REPORTABLE

CASE NO. SCR 01/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

KHODJY AFSHANI **FIRST APPLICANT**

SOHEIL AFSHANI **SECOND APPLICANT**

Versus

KATRIN VAATZ **RESPONDENT**

Coram: MARITZ, A.J.A.

Heard on: 2004-10-07
Delivered on: 2007-10-18

REVIEW JUDGMENT

MARITZ, A.J.A.: [1] The applicants are seeking to review the assistant taxing master's *allocatur*. The scope of the review is limited to a single item reflected as a disbursement in the respondent's bill of costs. The disbursement was allowed in part notwithstanding the applicants' objections. It concerns the first day fee marked by the

respondent's instructed counsel for his appearance in this Court on appeal against an order made in chambers by a single Judge of the High Court in an earlier taxation review between the same litigants.

[2] The taxation by the taxing master of the High Court followed upon an order of that Court mulcting the applicants in the wasted costs occasioned by the postponement of a pending defamation trial between them and the respondent. Dissatisfied by the taxing master's rulings, the applicants sought a review thereof under rule 48 of the High Court rules. The review was laid before and dismissed by a Judge of the High Court in chambers. The outcome was clearly not what the applicants had hoped for and they therefore appealed to this Court against the dismissal. The point which had to be decided *in limine* by this Court was crisp but novel: Is a judgement or order made in chambers by a single Judge of the High Court in a taxation review under rule 48 of the High Court Rules appealable? The Court unanimously held that it was not and struck the appeal from the roll with costs. It is the taxation of the costs awarded on appeal which now has given rise to this review.

[3] For his appearance and related services on appeal, the

respondent's instructed counsel marked his brief in an amount of N$11 250.00. His fee, included by respondent's instructing counsel as a disbursement in her bill of costs, was only allowed in part after the applicants' counsel, Mr Bloch, had objected to it. The objections, as I gather from the assistant taxing master's report, were threefold: Firstly, that instructed counsel was not entitled to mark and include a separate fee for the drafting of heads of argument; Secondly, that it was not necessary for the respondent's counsel to engage the services of instructed counsel to argue the appeal and, finally, that the fees of instructed counsel should conform to the prescribed tariff applicable to instructing counsel and, therefore, should be reduced to N$206.44. The first objection was allowed (compare *J D Van Niekerk en Genote Ing v Administrateur, Transvaal*, 1994 (1) SA 595 (A) at 601C-E and *Ocean Commodities Inc and Others v Standard Bank of SA and Others*, 1984 (3) SA 15 (A) at 19C-D and 20E), thus resulting in a reduction of the disbursement claimed in respect of instructed counsel's fee from N$11 250.00 to N$7 200.00. The second objection was disallowed: The assistant taxing master ruled that the point raised on appeal was sufficiently novel and complex to justify the costs consequent upon the engagement of one instructing and one instructed counsel. The applicants abide this ruling and have not taken issue with it in this

review. Hence, the only remaining ground upon which they are seeking a review is the last, to which I shall turn presently.

[4] Mr Bloch, for the applicants, formulates the issue raised by the third objection in more dramatic terms: This appeal, he says, "is simply to answer the question whether a legal practitioner (who also has the right to call himself 'advocate') is entitled to charge 35 times as much as a legal practitioner (who also has the right to call himself 'attorney')." He submits that all legal practitioners – whether engaged as instructing or instructed counsel – are subject to the same tariff. It is therefore impermissible and patently unjust, he reasons, that an instructing counsel (to whom he refers as an 'attorney') is subject to the "ridiculously low" tariffs prescribed by the Supreme Court rules but that disbursements made to an instructed counsel (to whom he refers as an "advocate") are allowed to the extent that, in the discretion of the taxing master, they appear to be reasonable and have been incurred either necessarily or properly as an expense. He illustrates the discrepancy contended for by tabulating the fees actually allowed by the assistant taxing master as a disbursement to respondent's instructed counsel and those which, in his opinion, her instructing counsel would have been allowed to tax on a party-and-party basis in

accordance with the tariff, had he argued the appeal in person:

