REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/14197

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

19/9/12
DATE

SIGNATURE

In the matter between:

COETZEE, JACOB ALBERTUS — **Applicant**

and

**THE TAXING MASTER,
SOUTH GAUTENG HIGH COURT** — **First Respondent**

and

SALANT ATTORNEYS — **Second Respondent**

JUDGMENT

SUTHERLAND J:

Introduction

[1] The Taxing master of the South Gauteng High Court taxed a bill as between the applicant (Coetzee) and his own attorney (Salant). Coetzee was aggrieved at the Taxing Master's decision and invoked Rule 48(1) of the Uniform Rules (the Rules) to review the decision.

[2] The matter was referred in terms of Rule 48(6)(a)(iv) to open court for argument. Represented in that argument were Coetzee, Salant and the Taxing Master. The parties inundated the matter with paper. This judgment shall endeavour to avoid tangential material and strive to be succinct.

[3] The controversy is about the consequences of a litigant and his attorney not having an agreement about the fees to be charged to the litigant. In this case the taxing master addressed the taxation on the basis that no fee agreement existed. There was some huffing and puffing by both Coetzee and Salant to the contrary, but ultimately they acquiesced in that factual premise. Their alternative would have been to withdraw from the taxation and proceed to litigate about the existence of an agreement and its terms.

The issues

[4] The first issue is whether or not an attorney who does not conclude a fee agreement with a client in a litigious matter can be paid a fee different to that prescribed in the tariff in Rule 70.

[5] If a taxing master may fix a different fee, the second question is whether that discretion was properly exercised in this case, and in that enquiry, what principles or norms permissibly inform a taxing master in so doing.

[6] Coetzee argues that the tariff rates prevail in the absence of an agreement. The Taxing master disagreed and determined a fee calculated at triple the tariff rates. Salant endorses the Taxing Masters decision.

[7] It is common cause that the taxing master exercised a discretion to fix that rate. The enquiry therefore is into whether or not there are grounds to interfere with the exercise of that discretion. The scope of a review under Rule 48 requires a court to be satisfied that the taxing Master was clearly wrong before interfering with a decision. (See: Ocean Commodities Inc v Standard Bank of SA Ltd 1984 (3) SA 15 (A) at 18E-G)

The Law

[8] The rules of court exist to regulate a public process of litigation in which the State, in accordance with law, facilitates dispute resolution. The law prescribes that a defeated litigant be liable in costs to the successful litigant. The quantum of such costs is to be what was reasonable to prosecute the proceedings. When a defeated party has to pay costs, the determination of such quantum is determined by the taxing master and is an exercise of public power.

[9] The relationship between attorneys and their clients is a private affair founded on contract. However, the state imposes itself upon that relationship to regulate the fees levied by attorneys on their own clients in order to ensure that clients are not charged unreasonable fees. The taxing master is a gatekeeper of fairness about those fees. (Cf: Aircraft Completions Centre (Pty) Ltd Rossouw & Others 2004 (1) SA 123 (W) at 169A-C.)

[10] It is plain that the function of a taxed bill to be paid by a defeated adversary and a taxed bill to be paid by a client for services rendered is not identical. Rule 70 (3) prescribes that the object of the defeated adversary paying the successful litigant's costs is to provide a 'full indemnity' to the successful litigant. The tariff is deemed to do so even if common sense reveals the contrary.

(Bowman NO v Avraamides & ano 1991(1) SA 92 (W).) The payment by a client to the client's own attorney is not aimed at a 'full indemnity', but rather is aimed at payment of a reasonable recompense for services rendered.

[11] The taxing master is a creature of Rule 70 (1) which provides:

> "(1) (a) The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do."

[12] This Sub-rule has been interpreted to mean that the Taxing Master's power to tax "any bill of costs" includes bills as between adversaries in litigation and as between a litigant and that litigant's own attorney: ie bills usually described as " attorney and own client".

