perusing Heads of Arguments prepared by Counsel as an aid to argue, argument and delivered by him to his opponent through (indistinct) instructing attorneys
MS BOTES: Okay, exactly, but that is when an advocate draws Heads of Argument. That is exactly my point. And in this instance there were no advocates
TAXING MASTER: It has been held that even where Heads of Arguments are compulsory under Rule 49.14 the Uniform Rules it is not necessary for a party to acquit himself from the content thereof, therefore a bill so charged cannot be made therefore (indistinct) party and party bill. I submit that this case is clearly wrong decided. So there is the answer.
MS WILLIAMS: What do you say? Are you allowing this now?
TAXING MASTER: No.
MS WILLIAMS: You can, okay you cannot allow it in any event, because it was supposed to be closing argument which stood down till another day and that is why the Heads of Argument were drafted,
TAXING MASTER: So I take that off.
MS BOTES: This item 294
TAXING MASTER: 294. 295
IS WILLIAMS: Ja, the drawing of the Heads of Argument it is the same thing that I just said. It is attorney own client cost
MS BOTES: But is not, that is not what you read
TAXING MASTER: That is, that is the perusal part

MS BOTES: Yes, the perusal part is fine if it is off
MS WILLIAMS: You cannot (intervention)
MS BOTES: But not the drawing thereof. (intervention)
MS WILLIAMS: You cannot allow the cost of the drawing of Heads of Argument, because the thing that had to be argued. Why it was stood down that day, was for closing argument It did not continue on the same day. That is why Mr Erasmus requested that he files Heads of Argument
MS BOTES: Okay, but you also filed Heads of Argument.
MS WILLIAMS: Ja.
SO, that is, you draft your Heads of Argument against the cost of your own client.
MS WILLIAMS: That is what I am saying and I have read to you already,
Yes. I hear what you say. I just want to confirm because I read from here the perusal file to convince Ms Botes.IS BOTES: No I do not have, I did not even mention the perusal. So I do not know who you are trying to convince.
TAXING MASTER: No, that is (indistinct)
MS WILLIAMS: No it is with regards to the drafting now.
TAXING MASTER: The items. Okay, the drafting. So with regard to the drafting of your Heads of Arguments let us see, drafting, Ms Williams you say we cannot allow (intervention)
MS WILLIAMS: You cannot allow it because the rules did not even, does not even provide for you to do something like that. This was a trial, an action, not an application where the rule provides that you must file Heads Argument.
TAXING MASTER: Let US see, further read, maybe we can get our answer from somewhere. 348
MS WILLIAMS: Here I have the answer for you if you do not want to (intervention)
TAXING MASTER: Cilliers.
MS WILLIAMS: Ja, there I marked it with my pencil. There is the authority from which it comes. It is going to be an argument about Counsel and what (indistinct). I mean seriously.
TAXING MASTER: Okay from the Law of Cost, Cilliers I will also disallow this one. Okay. Then the whole 296 will not be allowed, then 297 not allowed. ‘

[180] This debate, relating to heads of argument, then raises an interesting point. It is clear from the authorities cited, that the costs, relating to the drawing of heads of

argument, should, ordinarily, be recoverable as a party and party cost, only if required by the rules of court. I also have no doubt about the correctness of the 'tried and tested' related rule, that if heads are not required, by the rules of court, that such costs, for many years, were regarded as attorney and client costs and as such were not recoverable through an ordinary costs order.

[181] I do however believe that the time has come to take cognisance of the dramatic changes that have occurred in Namibia's current, everyday legal practice which require that the rule not only be adapted to meet the exigencies of modern practice set by the Practice Directives but also to align them with the new case management system with its own particular demands.

[182] Accordingly and when South African cases and South African text books, such as 'Jacobs & Ehlers' and 'Cilliers on Costs' are cited - and as useful as these authorities may be - it should not be forgotten that these authorities mainly apply to an era which had not yet seen the advent of the modern case management systems or in which such systems are only now being developed.