[5]

	Item	*Instructed counsel N$*		*Instructing counsel N$*	
1	Perusal: record of appeal	3hrs@ N$450/h	1350.00	127pp @ 27c/p	33.48
2	Perusal: appellant's	2hrs@ N$450/h	900.00	29pp @ 27c/p	7.83
3	heads	1 hr@ N$450/h	450.00	19pp @ 27c/p	5.13
4	Perusal: additional heads			2 hrs court	
	Preparations, appearance and argument on appeal	First day fee	4500.00	attendance	160.00
			7200.00		206.44

[6] Mr Bloch does not contend that the fee marked by respondent's instructed counsel is unreasonably high. On the contrary, he concedes that it conforms to the parameters of the fees laid down by the Society of Advocates as an internal guideline for their members. The guideline fees are often referred to by the taxing master in assessing the reasonableness of disbursements to instructed counsel during taxation. In a "what is good for the goose is good for the gander"-argument, he contends that, when taxing a party-and-party bill of costs, the taxing master should limit disbursements to instructed counsel to the same "unreasonably low" level as the fees which other legal practitioners are allowed to tax in terms of the prescribed tariff when they appear on behalf of their clients without engaging the services of instructed counsel. On this basis, Mr Bloch submits, the disbursement to respondent's instructed counsel should have been further reduced from N$7 200.00 to N$206.44.

[7] Mr Vaatz, on the other hand, contends on behalf of the respondent that, as a matter of principle, the respondent was entitled to full indemnity for all the costs reasonably incurred by her in opposition to the applicants' appeal. The assistant taxing master was therefore obliged in terms of Note 1 to the Tariff of Fees to allow her "the costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice". The disbursement made to instructed counsel in settlement of his fee list, he says, falls squarely within those parameters and was correctly allowed. Anything short of that will derogate from her right to full indemnity for all costs reasonably incurred by her.

[8] The assistant taxing master disagreed with the applicants' contention that the prescribed tariff applied equally to instructing and instructed counsel. He points out that Rule 14 of the Supreme Court rules expressly provides that the tariff constitutes the "fees that shall be allowed to *attorneys* conducting appeals or other matters before the Supreme Court". Whilst he notes the changes brought about by the provisions of the Legal Practitioners Act, 1995, he reasons that notwithstanding the fact that the Act "refers to attorneys and advocates as 'legal practitioners', it (remains) clear from the language

of Rule 14 that the prescribed tariff as set out in the annexure to the Rules of the Supreme Court only apply to attorneys as legal practitioners and not to advocates as legal practitioners". Hence, he argues, the taxing master is bound to the prescribed tariff when taxing attorney's fees but that the fees marked by an advocate (as instructed counsel) constitutes a cost to the litigant, the reasonableness whereof falls to be assessed and allowed under Note 1 of the Annexure to the rules. The Note, as I have mentioned earlier, charges the taxing master to 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". He, therefore, also agrees with the respondent's submission that the costs incurred by the engagement of instructed counsel constitutes a charge against the instructing counsel's client. As such, he considers instructed counsel's fees to be in the nature of gratuities for services rendered and that it must be reflected as disbursements incurred by instructing counsel in the conduct of his or her client's case - as would also be the case, for example, when monies are paid to a tracing agent for services rendered in connection with a case.

[9] These conflicting submissions can only be understood and

assessed in the context of the significant changes to legal practice in Namibia brought about by the provisions of the Legal Practitioners Act, 1995. At all relevant times prior to the promulgation of the Act – in fact, from the early 1920's – civil law in this country was practised by two professions: those of advocates and those of attorneys. Generally, each profession had its own domain of practice; its own rules of professional conduct and discipline; its own controlling body and its own legal framework regulating admission, enrolment, privileges, rights of audience and to practice law.