[13] Rule 70(1) alludes to Rule 70 (5) which governs the powers conferred in Rule 70(1). That sub-rule provides:

> "(5) (a) The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

> (b) In computing the fee to be allowed in respect of items 1, 2, 3, 6, 7 and 8 of Section A; 1, 2 and 6 of Section B and 2, 3, 4 and 7 of Section C, the taxing master 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 which he considers relevant."

[14] Self evidently, the wide discretion conferred in Rule 70 (5) is the true fount for any 'application of the mind' by a taxing master to the task of fixing a fee. Importantly, so it seems plain to me, the text of the sub-rule expresses a very clear structure to the approach licensed by the sub-rule; ie the tariff is the default position, which may be departed from under the conditions prescribed, ie, 'extraordinary or exceptional cases". Moreover, in addition to those extraordinary and exceptional circumstances having to be being found to be present, the taxing master must further find that a failure to depart from the tariff would result in an inequity. Plainly, fairness is the golden thread, both to the debtor client and to the creditor attorney.

[15] These prescriptions are all relevant to *matters where the tariff applies*. The question therefore arises whether or not there exist bills of costs that the taxing master is competent to tax that are not subject to the tariff? Sub-rule 70(1) which is the primary authorisation to tax 'any bill' is not, save insofar as rule 70(5) applies, expressly tied to the tariff in Rule 70.

[16] Can Rule 70 (1) therefore be interpreted to mean that the tariff in Rule 70 is only for party and party costs and no tariff is prescribed for attorney and own client costs?

[17] There is direct judicial authority for that view. Nicholas J in Malan v Meyer 1974(1) SA 477 (T) at 477 H held that :

> " there is no tariff prescribed in respect of fees as between attorney and client, but in practice the tariff prescribed in terms of rule 70 ... is used as a guide in the taxation of such fees."

This *dictum* is unaccompanied by any reasons or explanation for such conclusion. The facts in Malan v Meyer were indeed pertinent to attorney and own client and were not to do with a penal scale levied on an adversary, usually called an 'attorney and client' scale of costs. (Similar bald statements appear in Oshry & Lazar v Taxing Master & Ano 1947 (1) SA 657 (T) at 660 and in Udwin v Cross 1962(3) SA at 291 (T) at 293A, which both address true attorney and own client costs)

[18] In my respectful view, I am unable to divine from the text of Rule 70 (1) and 70(5) a foundation for the conclusion articulated by Nicholas J. Stegmann J, whose monumental analysis of the taxation of costs on an attorney and client scale, in Aircraft Completions Centre (Supra), does not

mention Malan v Meyer, but at [84] does cite Curlewis J in Gross v Svirsky 1923 TPD 422 at 425 who said:

> "The Court recognises, especially in a bill of costs as between, attorney and client, that the experience of the taxing master and his attorney in seeing that the client is not unduly saddled with costs of his attorney, is practically the only protection that the client has. It is very seldom that a client must bring in review the question of taxation of attorney and client costs, though we have had such cases. Another reason why I personally think that the Court should be very reluctant to interfere with the taxing master's discretion is that, unless there is a special agreement between attorney and client that special fees should be granted, the taxing master has to be guided in every case by certain principles. *The Court has held that the scale of fees laid down as between party and party in the tariff of attorney's fees applies mainly as between party and party, and it does not necessarily apply as between attorney and client.* I cannot agree with counsel's contention that because a bill of costs is one between attorney and client, the fees allowed should be more liberal; that they should be on a higher scale, merely because it happens to be a bill between attorney and client and not between party and party."
>
> *(Emphasis supplied)*

[19] At [85] in Aircraft Completions Centre (Supra), Stegmann J says the cited proposition advanced in Gross v Svirsky is 'unassailable'. Precisely what is unassailable is that a departure from the tariff, simply because the costs are between an attorney and own client without the factors stipulated in Rule 70(5) being present, is a wrong approach to taxation. The anterior point alluded to by Curlewis J that the tariff is 'mainly' for party and party costs and does 'not

necessarily' apply as between attorney and client; was, ostensible, not addressed by Stegmann J in these remarks.

