I am satisfied that the exemption clause is not wide enough to cover an accidental death, even though such accidental death be caused as a result of the conduct of the insured.

In the result, therefore, I come to the conclusion that the policy of insurance is binding upon the respondent and that the respondent is bound to pay the amount due to the applicant in the event of the insured having met his death as a result of an accident or misadventure. The parties were agreed that if this should be my conclusion the matter should be referred for the hearing of oral evidence to determine the question whether the deceased met his death in this way or as a result of his own deliberate act. The parties have not yet formulated a case for referral to oral evidence and I give them leave to do so. They may hand up a draft order during the course of the day.

The question of the costs of this opposed application must also be considered. The applicant has been successful in the contention which it has advanced; namely that the respondent is bound by the terms of the policy of insurance. I can think of no reason why the usual costs order should not follow.

In the result, therefore, the respondent is ordered to pay the applicant's costs of this application.

Applicant's Attorney: *Roy Bregman*. Respondent's Attorneys: *Deneys Reitz*.

KROMOSCOPE (PTY) LTD AND ANOTHER v RINOTH

WITWATERSRAND LOCAL DIVISION

FLEMMING J

Costs—Counsel's fees—Generally—Adjustments for reduced value of money is sound and fair but improper to allow for progressively increasing earnings in real terms—There is now a need more than ever to have a social consciousness and to keep in touch with the needs of the community—Court holding on review of taxation that fee of R600 for junior counsel in 'average' application appropriate.

In a review of the taxation of a bill of costs in respect of an opposed application to set aside as irregular a notice of appeal which had been filed in a magistrate's court, the Court remarked that it was sound and fair to adjust for the reduced value of money but that it was not proper to allow for the 'world-wide tendency of progressively increasing earnings in real terms'. The Court remarked further that there was now more than ever before a need to have a social consciousness and to keep in touch with the needs of the community. In the light thereof the Court reduced a fee of R1 200 allowed by the Taxing Master for junior counsel in this matter, which was described as an 'average' application, to R600.

Review of taxation. Flemming J: This is a review of the assessment of a bill of costs.

The applicant herein, whom I will call the 'respondent', was the unsuccessful respondent in an application. He was ordered to pay his opponents' costs. He firstly claims that the taxation of those costs was illegal because the second applicant, who was the sole shareholder in the first applicant, died on 17 November 1989. The bill was taxed on 21 February 1990. The said objection was then raised although it was not raised on the date initially appointed for taxation, 6 December 1989.

The Taxing Master is correct in the view that the existence of the company and its entitlement to costs was not affected by the death of any shareholder, even if the deceased was the only shareholder. The company had its own independent existence. Contracts concluded by the company continued to be effective. That also applies to a contract which creates authority of an attorney to act on behalf of the company. The prospect that new shareholders will have to become members and that they theoretically are entitled to revoke the authority does not mean that a revocation has already come into being.

The position is different in the case of a natural person. Subject to exceptions, authority created by him is automatically terminated when the agent obtains knowledge of the decease of the principal. That termination, however, only operates from that point onwards. Acts already performed with authority remain authorised steps. In this case then the attorney submitted the bill for taxation and saw to notice being given to the respondent while the deceased was still alive. That was validly done and did not have to be performed a second time. No new power of attorney was needed.

What was before the Taxing Master on 21 February 1990 was a validly submitted bill of costs. It had been submitted for the purposes of taxation. All that had been validly done. If on 21 February an attorney purported to appear on behalf of the deceased or his estate, it may be (it is not necessary to decide) that some new authorisation would have been necessary. However, nobody appeared. The bill was taxed, as is frequently the case, while the party favoured by the bill is absent and no one represents him at the process. The case must be seen as a bill of costs duly submitted for taxation which was then attended to by the Taxing Master when the appointed date arrived. If respondent, being a layman, is prepared to find benefit from analogy I might mention a request that his building society calculate interest to a specified date and send a cheque therefor. Compliance with the exercise of calculation and determining the amount due is not 'invalid' because the requesting party died before the determination is done. Respondent wants something different. He requires the authority of an attorney who did not turn up at the taxation and did not *there* represent the deceased to prove authority to represent.

Respondent attacks four items:

1. The fee for ng instructions is objected to because the Taxing Master did not insist upon proof which respondent wants about the

dates upon which, and the hours during which, instructions were given. In regard to what is inherent in the process of taking instructions and having considered the application, the fee could be determined as being reasonable in the amount claimed without any additional proof. The Taxing Master is not bound to comply with every insistence that the Taxing Master should not be satisfied unless he obtains more evidence.