[10] It is not necessary for purposes of this judgment to extensively catalogue the numerous but clearly defined distinctions between the two professions and the role which each of them played in the conduct of civil litigation. Given the limited scope of the issues between the litigants in this review, it will suffice to mention two: Firstly, litigants approached and primarily entrusted attorneys with the conduct of their lawsuits. Unlike attorneys, advocates could not be engaged directly by litigants. If their forensic skills were required by litigants, they had to be briefed by attorneys to act on behalf of those litigants. In those instances, the principal function of attorneys was to attend to the more formal aspects in the litigation whilst advocates generally concerned

themselves mostly with the forensic dimensions thereof, such as drawing pleadings and presenting litigants' cases in Court. Given the more immediate legal relationship between attorney and client, an attorney, acting on the instructions of his or her client, determined the scope and extent of an advocate's engagement. The attorney was therefore liable to the advocate for the payment of the latter's fees and, in turn, recovered it from the client. The second distinction material to the discussion of this case is that, with a few exceptions, only advocates had a right of audience in the superior courts of the land.

[11] The rules of those courts were drafted with these distinctions between the two professions in mind. Hence, the prescribed tariff of fees for attorneys was formulated with due regard to the type of work generally rendered by them in the course of litigation. For example, because attorneys generally had no right of audience in the Supreme Court, the tariff of fees allowed to attorneys under the annexure referred to in rule 14 of the Supreme Court Rules did not make provision for an appearance fee – only an attendance fee. The annexure also prescribed attorneys' fees to brief advocates on appeal, on petition and to note judgements but, because it was expressly

limited to the fees of attorneys, it, understandably, did not purport to prescribe any fees for advocates. Instead, advocates' fees, like all other "costs, charges and expenses" reasonably incurred by a litigant "in relation to his or her claim or defence", had to be assessed under Note 1 to the Annexure. Hence, advocates' fees were reflected in bills of costs, not as part of attorneys' fees, but as disbursements – and were included as such by the respondent in the bill which is the subject matter of this review.

[12] The two professions were "fused" on 7 September 1995 when the Legal Practitioners Act of 1995 came into operation. The Act, amongst others, repeals the Admission of Advocates Act (Act 74 of 1964) and the Attorneys Act (Act 53 of 1979) as amended (s.94); provides that persons who have been practising as attorneys and advocates under the repealed statutes should be enrolled as legal practitioners under the Act (s.6); prescribes the qualifications for future admissions of legal practitioners (ss 4 and 5); establishes one controlling body for all legal practitioners and compulsory membership thereof (ss. 40 and 43) and, to bring other legislation in line with the new dispensation created by the Act, provides in a single sweeping section (s 92(1)) that:

> "a reference in any other law to an advocate, a counsel or an attorney, shall be construed as a reference to a legal practitioner".

[13] It is not difficult to imagine that the effect of this sweeping provision on the construction of a plethora of other laws dealing with legal practice and procedure under the previous dispensation was rather inelegant, to put it mildly. Without properly considered amendments specifically designed to bring the substance of those laws in line with the reality of a fused profession, difficulties in the application and interpretation of laws falling within the general sweep of s 92(1) have manifested themselves - some of which, as I shall presently show, relates to the preparation of bills of costs and the taxation thereof.

[14] But, whatever justifiable criticism one may have against the formulation of the Act, the legislative purpose behind it remains beyond doubt: To consolidate the divergent legal professions into a single vocation subject to an all-inclusive statute regulating admission, enrolment, audience, discipline, control and the rights duties and obligations associated with legal practise in a uniform, equal, fair and responsible manner. The Act also recognises the multiplicity of skills

required in rendering a wide range of legal services to the public and, therefore, allows sufficient scope for diversity in legal practise amongst legal practitioners, eg. those who practise law as notaries public (s.86); as conveyancers (s.87); in the service of a law centre or in the service of the State (cf the definition of “practise” in s.1); for personal gain on their own accounts or in partnership either with (s.68) or without (s.67) fidelity fund certificates.