[183] In addition to these new developments[21] it has in this jurisdiction, not become uncommon that judges require the parties legal practitioner's, appearing before them, also in a trial, to file heads of argument, on a particular point, or in a particular interlocutory application and even in support of closing argument at the end of the case. I know of no judge that would not welcome heads of argument, particularly if they would be well- drawn and would have substance and would be to the point. In a jurisdiction where judges are over-inundated with work, caused by an ever-increasing case load, and were the public and justice demand that judgments be delivered within a reasonable time – practically meaning actually that judgments should be given as soon

[21]The implementation of the Case Management System and where also the Practice Directives require that heads of argument be filed in specific instances– in addition to the rules – see for instance Practice Directives : 20, 26 (3) (b)-(d), 27 (3) (c)-(d), 30(2),

as would be humanly possible – and were judges are driven to also meet the goals of case management - heads of argument constitute an important tool to alleviate the workload imposed on judges in that it assists judges in their judgment delivery and thus to meet these demands.

[184] But the filing of heads of argument is not only to the advantage of judges alone. Also the parties would obviously benefit from the written and structured aid afforded by properly drawn heads, in support of oral argument. A judge and all counsel will be presumed to have read the heads of argument by the time of the hearing - which are usually filed on behalf of the parties in advance of oral argument – and all parties will thus come to court better equipped to deal with oral argument and to raise and respond to pertinent questions emanating therefrom. This does not only facilitate succinct argument but also curtails court time, which may ultimately result in a saving of legal costs.

[185] I am also mindful of what the Supreme Court has said in *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) in regard to the underlying purpose pertaining to party and party costs:

'[27] Costs are not awarded on a party and party basis as punishment to the litigant whose cause or defence has been defeated or as an added bonus to the spoils of the victor: the purpose thereof is to create 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 as a result of another litigant's unjust actions or omissions in the dispute (compare *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488). It is intended to restore the disturbed balance in the scale of litigation expenses. To afford the party who has been awarded an order for costs a full indemnity for all costs incurred by him or her in relation to his or her claim or defence, Note I instructs the Taxing Master to 'allow such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party', but, save as against the party who incurred them, not to allow any costs which appear to him or her 'to have been incurred or

increased through over-caution, negligence or mistake, or by payment of a special fee to a legal practitioner or by other unusual expenses'.

[28] This Note, as Kriegler J remarked in the *Gauteng Lions* case[22] (supra at 74F), 'underscores that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds'. The indemnity contemplated by the Note is expressly limited only to those costs which have been reasonably incurred by the successful party in relation to the claim or defence. The expression 'costs reasonably incurred' is again equated with such costs, charges and expenses as 'are necessary or proper for the attainment of justice or for I defending the rights of any party' (See Van Rooyen's case[23] (supra) at 467F). Expressly excluded from the indemnity are those costs 'which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to a legal practitioner or by other unusual expenses'. By being inclusive of costs reasonably incurred and exclusive of all other costs, Kotze J said in J *Openshaw v Russel* 1967 (4) SA 344 (E) at 346A (quoted with approval in *Engel v Engel and Another* 1975 (1) SA 879 (SWA) at 881F), the Note 'fulfil(s) the ideal of attaining justice without increasing costs by sanctioning excessive caution'. Given the realities of legal practice where legal representatives rather err on the side of caution than risk their clients' cases by failing to turn yet another stone, a 'full indemnity' very rarely amounts to a 'complete indemnity', but, as Innes CJ said in the Texas Co judgment (supra at 488), 'that does not affect the principle on which (the taxation of costs) is based'.

[186] Given these parameters and background I have no hesitation to find that the costs, relating to the drawing and exchange of heads of argument, also in the circumstances of this case, ‘were costs reasonably incurred by a litigant in relation to his or her claim or defence'. I also do not believe that the allowing of such costs would upset ‘the moderating balance that should be struck in order to afford the innocent party adequate indemnification, within reasonable bounds’.

