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GRINDLAYS INTERNATIONAL FINANCE (RHODESIA) LTD v BALLAM 1985 (2) SA 636 (W)

Citation	1985 (2) SA 636 (W)
Court	Witwatersrand Local Division
Judge	Kriegler J
Heard	October 16, 1984
Judgment	October 16, 1984

B

Flynote : Sleutelwoorde

Costs - Taxation - Two attorneys' fees - Local and foreign attorney necessarily involved - Foreign attorney outside Republic and not subject to discipline of Supreme Court of South Africa - Taxing Master unable to tax bill in terms of Rule 70 (1) *(a)* of Uniform Rules of Court on its own C - Foreign attorney's bill taken into account in taxation of domestic bill - Taxing Master will consider bill as voucher to be scrutinised - Reliance placed on certificate of Taxing Officer of foreign Court by Taxing Master to greater or lesser extent depending on circumstances - Rules of taxation of bills outlined.

D Costs - Taxation of - Two attorneys - Local and foreign attorney necessarily involved - Taxing Master signing allocatur on domestic bill - Foreign bill not capable of independent taxation - Taxing Master able to reopen bill by consent of party in whose favour ruling made even if E allocatur signed - Defendant having consented to bill being taxed - Domestic and foreign bill sent to Taxing Master for reassessment.

Headnote : Kopnota

Whether one looks to the defintion of "attorney" in Rule 1 of the Uniform Rules of Court or whether one looks to the definition of the word as contained in the Attorneys' Act 53 of 1979, a foreign attorney, ie one practising outside the Republic of South Africa and not subject to the discipline of any one of the Divisions of the Supreme Court of South Africa, F cannot be regarded as a person whose bill of costs a Taxing Master is empowered by Rule 70 (1) *(a)* to tax. A Zimbabwean attorney's bill of costs (and any other foreign attorney's bill) can certainly be taken into account in a South African taxation of a domestic bill of costs. A South African Taxing Master will consider such a foreign bill in exactly the same way as he would consider any voucher for work done in G connection with a law suit the costs of which he is obliged to tax. He will not take it at face value. He will scrutinise the foreign bill and will, depending upon the circumstances, place a greater or lesser degree of reliance upon a certificate emanating from the office of his opposite number in the foreign Court.

Plaintiff, a company incorporated in Zimbabwe, sued defendant in the Court (a Local Division) where he was domiciled for R18287,48. During June 1982, defendant made a payment of R50 H into Court, in terms of Rule 34 (2), without prejudice as an offer of settlement and tendered to pay costs to date of settlement. The tender was accepted and plaintiff submitted two bills for debate, one from the local attorneys and one from the attorneys in Harare. The defendant's attorney objected to the form of the Harare bill which was withdrawn by consent to be redrafted and taxation thereupon postponed *sine die*. On 12 September 1983 plaintiff's Johannesburg bill was submitted to I the Taxing Master for signature of his *allocatur*. On 8 March 1984 the Harare bill was presented for taxation.

The bill was accompanied by a certificate from the Taxing Officer of the High Court of Zimbabwe stating that the bill was in accordance with the tariff but that the certificate "does not imply that the within bill of costs has been taxed by me and the reasonableness thereof is a matter for consideration by the Taxing Master concerned". The bill was objected to by defendant's attorney and the Taxing Master upheld this objection and refused to tax it. Plaintiff contended that where J more than one attorney has necessarily been engaged, each attorney is entitled to draw up

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and have taxed a bill of costs and this was so irrespective of A whether one of these attorneys practised in a foreign country. It was contended that it had been a long established practice in our Courts to recognise foreign attorneys for purposes of taxation, particularly those from Zimbabwe and the United Kingdom. Plaintiff submitted that it mattered not whether the foreign bill was "taxed" as a bill of costs or whether it was scrutinised as a voucher - those were merely questions of semantics. Once a foreign bill was accompanied by an appropriate certificate from the Taxing Officer and a copy of B the tariff was available for the Taxing Master, there could be no objection in principle or practice to a taxation or assessment of such a foreign attorney's bill of costs. Plaintiff conceded that, once a bill of costs representing all a litigant's fees and disbursements had been taxed, he cannot tax another bill in the absence of an agreement or an order of Court, but in the present matter the Harare attorney's bill had C been withdrawn at the express instance of defendant. Defendant contended that the power vested in the Taxing Master by Rule 70 (1) *(a)* to tax a bill of costs did not extend to services rendered by attorneys not admitted in any part of the Republic, that the Harare attorney's bill had formed no part of the local attorney's bill and that, inasmuch as the Taxing Master had already affixed his *allocatur*, he was *functus officio*.
Held, that the Taxing Master's refusal to tax the Harare attorney's bill of costs must be upheld as having been well D founded.
Held, further, that as a Zimbabwe bill was not capable of taxation in terms of Rule 70 (1) *(a)*, it was not capable of independent taxation but must form part of the Johannesburg bill of costs and it could not be taxed by the Registrar once the Johannesburg bill had been completed and its *allocatur* had been signed.
Held, further, that there was no reason in principle why a E party in whose favour a ruling had been made by a Taxing Master, even if such ruling has been formally certified with a signature, could not consent to its reversal.
Held, further, on the facts, that defendant had consented to the separate and subsequent scrutiny of the Zimbabwean bill once it had been presented.
Held, accordingly, that the matter should be referred back to the Taxing Master for scrutiny of the Zimbabwean bill and that no order of costs should be made. F