[15] Exemption from holding a fidelity fund certificate may be granted to practitioners who practise for gain on their own accounts but who do not, in the conduct thereof, accept, receive or hold moneys for or on account of any other person – much as advocates have practised prior to the promulgation of the Act. Hence, although the legal professions have been fused into one, many legal practitioners voluntarily opted to structure the mode of their practices, within the permissible ambit of the Act, more or less along the same lines as advocates and attorneys have done before. Within the sphere of civil practice one nowadays finds legal practitioners who take instructions directly from clients but only attend to the more formal side of litigation and instruct other legal practitioners to attend to the forensic aspects thereof (the former sometimes referred to as “instructing counsel”); those who do not take

instructions directly form clients but only from other legal practitioners representing them and who mainly render services of a forensic nature (generally referred to as “instructed counsel” or, informally, called “advocates”) and, lastly, those legal practitioners who take instructions directly from clients and who render both formal and forensic services in civil litigation to them. Although, *de jure* there may only be one legal profession, law is in reality practised by legal practitioners in a number of diverse styles under one regulatory and protective statutory umbrella. This diversity of practise, especially in civil litigation, further compounds the construction and application of the rules relating to fees and costs as they apply to the taxation of the costs in question.

[16] Whilst the rules relating to fees may conceivably take cognisance of the diversity in styles of civil practice and differentiate – without discriminating – amongst them (as, for example, the High Court rules seek to do), the Supreme Court rules applicable to this review do not make such a distinction and, therefore, none ought to be allowed on taxation. I pause here to note that the order of costs under taxation was made before the amendment to the rules relating to the tariff the Supreme Court’s fees by Government Notice 80 of 2003 on 4 April 2003. That amendment, therefore, has no bearing on this review. The

only amendment which bears upon the tariff as originally published in 1990 is the one brought about by s.92(1) of the Legal Practitioners Act, 1995. That is that "a reference in any other law to an advocate, a counsel or an attorney shall be construed as a reference to a legal practitioner."

[17] Rule 14 of the Supreme Court Rules which previously only referred to the fees of attorneys, must, pursuant to the provisions of the 1995 amendment, be construed to read as follows:

> "*Legal Practitioner's fees*
> 14. The fees which shall be allowed to legal practitioners conducting appeals or other matters before the Supreme Court, are as set out in the Annexure hereto."

[18] The effect of this construction is more significant than may appear at first blush: No longer does the annexure (which contains the prescribed tariff of fees) apply to the fees of attorneys only or, for that matter, to those who are practising as attorneys have done previously. It applies with equal force to the fees of all legal practitioners, irrespective of how they have chosen to style or structure their practices after the Legal Practitioners Act had come into force. It matters not whether they have been involved in a case as instructed or

instructing counsel or as correspondents, they are all treated alike (as "legal practitioners") for purposes of taxation. Moreover, the construction does not countenance the notion that those who have styled their practices in the same manner as those of advocates of old, are still practising a different profession and that their fees, therefore, constitute a "cost, charge or expense" to be reflected as a disbursement in their instructing counsels' bills of costs. Instructed counsel's fees, if allowed, must, like that of any other legal practitioner, be included as fees in bills of cost in the Supreme Court and, in accordance with Note IV of the Annexure, fall to be taxed by the taxing master of the Supreme Court "jointly and at the same time" with the fees of any other legal practitioner "necessarily engaged in the performance of any work" for the litigant in the same case.

[19] I find myself, therefore, in disagreement with the assistant taxing master's reasoning that "although the Legal Practitioners Act (Act No 15 of 1995) now refers to attorneys and advocates as legal practitioners only, it still does not affect or change the language of Rule 14" and that, from the language of Rule 14, it is clear that it refers only to "the fees of attorneys as legal practitioners". To hold, as he further reasoned, that "although the Legal Practitioners Act refers to

attorneys and advocates as legal practitioners, it is still clear from the language of Rule 14 that the prescribed tariff as set out in the Annexure to the Rule of the Supreme Court, only apply to attorneys as legal practitioners and not to advocates as legal practitioners" would fly in the face of s.92(1) of the Act, the legislative intention behind the Act and the notions of fairness and equality underpinning it – all of which I have referred to earlier in this judgement.