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[22] President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another 2002 (2) SA 64 (CC)

[23] Van Rooyen v Commercial Union Assurance Co of SA Ltd 1983 (2) SA I 465 (O)

[187] I can thus see no reason why a successful party should not be indemnified, on a party and party basis, for the costs relating to the drawing and exchange of heads of argument, particularly if they have been requested by a managing judge, in a civil matter, where such judge, in any event, is free to regulate the procedure before him or her or where the Practice Directives require this. The time has come, in my view, to recognize this procedural regulation and thus to disengage the past, restrictive linking of these costs to the requirements set by a particular rule of court only. It is also not inconceivable in this regard that the view may also be taken that the case management powers, exercised by a managing judge, in terms of the case management rules, ultimately, also amount to a requirement imposed by the rules of court and that such heads should therefore in any event, also in that vein, be recognized as a party and party expense in accordance with the existing authorities.

[188] The Taxing Master's ruling in respect of items 5 (294) and (295) is for these reasons reversed and it is directed that these fees, as claimed, should be allowed.

Ad the taxing off of the disbursement with regard to the account of the cost consultant

[189] On behalf of applicant it was submitted that the taxing master had incorrectly disallowed the fee paid to a cost consultant in respect of the drafting and drawing of the bill of costs in this case. The applicant objected to that approach and in doing so relied on a judgment of Smuts, J in *Otjozondo Mining (Pty) Ltd v Purity Manganese (Pty) Ltd and Others*, an unreported judgment of this court[24], at paragraph [27] and [29] thereof where the learned judge remarked:

[24]A385/2010 [2011] NAHC (14 October 2011 reported on the Saflii website at: http://www.saflii.org/na/cases/NAHC/2011/307.html

[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.

[190] No factual basis for counsel's submissions was found in the mechanically transcribed record of the taxation.

[192] In this regard it should also be mentioned that the record was defective. It is headed '*JW Wellmann and Hollard Insurance Company of Namibia'* and the *'Transcriber's Certificate'* from *Tunga Transcription Services* certifies, to the best of the transcriber's knowledge, the transcript to be a true and correct mechanical transcript of the proceedings in'*JW Wellmann and Hollard Insurance Company of Namibia'.*

[193] The bill of costs underlying this review however relates to the case of *'Hollard Insurance Company of Namibia v BJ de Neysschen t/a Gecko Guest House'*. Luckily the items in the transcript correspond with that bill of costs. However the transcript of the record stops at page 105 (end of tape 2) and does not contain anything relating to the claimed taxing off of any cost consultant's fee.

[194] The bill of costs – correctly labelled as pertaining to the case of *'Hollard Insurance Company of Namibia v BJ de Neysschen t/a Gecko Guest House'* - however reflects the following items relating to the drawing of the bill of costs in this matter:

77
77

‘1.Drawing Bill of costs @ N$42.00 per folio – in respect of which an amount of N$ 924.00 was allowed - and - 2. Perusing Bill of Costs @ N$21.00 per folio – in respect of which the amount of N$ 462.00 was allowed.

[195] Items 5 (307) and (308) ex facie the bill of costs then reflect that the perusal fees, relating to the cost consultant’s account (N$ 28.00), and the attendance to pay such account (N$ 28.00), and that a disbursement - in the amount of N$ 5510.05 - were indeed all taxed off. This disbursement probably constitutes the cost consultant’s fee.

[196] It can immediately be stated that items 1 and 2 relating to the drawing and perusal of the bill of costs were correctly allowed in accordance with the applicable Tariff Items F1 and F2 of the Sixth Schedule.

[197] It does also immediately emerge that, if the cost consultant’s fee, for the drawing this particular bill of costs would have been allowed, there would have been a duplication of costs in regard to the drawing of such bill.

[198] As the record is seemingly incomplete it remained unknown on which basis the Taxing Master disallowed items 5 (307) and (308) – also his stated case is silent on this aspect.

[199] In addition it is not apparent from the relied upon judgment in *Otjozondo Mining* case whether or not Smuts J, in that case, was faced with an impermissible duplication of charges - and thus considered - the issue of allowing or disallowing the applicant there to recover the charges of a costs consultant - in that context. It must be kept in mind that the learned judge expressly stated that no basis was put before him as to why the applicant in the *Otjozondo Mining* case should be precluded from recovering such

charges. In these premises I do not interpret the *Otjozondo Mining* case as constituting *carte blanche* authority for the allowance of the charges of a cost consultant, in all instances, as counsel for the applicant would like to have it.