2. The fee relating to attending to the opposing affidavits should have been disallowed (according to the respondent) because it is a 'duplication charged elsewhere'. I observe no duplication.
3. The fee for drawing the replying affidavit is objected to because respondent requested proof thereof but this was denied. The existence of the affidavit as filed (and delivered to respondent) proves that the work was done and strongly indicates what effort it entailed. No further proof was needed before regarding the relevant fee as fair for what was involved.
4. The amount of counsel's fee is stated to be excessive. I will deal with this aspect more fully.

In substance the Taxing Master relies upon the guidelines created in *Reef Lefebvre (Pty) Ltd v SA Railways and Harbours* 1978 (4) SA 961 (W). This approach has found extension in practice and in unreported judgments in this Division. Adjustments were made from time to time essentially by reason of increases in cost of living.

To adjust for the reduced value of money is sound and is fair. However, in the said judgment and in one unreported decision since then, it was found appropriate to make adjustments for an additional factor. It was found proper to allow for 'the world-wide tendency of progressively increasing earnings in real terms'.

I disagree with the soundness of allowing for that factor. In neither of the judgments is there any indication of the grounds for believing that such increases in real earnings have occurred. In responding I might equally simply state my view to the contrary.

I will, however, additionally comment that in economic logic a sustained advance in real terms can only be true in two situations. With reference to the population of a country as a whole, such a result may follow upon the presence of facts which would at the same time justify stating that the country has become richer, eg more diligence in labour, the introduction of more effective techniques, a higher savings ratio, reduced birth rate, increased reserves or accumulated national savings, opening up of export markets, etc. All that hinges upon factual matter. What may be a 'world-wide tendency', will not necessarily prevail in a specific country. It has not prevailed in this country. There is no reason to state that counsel's fees should be dealt with as if it did prevail.

Secondly, a section of the community may fare better than other sections. Those who fare better than average will, because inflation reflects the average, be gaining something in real terms and not enjoy only a nominal adjustment. If progress is the result of work for longer hours, higher productivity per hour, better innovation, etc, the entrepreneur deserves what he gains. I cannot reconcile myself with a Court sanctioning

industry must be dealt with in the allowing of fees in such a manner that A
it is guaranteed a long-term trend of continually faring better than the rest of society. Insofar as it is thought that there is some fairness in one group so progressing, fairness should be considered not only to counsel but also to those who need counsel. However much one individual advocate may fare better relative to another in the same profession, the profession as a B
whole is to serve the population. It must not do so not merely nominally (in the sense that it serves when it suits the profession on self-dictated terms). Society has every right to expect that the profession should be dealt with on a basis which permits real access to the services to an extent which is sufficiently fair to the population as a whole, bearing in mind that fairness to the profession requires that it should not be compensated C
inadequately and forced to work without incentives.

There is another side to the matter. The question must be asked to what extent the facts do indeed prove a tendency of any duration of an increase in real terms. An in-depth investigation will carry one to many and varying fields. The first experimental enquiry which I conducted was relative to D
the increase in salaries of academics. A university professor's R14 850 of November 1977 had become R50 960 twelve years later. 243 per cent of the 1970 salary was added to come to the 1989 figure. That refers to the starting salary. The percentage was the same for a senior lecturer. 250,6 per cent and 228 per cent was added respectively to the maximum salaries of a professor and a senior lecturer. Differences in perquisites make no E
material difference. To determine whether academics received a real increment, those incomes must be compared with the increase in the cost of living index. According to the chief economist of a prominent bank, R100 of November 1977 had become R496,15 of November 1989. The index figures are 37,7 and 187. That is an adding of 396,15 per cent. F

A similar exercise can be carried out for many other occupations. The results are almost invariably similar. That much is reflected by so many recent writings in the financial press. The exceptions seem to be mainly the professions and other specific classes such as estate agents whose commission rate was increased.

The dates for the spot check on salaries of academics and rates of G
inflation were chosen to link up with the date with reference to which the *Reef Lefebvre* case had to be decided and the date when the work was executed by counsel in the present matter.

I note then that the Taxing Master's guideline has, presumably in accordance with the *Reef Lefebvre* case, beaten inflation. Taking a case of H
'average' difficulty for senior counsel, the guidelines figure of R500 of the *Reef Lefebvre* case has become R4 761. That signifies an increase in the level of counsel's fees which are permitted by the Taxing Master equal to adding 851 per cent to the basic R500. The added element of academics was about 240 per cent. The addition to cost of living was 396 per cent thereof. I

The continuous outstripping of increases in general living expenses and general standards of remuneration in the community must necessarily result in an increasing inability of an increasing number of people to afford counsel's assistance. Neither this Court nor the Taxing Master can stop barristers from pricing themselves to the point where the very existence of J

he Bar becomes the issue. The concept of what is fair and the concept of what is reasonable in this society, is, however, one which is not governed imply by decisions of one or more advocates. Fees which are marked is nly a factor.

