I think that in that argument the scope of the word 'nage' is unduly widened. Didcott J took the same view at 37A. This feature, in my opinion, does not give the directors a power which they do not otherwise enjoy. The simple answer is that, if they find the company in such circumstances, they must cease trading forthwith.

In the present matter, according to the papers, they have already done that.

Furthermore, the company appears to have been in its present parlous state since December 1989. There is no apparent reason why a meeting of members could not have been called.

I therefore make no order on the application and it will be postponed *sine die*, with leave to the applicant, if so advised, to supplement to whatever extent may be proper.

Applicant's Attorney: *Peter Horwitz*.

MALCOLM LYONS & MUNRO v ABRO AND ANOTHER

WITWATERSRAND LOCAL DIVISION

KRIEGLER J

1991 January 30

Costs—Attorney and own client costs—Agreement by client that he would be liable for fees at a rate of R220 per hour—Such agreement not depriving Taxing Master of powers and duties vested in him to determine whether fees charged related to work specifically authorised and reasonable—Where agreement purporting to authorise work to be done and fees to be charged therefor not contemplated by the tariff and agreement based on the false premise that Rule 70 of the Uniform Rules of Court set a universal tariff charge per hour and otherwise vague and ambiguous, Taxing Master correctly regarding himself as not bound by such agreement.

The applicants, a firm of attorneys, applied for the review of a decision of the Taxing Master who had taxed off an amount of R18 000 from a bill of costs presented by the applicants to their client on whose behalf they had instituted a claim for personal injuries. The personal injuries claim was settled three days before trial with the defendant paying R180 000 plus party and party costs. The total bill presented to the client reflected an amount of R31 000 in respect of fees. There were 10 items in the bill which were disputed but eight of these were of a trivial nature. The two which together amounted to almost R17 500 of the amount taxed off related to:

'Atten between the period . . . perusing and analysing client's fees book re proof of loss earnings, checking the various cassettes and attending to enquiries in regard thereto, 36 hours in all attorney and clerk present . . . R6 480' and 'to perusing and researching medical literature on the injuries reviewing and checking all medico-legal reports in relation to each other and the literature, making copies of certain of the documentation, 50 hours in all . . . R11 000'. The applicants claimed that they were entitled to charge a fee of R220 per hour by virtue of a power of attorney which their client had signed. In terms of the power of attorney the client confirmed that 'the difference between "party and party" costs and "attorney and own client" costs has been explained to me and that the tariff charge is between R40 and R60 per hour' and agreed to pay fees of R160 per hour in addition to the former rate for all work to be done in connection with the action, including the applicants' own consultations, medical research, preparation, perusal and review. On review,

Held, that the Taxing Master had correctly held that the agreement did not deprive him of the powers and duties vested in him to determine whether the fees charged were related to work specifically authorised and whether the fees charged were reasonable.

Held, further, that the agreement was subject to criticism as it took as its baseline a universal tariff charge per hour which did not exist in Rule 70 of the Uniform Rules of Court and in addition was vague and ambiguous.

Held, further, that, as there was no specific mandate from the client to perform the exceptional work covered by the two disputed items, the Taxing Master had correctly considered whether the work was necessary at all and could not be faulted with the exercise of such discretion.

Held, accordingly, that the application for review had to be dismissed.

Review of taxation.

Kriegler J: In this review of taxation former attorneys and their erstwhile client are at loggerheads regarding 10 items in a bill of costs drawn as between attorney and own client. The disputants are the attorneys, the client and the Taxing Master.

A brief history is necessary. In November 1984 the client, an elderly specialist urologist, was involved in a motor collision. Nine days later he instructed the attorneys to act on his behalf in claiming damages for bodily injuries sustained in such collision. Apparently the client had had other attorneys acting for him, but decided to instruct these attorneys because of their expertise in personal injury cases. At the same time the client signed a special power of attorney on a standard form drafted by the attorneys. In the preamble and the opening three paragraphs the partners were authorised to institute the client's claim and to perform functions incidental thereto. Paragraphs 4, 5, 6 and 7 thereof then read as follows:

'4. I confirm that the difference between "party and party" costs and "attorney and own client" costs has been explained to me and that the tariff charge is between R40 and R60 per hour.