[20] The idea that the tariff is not intended for attorney and client costs, so that the taxing master merely uses the tariff as a guide (articulated in Malan v Meyer) , if married to the idea that the taxing master's decision to fix a fee for attorney and own client costs need not 'necessarily' be higher than the tariff (articulated in Gross v Svirsky) must lead to the outcome that the tariff is not binding on the taxation of attorney and own client costs and that therefore, the tariff rate cannot be a 'default fee rate' in respect of attorney and own client costs. However, if that is a correct statement of the law, what Stegmann J assumes in [85], nevertheless, subordinates the fixing of attorney and own client costs to the application of the Rule 70 tariff. What Stegmann J states is this:

> " .....On a taxation as between attorney and client, *irrespective of whether it is an attorney's own client, or the opposing party,* who may be obliged to pay the amount taxed, more is required than the mere fact that it is a taxation as between attorney and client before a departure from the tariff is justified. Rule 70(5) (a) determines what more is required. The Taxing Master is bound to apply the tariff in any taxation as between attorney and client unless, in the exercise of his discretion in terms of Rule 70(5)(a), he comes to the conclusion that the case is 'extraordinary or exceptional' within the meaning of that subrule, and that it would be inequitable to adhere strictly to the tariff. "

[21] I am uncertain these dicta can be perfectly reconciled. However, latent if not patent, in all of the pronouncements is that the taxing master is licensed to deviate from the tariff in fixing attorney and own client fees. It must follow that with such an outcome that the tariff is not a default position in the absence of an express fee agreement as between an attorney and own client; ie, the fee to be fixed is always, *ab intitio,* discretionary, albeit dictated by a margin of deviation from the tariff, from 0% to Z%, which can be justified by reference to relevant norms.

[22] The contention to the contrary favoured by Coetzee is derived ultimately from a dictum of Wessels J in Hitchcock v Raaff 1920 TPD 366 at 368-369. That case addressed a dispute which rendered the decision distinguishable. The attorney was mandated to procure the setting aside of a rival trader's liquor license so that he could obtain it. The attorney exacted from his client an agreement to pay a special remuneration, branded by the court as an unfair bonus and also, as it then was, an improper contingency fee. It was held that an attorney cannot behave in such manner. The critical passage reads:

> "... [the attorney] cannot contract for himself a bonus, either dependent on the result of the case or even if the result should be adverse. When once his client has embarked on litigation and when once he has obtained the confidence of his client in that litigation *he is bound to charge only the tariff fees allowed to be charged to solicitors."*
> *(Emphasis supplied)*

[23] This remark, in context, is intended to refer to the absolute prohibition, even with a client's consent, of an attorney charging a fee that contradicts the reasonableness standard. Earlier in the passage (at p 368) the Learned Judge phrased the proper stance of an honourable attorney with a hypothetical allusion to the tariff as the basis for fees being levied, and the latter remark is no more than following through in that vein. In the event that I might have construed this passage incorrectly, then I am in respectful disagreement with such a dictum. It was neither necessary to lay down such a principle to decide that case nor was the notion motivated in the least. Moreover, the weight of later authority does not endorse it.

[24] Upon an application of the ordinary principles of contract a tacit agreement to pay for services rendered may well come into being. This is a circumstance which applies to attorneys no less than to any other persons who render services. Conceivably, such an agreement might be for a *quantum meruit* or for a rate of pay at the Service Provider's usual rate or at a rate dictated by a trade custom. However, there is no room, on the approach I hold to be the law, for the party and party tariff to be a tacit, or even an implied rate, simply because of its mere existence. Litigants who wish to contend for one of these permutations must sue for a judgment in their favour before troubling the Taxing master.