[20] The inequality resulting from the fallacious reasoning of the assistant taxing master is amply illustrated by his concluding remarks that the "taxing master is therefore bound to the prescribed tariff when taxing attorney's costs while the fees as charged by the advocate as instructed counsel is pre-eminently left to the discretion of the taxing master". The satirical Orwellian proposition of everyone being equal but some being more equal than others is the very antithesis of the legislative intent which propelled the passing and promulgation of the Act.

[21] He compounded his erroneous approach by reasoning that an "advocate as instructed counsel", having been regarded as an expert in the past, was entitled to charge a higher fee than "the instructing

attorney". The forensic skills on which advocates drew for their expertise were mainly acquired by experience and honed by the regular conduct of litigation and trials in the Superior Courts – where, with a few exceptions, they were the only class of lawyers which had a right of audience. The exclusivity of that right was removed by the Act and it is now open for all legal practitioners to gain those skills and expertise – as many who are appearing, other than as instructed counsel, are doing daily. Even experienced legal practitioners, who previously practised as advocates, may elect to set up general practices with fidelity fund certificates and render the whole ambit of legal services in civil litigation. Must they be satisfied with a lower appearance fee just because they have changed the mode of their practices? Even if it would have been a relevant consideration in the taxation of costs, it seems to be manifestly unfair if counsel's forensic proficiency is assumed by mere reference to the mode of his or her legal practice rather than on merit.

[22] In relation to the taxation of fees for legal services actually rendered, the mode in which legal practitioners have chosen to structure their practices is not a consideration justifying differentiation in the application of the Supreme Court tariff. All legal practitioners are

entitled to be treated equally under the tariff and to charge and recover the same fees for the same work actually done. I find myself therefore in agreement with Mr Bloch's submission that all legal practitioners practising in the Supreme Court are under the Rules subject to the same tariff.

[23] I pause here to point out that, albeit in a different statutory context, equality of fees for similar work done also seems to be the approach adopted by the Courts in the Republic of South Africa where the dual system of legal practice still subsists but the limited right of audience accorded to attorneys has been relaxed by the provisions of the Right of Appearance in Courts Act, 1995 (RSA). The Act confers on attorneys, subject to certain conditions and qualifications, a right of audience in the High Court of South Africa. An attorney who, upon application, has been granted such a right of appearance is, in terms of s 3(4) of the Act "also entitled to discharge the other functions of an advocate in any proceedings" in the High Court. In *Stubbs v Johnson Brothers Properties CC and Others*, 2004 (1) SA 22 (N) Magid J, applying those provisions, followed an earlier judgment by Van Dijkhorst J in *Promine Agentskap en Konsultante BK v Du Plessis en 'n Ander,* (1998) JOL 3912 (T) and held (at 28E):

> "The attorney with the right of appearance who appears in Court in preference to briefing an advocate to do so cannot expect to be treated any differently as regards his fees for appearance than would an advocate."

In a similar vein Ebersohn AJ remarked in *Ndzamela v Eastern Cape Development Corporation Ltd and Another,* 2004 (6) SA 378 (TkH) at 386D: "An attorney who appears at the hearing is entitled to similar treatment as a counsel."

[24] Because the two professions still co-exist in South Africa and it is the attorneys who have been allowed to practise in what was previously regarded as the domain of advocates, it is not altogether surprising that in the South African context, the treatment to be accorded to an attorney (as regards fees for work actually done within that previously exclusive domain) is measured against the benchmark of what an advocate would have been entitled to. Given the fusion of the professions brought about by the Legal Practitioners Act and the effect of s.92(1) on the provisions of rule 14 of the Supreme Court, we do not have the same touchstone: ours is the prescribed tariff referred to in rule 14. It is the tariff which previously applied to the work of attorneys only.