5. To charge me fees of R160 per hour in addition to the aforesaid tariff charge of R40 to R60 per hour for all work to be done in connection with the said action including your own consultations, medical research, preparation, perusal and review.

6. I have been advised that the aforesaid hourly charge has been calculated in relation to:

(i) The cost structure of an attorneys office.
(ii) Your particular expertise in the field of personal injury.
(iii) Investigations in regard to both the merits and *quantum* which includes medical research, perusal and review.

In the event of circumstances warranting an increase in the hourly charge this will be subject to my confirmation.

7. In view of the fact that you will incur certain disbursements and fees on my behalf I hereby irrevocably and *in rem suam* authorise you to recover and receive on my behalf the capital and party and party costs from the defendant/s in my claim and to deduct fees and disbursements from the capital amount before payment of the balance of it to me.'

In amplification of clauses 5 and 6, clause 9 on p 2 authorised the attorneys in their discretion to appoint more than one attorney to be involved in handling the case at any one time. In addition a second document was signed on the same day expanding upon the powers vested in the attorneys by clause 7 of the first mandate.

Pursuant thereto the attorneys attended to the institution of the action and preparation of the client's case. In due course the defendant conceded the merits but three issues relating to *quantum* remained to complicate matters. Client had pre-existing pathology of the neck and of the ears (deafness and tinnitus), which conditions were aggravated by the collision. In addition the client's advanced years rendered his claim for loss of earnings, particularly in the future, problematical. There were additional complicating features. The first was that the previous treatment for the ear condition went back many years and included surgery in Europe. As far as loss of earnings was concerned the formulation of the claim entailed not only a fall-off in the number of patients the client could attend to after the accident but also that he had discontinued performing the more demanding (and hence more remunerative) aspects of his practice. Seventeen medico-legal reports were obtained by the attorneys and four by their opponents. In addition the attorneys liaised with the client's accountants and retained a firm of actuaries to calculate the claim for loss of earnings. In the event the action was settled on or about 2 June 1987, three days before trial. The defendant paid the client R180 000 plus party and party costs. The attorneys estimated that the attorney and client charges over and above the party and party costs they could recover would amount to R20 000 and on 17 June 1987 they accounted to the client accordingly. The latter, not being satisfied with the attorney and client fee of R20 000, called for taxation.

On 1 July 1988 the Taxing Master appended his *allocatur* to a party and party bill of costs amounting to R18 316,64. The attorney and client bill, which forms the subject-matter of this review, eventually came to be debated in February and March 1989. It ran to 47 pages, 672 items and reflected fees amounting to R31 359 and disbursements of R12 554,33. The Taxing Master taxed off an amount of R18 031,20 from the fees, leaving a balance of R13 327,80 before the additions and surcharges and a total sum, inclusive of disbursements, of R30 601,25. The attorneys filed a notice of review, challenging 10 rulings by the Taxing Master. The latter formulated a stated case, both sides responded thereto and the Taxing Master filed his report. In December 1989 both sides replied to the Taxing Master's report and in January 1990 the attorneys filed a supplementary submission. On 27 February 1990 an affidavit by the client was lodged challenging a number of the factual allegations made by the attorneys. As a result of the numerous documents filed relating to the review of taxation, there are a number of factual issues which cannot be determined on the papers. Nevertheless I do not consider it necessary to put the parties to the expense and trouble and the Court to the inconvenience of a mini-trial to resolve the outstanding issues.

Formally there are 10 items in dispute but eight of them are relatively trivial, the real dispute relating to two items involving R14 420 out of the R18 031,20 taxed off. The first, item 433, is formulated as follows in the bill:

'8.5.87 attending between the period of 4.5.87–8.5.87, perusing and analysing client's fees books re proof loss of earnings, checking the various cassettes and attending to enquiries in regard thereto, 36 hours in all attorney and clerk present . . . R6 480'.