Case Information

Review of taxation. The facts appear from the reasons for judgment.

Judgment

KRIEGLER J: This is a review of taxation in terms of Rule 48 of the Uniform Rules of Court. There are two points at issue, the G one raised by the defendant and the other by the plaintiff. The first is whether certain trial costs allowed by the Taxing Master should have been taxed off as having been covered by an order that the plaintiff pay certain wasted costs. The second is whether the Taxing Master was correct in refusing to tax a bill relating to services rendered by the plaintiff's Zimbabwe H attorneys. Those issues arose in the following circumstances.

The plaintiff, a company incorporated in Zimbabwe and having its head office in Harare, instituted action in this Division, the Court of domicile of the defendant, claiming R18287,48, interest thereon and costs. After close of the pleadings the matter was enrolled for hearing on 31 May 1981. On that day the I trial did not proceed. The plaintiff was granted leave to amend its pleadings and the hearing was postponed *sine die*. The plaintiff was ordered to pay the wasted costs of the postponement. On 16 June 1981 the plaintiff delivered its amended pleadings and in due course 9 November 1982 was allocated as the fresh trial date. On 11 June 1982, however, the defendant paid the sum of R50 into Court in terms of Rule J 34 (2), ie without prejudice as an offer of settlement.

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A Defendant in its notice of payment into Court tendered the costs to date of tender. After certain negotiations that tender was accepted. On 18 April and 8 June 1983 the parties' representatives appeared before the Taxing Master. Two bills were debated. The one related to services rendered by the B Johannesburg attorneys of the plaintiff and the other to services rendered by its Harare attorneys. The defendant's attorney objected to four items in the Johannesburg bill and raised certain objections in principle to the form in which the Harare bill had been prepared. The Taxing Master proceeded to deal with the Johannesburg bill and in the course of his C taxation thereof overruled the objection to the four items in question. As far as the Harare bill was concerned, that was withdrawn by consent with a view to its being redrafted. The taxation was thereupon postponed *sine die*.

On 26 August 1983 the defendant's attorney addressed a letter to the plaintiff's Johannesburg attorneys, the relevant portion of which read as follows:

> D "I would now be pleased to learn precisely what your intentions are in regard to the taxation of the bills of costs. As you are aware, the bills of costs prepared by you and your correspondents were taxed during the course of two days and a considerable amount of time, effort and money has been spent in the taxation of the bills.
>
> I note with surprise your client's enrolment of the matter in E terms of Rule 47 (1) of the Transvaal Rules, notwithstanding the fact that the taxation has as yet not been completed. In regard to your own bill of costs, as I understand the matter, all that is required is the Taxing Master's signature on the *allocatur* and, as regards the bill of your correspondents, I understand that it was your intention to have same redrafted or amended.
>
> Whilst it is conceded that your client would accept my client's F tender only in the event that the R50 tendered and the taxed costs were paid, it was clearly a term of the agreement that your client would proceed to have the bills taxed. It is clearly only in the event that upon taxation my client either fails or refuses to pay the amount of the taxed bill of costs, that your client would proceed with the action.
>
> It was clearly intended, however, that your client would G proceed with the taxation of the bills of costs to finality.
>
> My client has at all times been willing to effect payment of the costs as taxed and you are urged to advise me as to your intentions in regard to your bill which has already been taxed but, as far as I am aware, not yet signed, as well as that of your correspondent. My client shall immediately tender to your client a cheque in respect of such taxed costs subject, H however, that my client does reserve to himself the right to take upon review certain of the Taxing Master's decisions."