[25] Accordingly, I understand the law to be as follows:

25.1. The tariff in Rule 70 is designed for and intended for the taxation of party and party costs.

25.2. The tariff in Rule 70 is not binding on any taxation of costs other than party and party costs.

25.3. The tariff in Rule 70 must to be used as a guide in the taxation of :

25.3.1. Penal costs ordered by a court to be paid by the defeated adversary, called 'costs on the attorney and client scale'

25.3.2. Costs in a bill presented by an attorney to that attorney's own client, called 'attorney and own client' costs.

25.4. In all exercises to tax a bill of costs, including party and party costs, the taxing master has a discretion to depart from the tariff.

25.5. All departures from the tariff for any kind of bill of costs requires the taxing master to apply her mind to what is fair and reasonable and

in that regard shall apply her mind to the express provisions of Rule 70 (5).

25.6. Where an attorney and that attorney's client have agreed on fees and there is a complaint that the fees agreed are not reasonable, the taxing master shall exercise her discretion to determine the reasonableness the fees, which determination may:

25.6.1. be identical to the tariff in rule 70, or

25.6.2. be different, and at a higher rate.

25.7. In the absence of an agreement between an attorney and that attorney's client about fees to be paid by the client to that attorney for services rendered the taxing master shall exercise her discretion to determine reasonable fees, which may:

25.7.1. be identical to the tariff in rule 70 , or

25.7.2. be different, and at a higher rate.

The critical Facts

[26] The Taxing master has deposed to two affidavits. The sum of what is contained therein relevant to the controversy is as follows.

[27] There is a practice in the office of taxing master that recognises three distinct levels of costs which are treated as follows:

27.1. *Party and party costs ordered by a court* to be paid by the defeated adversary, which are taxed at the rates set out in the tariff in Rule 70.

27.2. *Penal costs ordered by a court* to be paid by the defeated adversary, called 'costs on the attorney and client scale', which are taxed at double the Rule 70 Tariff rate.

27.3. *Costs in a bill presented by an attorney to that attorney's own client*, which are taxed at triple the Rule 70 tariff rate.

[28] The rationale advanced by the Taxing Master for the practice of departing from the tariff to tax an attorney and own client bill is explained as follows in her affidavit:

28.1. Judicial authority that the scale as between attorney and own client costs contemplates a scale higher than any other form of costs to be allowed. (Aircraft Completions Centre (Supra) at 182C-D [115])

28.2. Judicial authority that the taxing master has a wide discretion to determine *which* costs are reasonable and *which* not. (Aloes Executive Cars (Pty) Ltd Motorland (Pty) Ltd 1990 (4) SA 587 (T) at 589B)

28.3. Judicial authority that the tariff in Rule 70 is not binding on attorney and own client scale costs, and is merely a guide. (Malan v Meyer (supra) et al)

[29] In exercising the discretion to determine a reasonable rate for time charges for services rendered the practice is to have regard to:

29.1. Fees charged by other legal practitioners,

29.2. The seniority of the attorney

29.3. The time taken over the work

29.4. The nature of the work performed

(Notably, These factors seem to be derived from Rule 70(5)(b))

[30] The taxing master alleges that the bill of costs in this matter was treated in accordance with this practice in as much as all time related items allowed were taxed at triple the tariff rate and all other items allowed were taxed at the tariff rate.

[31] Some considerable scepticism about this explanation was expressed on behalf of Coetzee. The main thrust of the argument was that it seems apparent that the Taxing master did no more than apply a rule of thumb to triple the tariff rates for the purpose of taxing this bill. The remarks made by the taxing master about the other factors enumerated above, it is argued, are mere puffery and nothing is before the court to show that they were genuinely weighed; ie, the rote tripling of the rate in the tariff is the sole basis for the decision in the taxation of the time based items.