The second main dispute relates to item 615:

'2.6.87 to perusing and researching medical literature on the injuries, reviewing and checking all medico-legal reports in relation to each other and the literature, making copies of certain of the documentation, 50 hours in all . . . R11 000'.

The Taxing Master's ruling on item 433, which is supported by the client, was that a fee of R60 per hour was a proper fee for the work claimed to have been done. Taking a guideline from item B5 of Rule 70 ('(a)ttending to give or make disclosure, per half hour or part thereof—by an attorney . . . R10–R20—by a clerk R5') the Taxing Master made an allowance which he regards as generous. In addition the Taxing Master had regard to items allowed in the bill which reflect fees and disbursements for consultation with the client's accountant, for perusal of the client's books of account by the attorneys and in respect of the employment of actuaries. The Taxing Master's attitude is that in the light of those activities, the fees allowed under item 433 were fair and reasonable. He also makes the point that at item 358 of the party and party bill of costs the corresponding item was charged out as a perusal of 432 folios at R1,50 per folio. The attorneys, in turn, point out that they perused numerous financial books and records relating to the client's financial affairs for the purposes of preparing the claim for loss of earnings. They make the point, indubitably correctly, that such records formed an important part of the client's case and that, notwithstanding the assistance of the accountants and the calculations by the actuaries, their contribution was vital to a crucial element of the client's claim for compensation. More especially the attorneys argue that it was not competent for the Taxing Master to allow the 36 hours of work claimed at a rate of R60 per hour only in the light of the agreement embodied in the power of attorney which made provision for payment at R220 per hour 'for all work to be done in connection with the said action'.

With regard to item 615 the Taxing Master's attitude was that a fee of R1,50 per folio for perusal of 600 folios of important medical literature was a proper allowance, whereas the fee charged of R11 000 (ie 50 hours of R220 per hour) was exorbitant. More especially the Taxing Master was of the view that numerous medical experts whom the attorneys had consulted on behalf of the client were so consulted for their expertise and that the fees charged by the attorneys related to duplication of work. He also had regard to item 612 ('attending to listen to the medical tape of our doctor') and 614 ('one hour researching the medical law and cases'). Furthermore

the Taxing Master took into account that the 50 hours allegedly spent on the work in question could not be verified by file notes, similar vouchers and represented a 'guesstimate' only. The attorneys, for their part, rely on their pre-eminence as specialists in the field of personal injury claims and the terms of the special power of attorney, more especially the closing words of clauses 5 and 6(iii) thereof. The senior partner of the attorneys contends 'that an attorney, particularly one who holds himself out as an expert, would be neglecting his duty' if he relied on the medico-legal experts without doing his own independent research. With regard to the time spent on the research, there is a dispute of fact. The Taxing Master's view that vouchers were not available (which view is supported by the client) elicited a response from the attorneys to the effect that proof of the time spent was available but had not been requested. The attorneys do not, however, comment on the Taxing Master's observation that the figure of 50 hours and the amount claimed had been altered on the bill.

Items 433 and 615 are not only the most important of the 10 disputed items in terms of money-value but are the only two that really raise issues of principle. Those issues appear to be twofold. On their reading of the special power of attorney the attorneys contend that work not otherwise chargeable is to be paid for and, secondly, is to be paid for at an agreed rate of R220 per hour. I do not read the special power of attorney as affording unqualified substantiation for either contention. In particular it does not serve—nor indeed could it in law serve—to deprive the Taxing Master of the powers and duties vested in him.