On 12 September 1983 the plaintiff's Johannesburg bill was submitted to the Taxing Master for signature of his *allocatur* without notice to the defendant. The defendant, after an exchange of correspondence between the attorneys which is not I relevant to the present discussion, duly delivered a notice in terms of Rule 48 (1) requiring the Taxing Master to state a case for decision by a Judge in respect of the four aforementioned items in the Johannesburg bill of costs. There the matter rested for some months. In a letter dated 13 December 1983 the defendant's attorney asked the plaintiff's Johannesburg attorneys to inform his representatives "of the date allocated in respect of the completion of the taxation of J your correspondent's bill". On 8 March 1984, after due notice had been given,

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the parties' representatives appeared before the Taxing Master A when the plaintiff's Harare bill of costs was presented for taxation. That bill was accompanied by a certificate in the following terms:

> "I, William, Benjamin Chimpaka Chirambasukwa, Deputy Registrar and Taxing Officer of the High Court of Zimbabwe, hereby certify that the fees set opposite the various items in the within bill of costs are in accordance with the tariff in *Government Notice* 359 of 1978 and the prevailing tariff in this B Court which came into operation on 1 October 1980 in terms of Statutory Instrument 537 of 1980 as amended.
>
> This certificate does not imply that the within bill of costs has been taxed by me and the reasonableness thereof is a matter for consideration by the Taxing Master concerned.
>
> Given under my hand and the Seal of the High Court of Zimbabwe, C at Harare this 16th day of September 1983."

The certificate bears the signature of Mr Chirambasukwa. Under the heading "Fees and Disbursements due to Honey and Blanckenberg, plaintiff's Harare attorneys as between party and party" the bill then sets out, substantially in the form D recognised in bills of costs emanating from attorneys in this country, 170 items totalling $1179,40 in respect of fees and disbursements. The bill then continues as follows:

"Less taxed off $

Drawing bill oc costs	$
Add disbursements	$
Total	$

Taxed and allowed in the sum of dollars and cents.

.....
Taxing Master

Certified that the fees applied to the items in this bill of F costs have been charged according to the tariff applicable in the High Court of Zimbabwe on the dates referred to in the bill.

Chirambasukwa 16.9.83
.....
(Signed)
Taxing Master"

The defendant's representative objected to the taxation of the G Harare bill of costs, which objection was upheld by the Taxing Master, who endorsed the bill at the foot of the last page to the effect that he refused to tax it after having heard argument. Thereafter the plaintiff delivered a notice in terms of Rule 48 (1) requesting the Taxing Master to state a case for decision relating to the refusal to tax the Harare bill. H Thereupon the Taxing Master prepared a stated case relating to the objection by the defendant's attorney to the four items in the Johannesburg bill of costs and also relating to the plaintiff's objection to the refusal to tax the Harare bill of costs. Attached to the stated case was a memorandum from the plaintiff's Johannesburg attorneys dated 30 November 1983 in I support of the contention that the Taxing Master was entitled to tax the Harare bill notwithstanding the fact that his *allocatur* had already been placed on the Johannesburg bill of costs. In due course both parties filed their respective contentions in reply to the Taxing Master's stated case and on 31 July 1984 the Taxing Master prepared a full report dealing with the opposing contentions of the parties on both issues. J Both parties

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A availed themselves of the right afforded by Rule 48 (2) to submit further contentions on the Taxing Master's report and the matter was thereafter submitted to me for consideration.

The test I have to apply in performing the duty thus entrusted to me has been enunciated in various ways in numerous reported B cases. However, in the recent case of *Ocean Commodities Inc and Others v Standard Bank of South Africa Ltd and Others* 1984 (3) SA 15 (A) RABIE CJ, having reviewed a number of those cases, more particularly *Legal & General Assurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473 (A), said as follows:

> C "... the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him... The Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling."

I proceed to consider the Taxing Master's factual findings and D conclusions of law in the light of the test quoted. In doing so it will be convenient to deal, first, with the objection taken by the defendant to the four items contained in the Johannesburg bill of costs. They are the following:

	Fees	Disbursements	Allowed
Item 241	R 10,00		10,00

Item 242	R 2,50		2,50
Item 243	R100,00		100,00
Item 252		R200,00	200,00"

Those four items are detailed in the Johannesburg bill of costs as follows:

"26.3.81	241	Instructions to counsel on consultation and trial		10,00
	242	Drawing counsel's brief, sorting the annexed documents and attending to deliver	2,50	
30.3.81	243	Attending counsel, plaintiff and correspondents in consultation (5 hours)	100,00	
	252	Attending to pay counsel's fees:		
		(a) on consultation		200,00"

(A fee and disbursement relating to a further item forming part of item 252 was not the subject-matter of an objection and need not be considered further.)