On this reasoning it follows that (i) when staying closer to strictly inancial norms and in that sense to general costs in the community, and ii) when fairness and reasonableness is assessed without forgetting the peration of society as a whole, more particularly if increases in cost of iving was not exceeded (except to prevent distortions), the Taxing Master would have come to a completely different result. The R500 of the *Reef Lefebvre* case should, relative to November 1989 and 1990, be R2 480 and ot R4 761.

The said fault in the process of annual increases in fees has been nentioned in relation to the R500 but it pervades the Taxing Master's pproach to all fees. It therefore also vitiates the starting-point to assess ees of junior counsel for an 'average' application.

The reasonableness of fees must obviously be tested while bearing in nind *inter alia* the prevailing level of fees. On the other hand, the fees in act allowed by the Taxing Master tend to confirm and so encourage the evel of marking fees. For that reason it is at present not safe to accept the urrent level of marking fees at face value for the purpose of Rule 70. I elieve that if this point of view was considered in *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd and Another* (case No 3414/89 (T)*), the earned Judge may well have agreed with my view that the current range of fees for juniors on application should be R700 to R1 400.

The objective outsider may well test the reasonableness of the fee of counsel of two to three years standing slightly differently. If it is fair that he should earn a take home remuneration approximately equal to that of a senior lecturer, he merits an income of R39 312. With more experience the level will tend to increase and eventually outstrip even the earnings of a professor. I am accordingly not now referring to junior counsel of longer standing. To provide, for example, for a pension and insurance against illness, a 10 per cent or 15 per cent addition seems warranted. He then requires say R45 200. He has expenses in terms of bar dues, office rental, telephone and motor vehicle expenses, and a multitude of other items. I have been unsuccessful in obtaining any satisfactory assistance on this aspect. I do have knowledge, though, of the figures presented by the Bar to the Rules Board. Bearing that in mind, it seems fair to argue towards a junior of two to three years standing being deserving of R84 000 per year. If he is expected to work on 225 days in a year, it represents a daily remuneration of R373.

R373 and also a merely inflation adjusted R150 of 1979 (R744) differs materially from the guideline figure on which the Taxing Master worked with reference to 1989 (R1 725). The Taxing Master did in this case deviate substantially from the guidelines. Even then the allowance of R1 200 differs very markedly from what was set as a fair level in the *Reef Lefebvre* case when that is adjusted in proportion to what the community

* Reported at 1990 (4) SA 587 (T)—Eds

as a whole has suffered. The only reason for the markedly higher fee is the decision to apply standards of ensuring for the Bar a progressively marked advance in real earnings. That, to my mind, is, despite the *Reef Lefebvre* case, not permissible or justifiable.

Alternatively, even if the *Reef Lefebvre* remark did have some factual justification, there is now—if not already in that era—a need more than ever to have a social consciousness, to have nerves which are in touch with the community and the needs of the community. If policy considerations did not then prevent the tolerating of progressively increasing real earnings despite the rest of the community staying behind, policy considerations now require that the *Reef Lefebvre* decision be regarded as overruled.

A purely arithmetical exercise does have its dangers. The accuracy of information, the correctness of handling figures, and also any adjustment in the process, in particular if the adjustment is magnified by percentages added thereto once or by repetition, are important. I will illustrate that importance with reference to the *Reef Lefebvre* case:

1. The decrease in purchasing power from 27,83 to 39,90 in the decade from 1950 (at 964F of the report) amounts to 41,2 per cent of 27,83. Cost of living figures published in the July 1985 issue of *De Rebus* show a decrease from 34,4 to 48,6 in the same period. That is only 29,06 per cent.
2. If 100 guineas was taken at R240 (at 965A) and this is adjusted at the rate of 39,3 to 100, I calculate an end 1977 figure of only R431. At 966A a figure of R450 was chosen. The mere R19 random adjustment has been multiplied to much more by annual adjustments in later years.
3. The R450 received a further adjustment in excess of 11 per cent (in money terms more than R50 in subsequent years) for 'progressively increasing earnings'. That should have been nil.
4. If the said R240 was adjusted by 100:27,83 (and thus if the jumps mentioned in 2 and 3 are ignored) the figure would have amounted to R862 and not R1 000 at the end of 1977, beginning 1978. The Taxing Master's premises showed further changes:
   (*a*) it was, before rounding-off adjustments, increased in the proportion of 100:36,6 from the beginning of 1985 in the unreported review judgment in case No 11843/84. (Comparing the *De Rebus* information, I note that the May 1986 issue indicates an increase of 12,7 per cent for 1985 (152 to 171,7). If the resulting percentage is added to the 1984 figure of 292,8 mentioned in the July 1985 issue, the increase from 1978 (137,2) to 1985 (330,57) is 42,2 per cent while the *ratio* would be 100:41,5 if the 1977 figure (123,7) is compared to 292,8 for 1984.) Adjustment by 100:36,6 produced a higher figure than 100:42,2 or 100:41,5.
   (*b*) In 1985 the Taxing Master without waiting for 1986 increased the R2 200 thus achieved (the counterpart of R750 in the *Reef Lefebvre* case) to R2 500. (For the 100 guineas fee the figure would be one-third more, ie R3 333. This the Taxing Master

took up in his guidelines at R3 500. This was for what in the *Reef Lefebvre* case at 962F–963 was regarded as a 'complicated case'.)