The special power of attorney is not a particularly elegantly drafted document. The preamble, ending with the colon in the fifth line, serves to introduce a number of functions to be performed by the partners on behalf of the signatory. Accordingly the first three paragraphs commence with an infinitive. Then however, clauses 4, 5, 6, 7 and 9, interwoven with recordings of functions delegated to the attorneys, serve to introduce an unusual basis of payment for such functions. Indeed, what those clauses serve to place on record is an undertaking on the part of the client to pay for work which would not otherwise be chargeable and, moreover, to do so at a rate three or four times higher than the tariff. Clause 4, which purports to confirm that the difference between party and party costs and attorney and own client costs had been explained to the client, by its very wording casts doubt on the adequacy or accuracy of such explanation. The statement 'that the tariff charge is between R40 and R60 per hour' is downright misleading. Some of the items in section E of the tariff are taxable at R20–R30 per half hour but the vast majority of the items listed in the various sections of the tariff are not chargeable at such a rate. Indeed the majority of items are not calculable on a time basis at all. Furthermore clause 5 is, in terms, based on the tariff charges but, at the same time, purports to entitle the attorneys to payment 'for all work to be done in connection with the said action'. In my view there are three objections to the clause as worded. First, it takes as its baseline a universal tariff charge per hour which does not exist in Rule 70. Then it purports to authorise work to be done and fees to be charged therefor not contemplated by the tariff—'all work'. In the third instance it ignores the important qualification in tariff item E3 ('any other matter which the Taxing Master may consider necessary'). It follows that in my view the client did not give his informed consent to pay for all work done at the rate of R220 per hour, nor could he lawfully have done so.

Clause 6 of the special power of attorney also raises a number of difficulties. The reference to 'the aforesaid hourly charge' in the opening line is ambiguous and in any event based on the false premise that all charges are calculated on a time basis. Secondly, the word 'investigations' in subpara (iii) is vague, as is the term 'medical research'. Lastly the closing sentence of the clause is vague and ambiguous. On the face of it the client is afforded a discretion to confirm (or, of course, to refuse to confirm) an increase in the hourly charge. What is wholly unclear, is whether such discretion relates to the increase from R40–R60 per hour up to R220 per hour or above the latter figure.

All in all, therefore, the Taxing Master in my opinion rightly did not regard the client nor, of course, himself, to be bound by an agreement to the effect that the attorneys would be entitled to payment at the rate of R220 per hour for all the work they did in connection with the action, necessary or unnecessary, prudent or prodigal. Although it is true that a bill of costs as between an attorney and his own client is taxed on a basis different from that on which a party and party bill is taxed—or even different from that upon which an attorney and client bill is taxed when it is to be paid by the opposing litigant, the Taxing Master was empowered—and indeed in duty bound—to satisfy himself that the fees claimed related to work specifically authorised by the client and that the fees charged were reasonable. (See *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T).)

I am unpersuaded that the Taxing Master, in performing such duties, erred. On the contrary, I support his conclusions. There was no specific mandate from the client to perform the exceptional work covered by the two items under discussion and the Taxing Master rightly considered whether the work was necessary at all and what proper remuneration therefor would be. The basis upon which he exercised such discretion cannot be faulted. With regard to the major item, the perusal and research of medical literature for which a charge of R11 000 was levied, one further comment should be made. I have perused the various medical reports contained in the trial file and can find little, if any, support for the attorneys' contention that it was a matter of exceptional complexity requiring such intensive and prolonged study by an attorney abnormally skilled in personal injury cases. The pre-existing pathology did to some extent complicate the issue but there is nothing in the medico-legal reports to suggest that it was necessary for the attorney to augment the formidable array of medical and legal knowledge, skills and experience which had been retained.

For the rest the disputed items are trivial. The Taxing Master's approach to item 53, the fee for attending upon the client when he signed the MVA 13 form, was correct. It was a pure formality and a fee of R10 was generous. More especially it is the case where it is noted that a fee of R30 was allowed for taking instructions on the drafting of the form (item 50) and of R60 for the drafting itself (item 51). Items 60, 61 and 613 relate to a medical expert from whom a report was not obtained and who, in the

event, made no contribution to the case. There is a factual dispute between the attorneys on the one hand and their erstwhile client on the other as to why the expert was considered in the first instance and the Taxing Master in my view rightly disallowed any fees relating thereto.