H The Taxing Master, having had the benefit of considering the written contentions of the parties, concluded that he had initially been in error in allowing the four items in question. I quote from para 1.1 of his report:

> "It is common cause that items 241, 242, 243 and 252 relate to the plaintiff's fees for preparing for the trial which had been set down for 31 March 1981. Since the costs for that day were I awarded to the defendant, the plaintiff clearly cannot claim any fees for these services. There would have been merit in the plaintiff's submissions as set out in para 1.1.2 of his contentions *if the defendant had to pay the costs to date of trial*. The defendant, however, tendered costs up to and including 11 June 1982. As between party and party-fees for preparing for trial will only be allowed at the earliest after notice of set down is received from the Registrar. At the time when the services in question were rendered the second date for trial had not as yet been fixed by the Registrar and any J preparation for trial at that stage of the proceedings would have been premature."

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Paragraph 1.1.2 of the plaintiff's submissions, to which the A Taxing Master refers in the above-quoted passage in his report, reads as follows:

> "It was argued for the plaintiff at the taxation that the services rendered in preparing for trial, and which are reflected in items 241, 242, 243, 252 of the plaintiff's bill, would not be repeated at a later stage when the matter was set down for trial again and that the plaintiff was therefore entitled to these costs, even though they had been incurred at B such an early stage."

I am satisfied that the Taxing Master is clearly correct, both in his conclusion and in the underlying reasoning set out in the above-quoted passage from his report. The order directing the plaintiff to pay the wasted costs occasioned by the postponement of the trial on 31 March 1981 inevitably entailed that it would be liable for each of the four items in question. C They related to fees and disbursements earned and made on 26 March 1981 and 30 March 1981 relating to, in anticipation of and in preparation for trial on 31 March 1981. The Taxing Master was clearly wrong in initially allowing the four items in question. That ruling falls to be set aside and an appropriate order will be made at the conclusion of this D judgment.

The second point at issue is considerably more difficult. Moreover, I have been informed by the Taxing Master that it raises questions of considerable moment for Taxing Masters and litigants. With the advent of more and more independent former homelands and the growth in international commerce it is E inevitable that, with increasing frequency, litigants in South African Courts will make use of *inter alia* foreign attorneys. What is a Taxing Master to do with a bill of costs relating to such services? Is he empowered to tax it? If so, on what basis is he to do so? If he is not empowered to tax a foreign bill, is he empowered to perform some similar, but less precise, exercise? Is a separate bill of costs to be presented in F respect of the services of the foreign attorney or is his bill to be included in or annexed to the attorney of record's bill of costs as a voucher for disbursements? In the latter event, is the Taxing Master entitled or obliged to peruse such voucher and, if he is, what criteria are to be applied by him? Finally, whether the foreign attorney's list of fees and disbursements G is to be regarded as a separate, taxable, bill of costs or whether it is to be regarded as an adjunct to the domestic attorney's bill, can it be taxed or perused separately from and even subsequent to the affixing of the Taxing Master's signature to the *allocatur* on the South African bill of costs?

Well, what are the contentions that have been advanced in this case regarding those questions? On behalf of the plaintiff it H has been argued that, where more than one attorney has necessarily been engaged, each such attorney is entitled to draw up and have taxed a bill of costs. This is so, it was argued, irrespective of whether one of those attorneys practised in a foreign country. As authority for those I propositions the plaintiff relied on a passage in Cilliers *Law of Costs* 1st ed at 266 and Roos *The Taxation of Bills of Costs in the Superior Courts of South Africa* at 119, referring to the case of *Symons and Moses v Davies* 1910 NLR 326. Moreover, so it was argued, it is a long established practice in our Courts to recognise foreign attorneys for purposes of taxation, particularly those practising in Zimbabwe, other neighbouring States and the United Kingdom. This, so it was contended, was a J result of the reciprocity