[25] The difficulty it's application presents is that it is a tariff neither

intended nor designed at the time to be a yardstick for the assessment of fees claimed for the forensic work formerly done by advocates. As I have pointed out earlier, it does not even contain a specific tariff laid down for appearances at Court on the hearing of appeals or applications. The tariff for "attendance at court on hearing or application", which Mr Bloch urges upon the Court to apply towards the reduction of the *allocatur,* is not and could never have been intended to apply to "appearances". The reason why the tariff expressly provides for "attendances" and not for "appearances" is because the work of attorneys – for which the tariff was designed - involved the one and not the other. The preparations for and work involved in an "appearance" at the hearing of an appeal are significantly more extensive and complex than that which an "attendance" only require – or so one would hope!

[26] The difficulty is that, by amending rule 14 the way it did, the Legislature effectively extended the application of the tariff of fees to areas of forensic work which was neither contemplated nor specifically included in its initial design. "First day fees on appearance", "refreshers" on second or subsequent days, "heads of argument", etc – all of which are terms of art, albeit with a well-defined content and

generally applied in the assessment of disbursements claimed in respect of advocates' fees – are concepts nowhere to be found in the prescribed tariff. Does this mean that the forensic services contemplated by those concepts (such as those rendered in this case) cannot be countenanced in the taxation of bills of costs in the Supreme Court? It is to this question that I shall turn next.

[27] Being part of the Rules of Court, the tariff of fees has the force of law (*Van Rooyen v Commercial Union Assurance Co of SA Ltd*, 1983 (2) SA 465 (O) at 482G). The taxing master is bound to apply them and to do so with a considerable measure of rigidity (c.f. *Greenblatt and Another v Wireohms South Africa (Pty) Ltd,* 1960 (2) SA 527 (C) at 529; *Thornycroft Cartage Co v Beier & Co and Another* 1962 (3) SA 26 (N) at 28 and *Loots v Loots*, 1974(1) SA 431 (E) at 434F-G). That, however, does not mean that the prescribed tariffs are all embracing in extent or absolute in the scale set from time to time. That much is apparent from the "instructions" to the taxing master (c.f. *Hirsch v Taxing Master and Others*, 1958(2) SA 632 (W) at 633G) contained in Notes I and II of Part H of the tariff. Whereas the one note embody the "overarching general principle applicable to all awards of party and party costs" (*per* Kriegler J in *President of the Republic of South Africa and Others v Gauteng*

Lions Rugby Union and Another, 2002 (2) SA 64 (CC) at 74 B), the other confers on the taxing master limited discretionary powers to give effect to that principle where the otherwise rigid application of the prescribed tariffs will render an unfair result. Together, they underpin the basic purpose of the process of taxation: being "a regulating procedure based upon notions of fairness and practicality and designed to effect a just balance between the fruits of victory and the burden of defeat in the sphere of litigation expenses" (*per* MT Steyn, J – as he then was - in *Van Rooyen v Commercial Union Assurance Co of SA Ltd*, 1983 (2) SA 465 (O) at 467 F).

[28] Costs are not awarded on a party and party-basis as punishment to the litigant whose cause or defense 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 vs. Cape Town Municipality,* 1926 AD 467 at 488). It is intended to restore the disturbed balance in the scale 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 of 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 the payment or a special fee to a legal practitioner or by other unusual expenses".

[29] This Note, as Kriegler J remarked in the *Gauteng Lions*-case (*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 a costs, charges and expenses "as are" necessary or proper for the attainment of justice or for defending the rights of any party" (See: *Van Rooyen's case*, *supra,* at 467 F). 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 *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 risking 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.*- judgement (*supra* at 488), "that does not affect the principle on which (the taxation of costs) is based".