Items 105, 188 and 366 relate to consultations allegedly held by the attorneys with counsel of a duration of one-and-a-quarter hours, one-and-a-half hours and one hour respectively. Counsel raised no charges for the first two consultations and the Taxing Master, applying a useful rule of thumb, disallowed the attorneys any fees in respect thereof. No one with experience of trial practice in the Supreme Court, especially in motor collision work, is unaware that, as a matter reaches the critical trial phase, there are frequent communications between attorney and client. Some of them are very brief and trivial whereas others are of some substance. As good a basis as any for deciding which of these numerous communications are to be debited on a consultation basis rather than as formal attendances, is to note whether counsel debited for a consultation. I cannot fault the rule of thumb nor the Taxing Master's application thereof. In respect of the third short consultation (item 366) the Taxing Master in my view likewise applied his mind properly and fairly.

That leaves item 148, an attendance at the Johannesburg magistrate's court on 22 October 1985 when the insured driver was to appear on charges arising out of the subject motor collision. There is a direct and irresoluble conflict of fact on the question whether the merits of the collision were at that stage still in contention. The client says that the insured driver from the outset acknowledged his liability and that there was no reason for the attorneys to attend at Court. They in turn contend that a formal admission of liability only followed in the defendant's plea long thereafter. The Taxing Master taxed two-thirds off the attorneys' claim for payment of the sum of R330 for their attendance at the criminal trial on the day in question. I do not think that in doing so he erred. He did the best he could with the data at his disposal and arrived at a conclusion which was fair to both parties.

In the result the attorneys have failed to establish that the Taxing Master erred in any respect at all. Having regard to the unusual volume of paper produced in the review proceedings, a fair figure for the costs entailed therein would be R250.

For the aforegoing reasons the review is dismissed and the attorneys are ordered to pay the amount of R250 towards the costs of the client entailed in the review proceedings.

VAN RENSBURG AND ANOTHER v RUSSER

NAMIBIA HIGH COURT

LEVY J

1990 June 18, 29

Motor vehicle accidents—Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (RSA)—Applicable in Namibia—Not possible to sue owner or driver for damages for bodily injury arising out of motor vehicle accident unless Fund established by legislation unable to pay—Section 52 of Act—Reliance on letter from Fund indicating intention to deny liability after independence of Namibia not basis for proceeding against driver—Fund not able to amend legislation imposing liability upon it—Accordingly rule issued as interim order for arrest of party tamquam suspectus de fuga *for provision of security discharged.*

In an application to discharge a rule *nisi* issued for the arrest *tamquam suspectus de fuga* of respondent, a citizen of the USA, subject to the provision by her of security in the sum of R50 000 in respect of a claim for damages to be instituted by the applicant arising out of bodily injuries sustained in a motor vehicle accident,

Held, that on 1 June 1989 the State President had assented to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 which was applicable in South West Africa and art 140 of the Constitution of Namibia made the laws applicable before independence applicable thereafter until repealed or declared unconstitutional.

Held, accordingly, that the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 was operational in Namibia.

Held, further, that in terms of s 52 of that Act, where a person was entitled to claim from the MMF or its agent for damages for bodily injury arising out of a motor vehicle accident, that person was not entitled to claim from the owner or driver of the vehicle responsible unless the Fund was unable to pay.

Held, further, that the rule *nisi* had been granted for interim relief on the basis of a letter received from the MMF indicating an intention to deny liability for claims arising after the independence of Namibia, which the MMF was not empowered to do, i e it could not breach an obligation set out in legislation or of a contractual nature, nor could it purport to amend the legislation.

Held, accordingly, that the applicants were bound by the provisions of s 52 of Act 93 of 1989 not to proceed against the respondent personally and the rule had accordingly to be discharged.

Application for the discharge of an interim interdict. The facts appear from the reasons for judgment.

G Coleman for the applicants.

J D G Maritz for the respondents.

Cur adv vult.

Postea (29 June 1990).

Levy J: On 20 June 1990, I discharged a rule *nisi* which had acted as an interim interdict in terms whereof the respondent had been arrested *suspectus de fuga* subject to the provision by her of security for R50 000, this being a claim as and for damages and costs in respect of an action to be instituted by applicants. The application to discharge the rule was made