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A afforded by the legal profession in those countries for the taxation of costs incurred by a local litigant to his South African attorney. According to the argument it matters not whether the foreign bill is "taxed" as a "bill of costs" or whether it is scrutinised as a voucher. According to the argument these are merely questions of semantics. Provided the foreign bill is accompanied by an appropriate certificate from B the taxing officer of the Court having jurisdiction over the foreign attorney and, if needs be, a copy of the tariff applicable in that Court were made available to the local Taxing Master, there is no objection in principle or in practice to a taxation or assessment of such a foreign attorney's bill of costs. On behalf of the plaintiff it is C conceded that, once a bill of costs representing all a litigant's fees and disbursements has been taxed, he cannot tax another bill or add to the bill in the absence of agreement or an order of Court. However, so it is argued on behalf of the plaintiff, in the instant case there was such agreement to separate the subsequent taxation of the Harare bill of costs. D To the knowledge of the Taxing Master and at the express instance of the defendant, the Harare bill was withdrawn from taxation in order that it could be recast and redrawn. Moreover, the two letters from the defendant's attorney to the plaintiff's attorney dated 26 August and 13 December 1983 respectively (from which I have quoted the relevant extracts above) constitute consent on the part of the defendant to taxation of the Harare attorney's bill. On behalf of the E plaintiff it has been pointed out that the former of those letters was written before the *allocatur* had been signed and the latter thereafter. In any event, so it is contended, the defendant's insistence that the Harare bill be redrawn with greater particularity in itself constituted a consent to it being taxed.

The defendant argued that the power vested in the Taxing Master F by Rule 70 (1) *(a)* to tax a bill of costs did not extend to services rendered by attorneys not admitted to practise as such in any part of the Republic. From this it followed that the Harare attorney's bill had to form part of the plaintiff's local bill of costs but, inasmuch as the Taxing Master had already affixed his signature to the *allocatur* to the latter G bill, he was *functus officio* and could not add to or subtract from that bill.

The Taxing Master, in the stated case and in his report, dealt with each of the opposing contentions with great care and concluded that he was not empowered to tax the Harare bill but could merely "assess" it as a voucher forming part of the Johannesburg bill of costs. However, inasmuch as the latter H bill had been concluded by the certifying signature to the *allocatur*, it could not be reopened in the absence of consent by the defendant. The reasoning that led him to those conclusions is sufficiently cogent to warrant quotation *in extenso:*

"2.1 The first issue to be decided is whether or not a Taxing Master is competent to tax a foreign attorney's bill of costs. It is respectfully submitted that he is not competent to do so for the following reasons:

I 2.1.1 A Taxing Master derives his authority to tax from Rule 70 (1) *(a)* of the Rules of Court which provides that

'the Taxing Master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such...'

2.1.2 Rule 1 of the Rules of Court defines an attorney as an attorney admitted, enrolled and entitled to practise as such in the J Division concerned. The definition does not include foreign attorneys and it is

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respectfully submitted that the Taxing A Master is accordingly not 'competent' to tax bills of costs for services rendered by any person other than an attorney as defined by Rule 1 of the Rules of Court.

2.1.3 It is respectfully submitted that should a Taxing Master be required to tax bills of costs for services rendered by foreign attorneys then he will be faced with the practical difficulty of taxing bills without any knowledge of the tariff prevailing in the country concerned.

2.1.3.1 The *Oxford Dictionary* describes B taxation as 'the fixing of the sum of import, damages, price etc, assessment, valuation.'

2.1.3.2 It is submitted that in taxing a bill of costs the Taxing Master's duty is to assess or value each item in the bill. Certain items in the tariff do not require the Taxing Master to exercise his discretion in order to place a C value on the services rendered whereas other items leave it entirely to the discretion of the Taxing Master to value the services rendered. Thus the fee for drawing a summons, for instance, is R6 per folio and it only requires a simple arithmetical calculation to assess a fee for this service. On the other hand, the fee laid down for taking instructions to institute or defend an action is from R10 to R100. In order to value this D service the Taxing Master has to exercise his discretion

taking into account the nature and importance of the matter, the legal and factual complexity of the matter, the fees usually allowed in matters of a similar nature and any other relevant factors which may be placed before him.