[200] There is however another consideration which weighs with me in this instance and that is that Part F, of the Sixth Schedule, titled *"BILLS OF COST IN RESPECT OF OPPOSED MATTER",* specifically regulates the allowable tariffs relating to the attendances relating to a bill of costs in opposed matters. The fact that a legal practitioner or his client elect to outsource the task of drawing a bill of costs to a cost consultant, resulting in a much higher disbursement than the fee which would have been recoverable by the legal practitioner under Part F of the Sixth Schedule to the Rules of this Court[25], should surely not come at any increased expense to an unsuccessful litigant, certainly not on a party and party scale, especially if one takes into account that an admitted legal practitioner is or should have been capable of performing this task him or herself and were it is a fundamental principle that the taxation of a bill of costs should always ensure that the party 'who is condemned to pay the costs does not pay excessive costs'.[26]

[201] Given the circumstances of this case and the fact that the bill of costs reveals that there was indeed a duplication of charges claimed originally, and were the Taxing Master, at taxation, decided to allow those charges, which were squarely claimable under the applicable Tariff Item F, of the Sixth Schedule, it cannot be said that the Taxing Master exercised his discretion wrongly, in this instance, when he disallowed the charges and disbursement relating to the attendances of the cost consultant.

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[25] In this instance - compare : the taxed off disbursement of the cost consultant of N$ 5510.05 - with the allowed fee of N$ 924.00

[26] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at p22 - See also for example: *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) at 589D-G; *Malcolm Lyons & Munro v Abro and Another* 1991 (3) SA 464 (W) op 469D-E)

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Costs

[202] I am not inclined to grant the applicant the costs of the review.

[203] My reasons are as follows:

a) Firstly, and in view of the overall result, the applicant cannot really be regarded as having been substantially successful.

b) Secondly, the underlying documentation for the taxation was in shambles. The papers were not bound and indexed.

c) No care was taken to ensure that the transcribed record of the taxation was complete. It will have emerged that a properly mechanically transcribed record of the taxation is important for the proper determination of the factual issues underlying a taxation review in general.

d) The court wishes to record its disapproval for the manner in which the documentation underlying the review was presented for consideration by the applicant's legal practitioners, which made the adjudication in this matter cumbersome, time consuming and painful.

e) It should have been a simple matter to collate, sort, bind, index and present the relevant documentation relevant to this review which were merely:

i) the applicant's request for a stated case;

ii) the Taxing Master's response, in the nature of a stated case;

iii) the applicant's contentions in the review in response to the Taxing Master's stated case;

iv) the mechanically recorded complete transcript of the proceedings before the Taxing Master; and

v) the actual bill of costs.

f) In order to enable the effective consideration of all issues raised properly and efficiently one would have expected some clear cross-referencing by the parties in their documents – with page references and references to the record - in respect of all issues - in an orderly and logic fashion, assisted by an index and properly bound documentation, thereby facilitating the continuous cross-referencing between all documents, which had to occur at most times;

g) As no care was taken in this instance to arrange the court file in an orderly manner, or to link argument to specific parts of the record, the court was immensely inconvenienced by having to continuously try and search for- and identify the corresponding items and then to link them to the submissions and then to find the relevant passages in the transcribed record and bill of costs, in order to consider the veracity of the respective submissions made by the parties herein.

h) It would also have been of immense assistance if - at the beginning of each disputed item, or group of items - an accurate description of each item would have been found – as opposed to a general one – which precise identification would have served to set the introductory scene and background to the subsequent arguments and counter-arguments raised in respect of such items. All this was not done in this instance unfortunately.

In the result:

1. The Taxing master's rulings in regard to items : 5 (12), items 5 – 15, 87, 88, 137, 139, 159, 160,163, 167, 168, 169 - Items 111 and 112 - Items 5 – - (45),, (65) – (67) (73), (76), (84), (85), (104) - (106), (128) and (136) - items 5 (294) and (295) - are set aside;

2. These items are remitted back to the Taxing Master to be taxed afresh in the light of this judgment.

H GEIER

Judge

ON BEHALF OF THE PARTIES:

APPLICANT/PLAINTIFF:	Francois Erasmus & Partners
RESPONDENT/DEFENDANT:	Andreas Vaatz & Partners

82
82