(*c*) The rounded off R3 500 was further increased in subsequent years which again showed a rounding-off of figures and not an exact adjustment in accordance with a percentage applied to the previous year. How much of this is attributable to 'progressively increasing real earnings in real terms' is not known.

I accordingly warn myself against a mere arithmetical exercise. I realise that present circumstances and more particularly the level of fees which are marked, is a factor which must be considered.

'But then one must guard against a tendency to regard such levels as the norm when determining objectively, what is fair and reasonable and proper'

(at 965D in the *Reef Lefebvre* case). I must, as the Taxing Master was bound to do, take into account the work which was involved. The application was one for setting aside as irregular a notice of appeal which was filed in the magistrate's court. The point was that in disregard of the Rule of Court, the notice did not state any ground of appeal. It only said that the appellant was unable to state 'specific points'. Although in the Taxing Master's classification it will figure as an 'average' application because there is no lower classification, the point in issue was so crisp and straightforward that one marvels at the fact that it required an application of 23 pages to raise the point.

I am convinced that counsel would be fairly compensated as a professional man for his preparation, attendance at Court, presentation of argument and all the thought, concern and responsibility that went into the matter if he was paid R600.

It is regretted that one-third taxing-off as in the *Reef Lefebvre* case or one-half as in the present case, has to occur. It would be more calculated to be popular if a high level of fees was endorsed.

I am also aware of two judgments given in Pretoria which may be seen as doing so. I understand both to reflect the particular difficulty which the learned Judge took trouble to emphasise and the importance of the decision. If it should imply a different level of counsel's fees the Taxing Master's position may become so intolerable that he may well have to ask the Rules Board to give him a fair grip on taxation without being squeezed between exceptional conservatism and boisterous enthusiasm about fees. Whether that can be evolved without introducing maximum fees is not now to be debated.

In the second matter between the same parties an application for condonation of late service of an adequate notice of appeal was dismissed with costs. There was no opposing affidavit. Neither was a notice of opposition filed in which is stated that only a legal point will be taken. Presumably the five page affidavit lacked an essential element for the granting of condonation. Arising out of that taxation, two items require attention.

Item 10

I disagree that there is any duplication. Nor was it unnecessary. The item refers to the attorney's fee for one hour which he spent attending

Court when the matter was (*a*) heard and (*b*) 'discussed'. The attorney's total fees, as taxed, amount to R197,60 before the 70 per cent surcharge was added. (The attorney was also allowed R57,11 as a drawing fee and a fee for 'attending taxation'. In the previous matter, simultaneously taxed, the allowance for this item was R135,22.)

Counsel's fees

The attorney correctly briefed a rather junior counsel for the matter. In all the circumstances I am again convinced that on a proper consideration of the matter it is not required to allow a rate of remuneration (assuming 225 working days a year) of R270 000 per annum. R600 was adequate.

The review is dismissed except that in both bills of costs the figure 'R1 200' is replaced by the figure 'R600'. No order for costs is made.

Applicants' Attorneys: *J S G Coetzee & Coetzee.*

SOLAGLASS FINANCE CO (PTY) LTD v COMMISSIONER FOR INLAND REVENUE

APPELLATE DIVISION

BOTHA JA, E M GROSSKOPF JA, NICHOLAS AJA, FRIEDMAN AJA and NIENABER AJA

1990 September 13, 30

Revenue—Income tax—Deductions—Losses of a revenue nature —Subsidiary company of major group acting as banker for the whole group—All surplus funds of companies in group channelled to its finance company which also made loans to other companies in group—One of the companies in group sold when it was realised that it was not viable and finance company suffering a substantial loss in having to write off large debt owed to it—Question whether taxpayer carrying on business of money-lender or banker depending on facts of each case—Although there were features of finance company's business not normally associated with ordinary commercial money-lending business it could be regarded as such and the capital it used was not fixed but circulating capital and loss thereof of a revenue nature—As finance company's trading activities geared to achievement of dual purpose, viz furthering interests of group and making a profit for itself, expenditure not exclusively laid out for the purposes of trade and deduction prohibited by virtue of s 23(g) *of the Income Tax Act 58 of 1962.*