2.1.3.3 It is respectfully submitted that without a tariff as a guide the Taxing Master cannot value any E item in the bill. In order to illustrate but one practical difficulty, the Court is respectfully referred to item 1 of the Harare attorneys' bill (p 6). A fee of $20 is charged for taking instructions in the matter concerned. It is respectfully submitted that a Taxing Master cannot make a ruling as to the reasonableness or otherwise of the fee charged unless he knows what F fees are laid down by the particular tariff for services of this nature. If, by way of example, the maximum fee laid down by the tariff for instructions is $20 then the Taxing Master may be of the view that the nature and complexity of the matter do not justify the maximum fee and he may then suitably reduce the fee. On the other hand, if the maximum fee laid down by the tariff is $30 then the Taxing Master may be of G the view that $20 is a reasonable fee. The certificate referred to in para 2.6.2 of the plaintiff's submissions, and which certificate is issued by the Taxing Master of the foreign Court, would be of no assistance to the local Taxing Master should he be required to tax the foreign attorney's bill because the certificate merely states that the fees are *in accordance with the prevailing* H *tariff in that Court* - it does not give the local Taxing Master any particulars about the said tariff. It is respectfully submitted that the only purpose served by such a certificate is to safeguard against abuse and to ensure that the party liable to pay the bill will not be required to pay exorbitant fees.

2.2 The second issue to be decided is whether the existing practice to treat a foreign attorney's bill of costs as a I voucher in support of a disbursement in the local attorney's bill is the correct procedure or not.

2.2.1 Once a bill has been taxed the *allocatur* is completed by subtracting the fees taxed off and the disbursements disallowed and adding 10% on the first R500, 5% on the second R500 and 21/2% on the balance of the fees allowed. The disbursements allowed are added to this total, whereafter the Taxing Master issues a J certificate which reads as follows:

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A 'Taxed and allowed in the sum of RX,00'

2.2.2 It is submitted that the above certificate can only be issued by a Taxing Master who is competent to tax the bill and who did in fact tax the bill.

2.2.3 Since, according to my respectful submissions, a foreign attorney's bill cannot be taxed by a Taxing Master of the Supreme Court of South Africa, the Taxing Master must assess or value the bill as a whole. In coming to a just globular figure B the Taxing Master must disallow fees charged for services unnecessarily rendered, costs which appear to him to have been incurred or increased through overcaution, negligence or mistake and all other costs which do not appear to him to have been necessary or proper or which induce a sense of shock.

2.2.4 Once the fees of the foreign attorney have C been assessed the question arises as to how he should recover his costs. It is respectfully submitted that the only way it can be done is to follow the old established practice which is to treat the bill as a voucher in support of a disbursement claimed in the local attorney's bill of costs as is done with counsel's fees, qualifying fees, fees for medico-legal reports and many other disbursements. If the bill of costs of the D foreign attorney figures as a disbursement in the local attorney's bill then it is proper for the Taxing Master to certify that he has taxed the attorney's fees and allowed the disbursements. Attorney's fees are taxed and disbursements are allowed - hence the certificate 'taxed and allowed...'."

The Taxing Master agrees with the submission on behalf of the plaintiff that a litigant may tax more than one bill of costs, but adds

E "that once a bill of costs representing all the litigant's fees and disbursements in a particular matter has been taxed he cannot, it is submitted, tax another bill or add to the bill so taxed unless the other side agreed thereto or the Court so orders".

He also agrees with the plaintiff's submission that two separate bills of costs emanating from two attorneys can be F taxed separately and at different times. He, however, adds the qualification

"but only in so far as it relates to an attorney as defined by Rule 1 of the Rules of Court. The foreign attorney can also 'tax' his bill considerably later than the local attorney's bill but once the *allocatur* of the local attorney has been signed he cannot, without the consent of the other side, submit his bill for 'taxation' since his bill should have been reflected as a disbursement in the local attorney's bill."

G The Taxing Master, in distinguishing between the taxation of separate bills emanating from attorneys admitted to practise in the Republic and the case where a foreign attorney is involved, states the following in his report:

"It is respectfully submitted that a Taxing Master of any H Division of the Supreme Court of South Africa is qualified and able to tax bills of attorneys practising in other Divisions because all Taxing Masters attend the same taxation courses, they all use the same tariff and they all apply the same basic principles. It should be mentioned that Taxing Masters are frequently transferred from one Division of the Supreme Court to another Division which adds to their insight and experience...

I It is submitted that a Taxing Master subsequent to Union and prior to the coming into effect of the Uniform Rules of Court could have had no practical difficulties in taxing bills of costs of attorneys practising in the other Divisions since the tariffs of the several Divisions, including, I think, the tariff of Rhodesia, were readily available to him. What is more, the Taxing Masters of the several Divisions were frequently transferred from one Division to another.

Whether or not these bills were actually 'taxed' by the Taxing Master I do not know. I do know, however, that ever since I J have been taxing, ie from 1959, the practice has been to add the correspondent's bill to that of the local attorney which

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had the effect that only one *allocatur* was signed. This A practice was discontinued by certain Taxing Masters since the coming into effect of the Uniform Rules of Court.