[32] On the facts adduced, I must agree with this submission. Indeed, it seems plain that from the Taxing Master's own papers the tripling rule of thumb did not leave room for any other pertinent factor to play a genuine role, even though she says that it did. For example, it is not apparent that the same rate of taxation would not have been applied to a junior attorney, or to a manifestly elementary matter, or to a matter than consumed hardly any time to prepare. The mere ipse

dixit about the seniority of Salant, the supposed complexity, and the time taken, remain just that when in the same breath it is stated that as matter of practice attorney and own client bills are taxed at triple the tariff.

[33] Is a rule of thumb to triple the tariff to create a default informal attorney and own client scale a proper exercise of the Taxing Master's discretion?

[34] It seems to me that the weight of authority is against such an approach. (See: Gross v Svirsky (Supra) at 425; Loots v Loots 1974 (1) SA 431 (E) at 434A-B; Aircraft Completions Centre (Supra) at [84]

[35] In my view, a departure from the tariff in any given case must be *ad hoc* and fact specific. This is not to say generic factors ought not to be considered.

[36] It cannot be objectionable to strive for a degree of uniformity in the taxation of bills of costs, but the uniformity ought to be informed by a method, or an approach, and based upon some principle, rather than a randomly selected figure or multiple of the tariff bereft of a convincing justification for that particular selection.

[37] However, in my view, it would not be objectionable to settle on a higher rate *per se* as a point of departure to tax attorney and own client bills. But, in such event, any higher rate, *qua* point of departure, must be informed by:

37.1. A rational factual basis, which may address facts common to all or most matters.

37.2. A rational policy basis, which may indentify generic factors that are considered relevant, and might include comparators about professional fees, overheads expenses, regional variables, and the like; there can be no closed list.

[38] A higher rate which is informed by no more than the notion that such rate ought to be higher and be the 'most generous rate' (as alluded to in *Aircraft Completions at 166 C-D*) is not the product of a proper exercise of the Taxing Master's discretion. On the material placed before me it is not possible to conclude that there is any more to the practice employed by the Taxing master, in general or in this particular case.

Outcome

[39] In the result, I find that the Taxing Master has not adduced facts upon which I could find that she properly exercised her discretion in this matter.

[40] As to the question of costs, because the matter was mainly contested on a basis of principle and the practices of the Taxing master, over which neither

Coetzee or Salant have any control, I deem it appropriate, pursuant to my discretion in terms of Rule 48(7), to make no order as to costs.

The Order

[41] The following order is made:

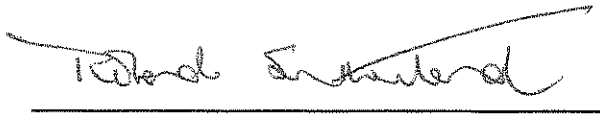
41.1 The review succeeds.

41.2 The Taxing Master's taxation is set aside.

41.3 The Taxing master is directed to reconvene, if requested, a hearing and consider afresh a bill of costs to be presented by Attorney Salant, who, if he so chooses, may submit a revised bill of costs for taxation; alternatively, if no request to reconvene a hearing is requested, to prepare a fresh taxed bill in accordance with the principles set out in this judgment, within 90 days of such reconvened hearing or of the date of this judgment, as the case may be.

41.4 Upon the Taxing Master presenting a fresh taxed bill, either party may, if so minded, invoke the provisions Rule 48, if aggrieved by the fresh determination.

41.5 There shall be no order as to costs.



ROLAND SUTHERLAND

Judge of the South Gauteng High Court, Johannesburg

19 September 2012.

Hearing: 18 and 25 July 2012
Judgment delivered: 28 September 2012

For the Applicant (J.P. Coetzee)
Adv W. L. Kock
Instructed by Bennie Botha Attorneys

For the First Respondent (The Taxing Master)
The State Attorney.

For the Second Respndent (Attorneys Salant)
Adv S Bekker SC