[30] With this analysis of Note I in mind, I have no hesitation in finding that some of the fees at issue in this review are clearly "costs reasonably incurred" by the respondent in successfully defending her rights on appeal. The difficulty, as I have shown earlier in this judgment, is that those costs are nowhere expressly mentioned or quantified as an item in the tariff. Had the taxing master been precluded from allowing fees on taxation beyond those expressly

itemized in the tariff, Mr Bloch might well have been right to suggest that the best he could have done for the respondent was to allow the reduced fees for "attendance" instead of the first day fee claimed for "appearance" in the appeal. Such a result would have been patently unjust and, clearly, would have flown in the face of the guiding general principle of "full indemnification" embodied in Note I. It is, in my view, precisely to avoid any unfairness which may result from an inflexible application of the enumerated tariffs in the schedule and to allow the taxing master to give full effect to the principle underpinning Note I, that the Chief Justice promulgated Note II. The note reads as follows:

> "The taxing master shall be entitled in his or her discretion at any time to depart from any of the provisions of this tariff in extraordinary or exceptional circumstances where the strict execution thereof will be unjust, and in this regard shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant."

[31] Although similar or identical provisions have often been applied to the taxation of bills of costs on a scale as between attorney and client (such as examined in *Loots v Loots*, *supra* at 434D), its scope extends well beyond those cases. The discretion contemplated by the

Note not only allows for the quantum of the tariff to be adjusted upwards or downwards in extraordinary or exceptional circumstances (compare *Bradshaw v Florida Twin Estates (Pty) Ltd*, 1973(3) SA 315 (D) at 317C-D), but also instances where fees or charges - not otherwise specified in the tariff - are sought to be included in bills of costs (*Van Rooyen's case*, *supra,* at 483B). In my view, it would be manifestly unjust if litigants are deprived of the costs incurred to secure the appearance of a legal practitioner on appeal simply because, on a strict application of the tariff, such an item has not been specifically allowed for.

[32] Given the notion of fairness underlying the taxation of bills of costs and the cardinal principle of "full indemnification" as discussed earlier, the significant changes to the structure of legal practice and the right of audience in the superior courts brought about by the provisions of the Legal Practitioners Act, constitute "extraordinary or exceptional circumstances" which would justify the taxing master in allowing first day fees and refreshers on appearances of legal practitioners in appeals and applications before the Supreme Court. It falls to be noted, however, that any services incorporated in the meaning of those legal concepts which have been specified separately

in the tariff (such as “perusing record on appeal” or “perusing any plan, diagram, photograph or other annexure…- referred to in items C 1 (b) and C 2 of the tariff) ought to be taxed as a separate item and the first day fee, which previously have included a fee for reading, should be adjusted to only include a combined fee for preparation, drawing heads of argument and appearance in Court. The quantum of the first day fee will, by necessity, differ from case to case and depend on “the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute” and any other factors the taxing master may consider relevant, such as “the degree of expertise and seniority required (not possessed by) whoever appears in the matter” (see: Note II and *Stubbs v Johnson Brothers Properties CC and Others*, *supra* at 30C-D).

[33] With this analysis in mind, I now turn to the item in the bill of costs which is the subject matter of this review. I have already pointed out that the ground on which the applicant is seeking to set aside the assistant taxing master’s *allocatur* is narrow in scope. The review is limited to that grounds (c.f. *Engelbrecht v Voorsitter, Wetgewende Vergadering van Suidwes-Afrika en Andere,* 1973(1) SA 52 (SWA) at 55D-E) and, not being privy to any agreements or understandings

between the parties which might have preceded the taxation or the review application, it would be inappropriate and potentially unjust if I were to decide the review on other conceivable grounds – such as that (a) instructed counsel's fees should not have been taxed as a disbursement in the instructing counsel's bill of costs but only as a fee in a separate bill of costs taxed jointly and at the same time as contemplated in Note IV or (b) that in the absence of a specific order of the Court authorising the fees consequent upon the employment of more than one legal practitioner, rule 11(4) allows for only the fees consequent upon the employment of one legal practitioner to be taxed. Not having raised these grounds specifically, the respondent has not been alerted to meet them. They have therefore not been traversed either as part of the facts or in argument and the Court has not been adequately apprised to arrive at a well-informed decision on them in the circumstances of this review (see: *Moleah v University of Transkei and Others*, 1998(2) SA 522 (Tk HC) at 533F-G).