It is respectfully submitted, however, that the practice which existed prior to the coming into effect of the Uniform Rules of Court is not relevant. It takes the matter no further because in the present case the situation is different. The present issue is whether or not a Taxing Master of any Division of the Supreme Court of South Africa is competent to tax a bill of B costs of a person other than an attorney as defined in the existing Rules of Court and, if so, whether it is practically possible to tax a bill of costs on a tariff which is not known to him...

It is not contended that a foreign attorney is not entitled to recover his costs nor was it contended in this particular matter that the Harare attorneys would not have been entitled to recover their costs. The fees to be allowed were still to be determined by the Taxing Master, whereafter it would have been C added to the local attorney's bill. Unfortunately the plaintiff caused the *allocatur* of the local attorney's bill to be signed and by doing so he opened the door for an objection to the inclusion of the Harare bill in the local attorney's bill...

The Harare attorney can, if I am correct in my submissions, only recover his costs through the local attorney's bill. Only one *allocatur* can be signed and this has already been done. Nothing can be added to that *allocatur* unless the defendant D agrees thereto or the *allocatur* is set aside by the Court."

Before seeking to formulate answers to the questions posed, I think it would be convenient to state certain propositions that are common cause or clearly established:

1. The Taxing Master, an officer of the Supreme Court appointed in terms of s 34 (1) *(a)* of the Supreme E Court Act 59 of 1959, derives his authority to tax bills of costs from Rule 70 (1) *(a)* of the Uniform Rules of Court which reads as follows:

   "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 F 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."

2. In exercising that function the Taxing Master must, in principle, have regard to the objective enunciated in subrule (3) of Rule 70, to wit:

   "With a view to affording the party who has been G awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him 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 the same, no costs shall be allowed which H 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 an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses."

3. A litigant is entitled to recover the costs on a party and party basis of consulting an attorney or attorneys I elsewhere than at the place where proceedings are instituted, provided that it was reasonably necessary to do so and there has been no duplication of costs.

See *Roos (op cit* at 13); *Carrick's Executors v Pattison's Executor* 1910 TPD 1066 at 1068; *South African Railways v Kemp* 1916 TPD 174; *Fanel's (Pty) Ltd v Simmons NO and Another* 1957 (4) SA 591 (T) J. See also Rule 70 (8):

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A "Where, in the opinion of the Taxing Master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him."

4. It is the Taxing Master of the Division of the Supreme Court in which the litigation took place that has B jurisdiction to tax a bill of costs in respect of services rendered in connection with such litigation. See *Roos (op cit* at 14):

"Though it is an established practice that the Taxing Master recognises for the purpose of taxation only the attorney of record and deals with the costs of the country attorney as if they were disbursements of the record attorney..."

C "When a case has been heard in one province but legal work in connection with the case had been performed in another province, such attorney may have his bill of costs taxed by the Taxing Master of the Court that dealt wit the case..."

(*Roos (op cit* at 199); Jacobs and Ehlers *Law of Attorneys' Costs and Taxation Thereof* 1st ed at 3 and D also at 226; *Carrick's* case *supra loc cit; Krohn v Minister of Mines* 1968 (4) SA 193 (C).)

5. Formerly the country attorney's charges had to

"appear in the shape of an account, just as if they were disbursements made by the attorney of record..."

(*Per* MASON J in *Carrick's* case *loc cit*). In *Gundelfinger v Norwich Union Fire Insurance Society* E *Ltd* 1916 TPD 341 at 352 CURLEWIS J held that, although there are two bills of costs, "they are really regarded as one and must be treated as one..." The same attitude is apparent from the two comments by *Roos*, quoted above. (That work was published in 1947.) Latterly, however, the practice has been to allow two separate bills of costs, both to be taxed by F the Taxing Master of the Court having jurisdiction in respect of the suit in question, or to allow the country attorney's bill to be incorporated in or annexed to the bill of costs of the attorney of record. Thus in *Krohn's* case *supra* there were two separate bills of costs taxed in respect of the country attorney and the attorney of record; in G Fanels' case *supra* there was apparently only one bill in respect of the services of both attorneys and in *Upfold v Maingard and Another* 1960 (1) SA 561 (N) at 565A - B FANNIN J held that each attorney was entitled to draw up an independent bill of costs and to have the fees for such taxation allowed. The learned Judge added that, although it was the practice H to add the bills together and for a single *allocatur* to be made, it was not mandatory and could indeed cause difficulty where attorney and client bills were to be taxed. In *Groenewald v Selford Motors (Edms) Bpk* 1971 (3) SA 677 (C) at 682 Vos AJ approved of the procedure which had been followed in that case where a correspondent's fully specified account had been I incorporated in the attorney of record's bill of costs. See also *Everson v Blom* 1976 (2) SA 518 (C) and *Cordingley NO v BP Southern Africa (Pty) Ltd* 1971 (3) SA 118 (O).