[34] The fee prescribed by item C 1 (b) the tariff for perusal of a "record on appeal" is 27 cents for each page or part thereof. It is not in dispute that the record consists of 127 pages. I therefore agree with Mr Bloch that the fee of N$1 350.00 claimed in that regard should have

been taxed down but, according to my calculations, to N$34.29 (not N$33.48 as suggested by him). The fees charged for perusal of the appellant's heads and additional heads of argument are not specified in the tariff. The perusal thereof (like the drafting of heads of argument) forms part of the preparatory work normally included in a first day fee on appeal and should not have been allowed and taxed as a separate item. The first day fee of N$4 500.00 for "preparations, appearance and argument on appeal" should have been allowed under the assistant taxing master's discretionary powers contemplated in Note II to the tariff. In summary, therefore, of the sum of N$7 200.00 taxed as instructing counsel's fees, only N$4 534.29 (i.e. N$4 500.00 + N$34.29) should have been allowed. This represents a reduction of N$2 665.71 which must be deducted from the assistant taxing master's *allocatur* of N$8 195.50, leaving a difference of N$5 529.79.

[35] In arriving at this conclusion, I am mindful that courts of law will not readily disturb a ruling of a taxing master falling within his or her discretion (see: *Bradshaw v Florida Twin Estates (Pty) Ltd,* 1973(3) SA 315 (D) at 316 *in fine*) unless he or she (a) has not exercised his discretion judicially but has done so improperly; (b) has not brought his or her mind to bear upon the question or (c) has acted on a wrong

principle (see e.g. *General Leasing Corporation Ltd v Louw,* 1974 (4) SA 455 (C) at 461-2 and *Noel Lancaster Sands (Pty) Ltd v Theron and Others,* 1975 (2) SA 280 (T) at 282F). In addition, given the supervisory powers the Court retains to ensure fairness, reasonableness and justice in court annexed procedures - such as the taxation of bills of costs (compare the authorities referred to in *Pinkster Gemeente van Namibia (previously South West Africa) v Navolgers van Christus Kerk SA*, 2002 NR 14 (HC) at 17B to H) - the Court may also correct the Taxing Master's ruling not only on the aforementioned common law grounds of review, but also when it is clearly satisfied that the taxing master was wrong (c.f. *Legal and General Assurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473 (A) at 478G-H). Earlier in this judgment, I dealt with a number of the reasons on which the assistant taxing master premised his rulings and concluded that they were clearly untenable given the letter and spirit of the Legal Practitioners Act, 1995 as well as the numerous legal and structural amendments brought about in the wake thereof. In my view, the assistant taxing master acted on an indefensibly incorrect interpretation of the Act and his rulings on some of the applicants' objections were clearly wrong. To the extent indicated, his rulings must be set aside or corrected.

[36] As regards the question of costs in the review: The parties agreed that, given the importance of the principles to be decided in this review and the bearing they may have on future taxations, no order of costs should be made. I agree.

In the result, the following order is made:

1. The taxation review succeeds.

2. Instructed counsel's fees referred to in item 16 of the respondent's bill of costs is taxed off to N$4 534.29

3. The assistant taxing master's *allocatur* is set aside and the following is substituted:

> "Taxed and allowed in the amount of N$ 5 529.79 (five thousand five hundred twenty nine Namibia dollar seventy nine cents)."

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MARITZ, A. J.A.

ON BEHALF OF THE APPELLANT:	Mr A Vaatz
Instructed by:	A Vaatz & Partners
ON BEHALF OF THE RESPONDENT:	Mr B Bloch
Instructed by:	Basil Bloch Attorneys