6. In pre-Union Natal Rule 1, Order XX authorised the Taxing Master to allow the amount certified by a Supreme Court Taxing Officer of the Cape Colony, J Transvaal, the Orange River Colony and Rhodesia "saving all just exceptions". In *Symons & Moses* v

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Davies (supra) DOVE WILSON AJP stated that the A certification by the foreign Taxing Master served as a rough and ready guide but that the Natal Taxing Master was still obliged to perform the actual task of taxation. After Union it was the practice for Taxing Masters of the various Divisions to tax bills emanating from other Divisions provided the "foreign" B bill bore a certificate from the "foreign" Taxing Master to the effect that the charges were in accordance with the tariff in force for work done in cases in his Court. The certifying Taxing Master merely scrutinised the bill to ensure that the charges were in accordance with the tariff applicable in his Division of the Supreme Court. The practice was then for

the Taxing Master at the seat of the Court to tax C the bill according to the tariff of the Division from which it had emanated. (See *Roos (op cit* at 119).) It was also the practice to regard Southern Rhodesia, although not part of the Union, as a Division whose bills could be so certified and taxed by a South African Taxing Master. (*Ibid*.) *Roos (op cit*) actually annexes a copy of the then current Southern Rhodesian D tariff, apparently to facilitate the exercise.

7. Once a Taxing Master has completed his *allocatur* by affixing his signature, he is not empowered to retax that bill, to amend it or supplement it. *Roos (op cit* at 122) expresses the opinion that such a reopening could be effected by consent whereas *Jacobs and Ehlers (op cit* at 229) are of the view that the Taxing E Master, being *functus officio* once he had affixed his signature to the *allocatur*, could not amend the bill even with the consent of the parties. According to them an order of Court would be required.

It appears to me that the Taxing Master's refusal to tax the Harare attorney's bill of costs must be upheld as having been F well-founded. Whether one looks to the definition of "attorney" in Rule 1 of the Uniform Rules of Court (as the Taxing Master suggests one should) or whether one looks to the definition of the word as contained in the Attorneys' Act 53 of 1979 (as the defendant would have it), a foreign attorney, ie G one practising outside the Republic of South Africa and not subject to the discipline of any one of the Divisions of the Supreme Court of South Africa, cannot, in my view, be regarded as a person whose bill of costs a Taxing Master is empowered by Rule 70 (1) *(a)* to tax. Indeed, upon closer analysis, the plaintiff does not seriously contend to the contrary. That is implicit in its argument that the issue is largely one of semantics. I understand that to mean that, although it is H conceded that the Harare attorney is not an attorney as contemplated by Rule 70 (1) *(a)* and that his bill is not one amenable to taxation thereunder, it is capable of taxation and ought to be taxed as a schedule of expenses necessarily and properly incurred by the plaintiff in the conduct of the suit in question and ought to be "assessed" or scrutinised by the I Taxing Master as he would scrutinise any other disbursement contained in the Johannesburg attorney's bill of costs. I base the conclusion not only on the wording of Rule 70 (1) *(a)* of the Uniform Rules of Court, read in its context, but also on the practical grounds mentioned by the Taxing Master. Although it is true that the High Court of Zimbabwe shares a common tradition with the South African Supreme Court (which was J probably the reason why

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A Southern Rhodesian bills used to be taxed in this country as if they had emanated from a Division of the Supreme Court of South Africa), there are differences in terminology and in practice between the two systems. The Taxing Master does not know - and cannot be expected to know - whether and to B what extent there are differences. In any event, why should a Zimbabwean bill of costs continue to be dealt with on a basis other than would one, say, emanating from Australia or Canada? Recent legislation in Zimbabwe has done away with the technical difference between advocates and attorneys (they are now generally referred to as "legal practitioners") and the Taxing Master is not to know what items in a Zimbabwean tariff C are more appropriate to attorneys' work or advocates' work as we know it in this country. Furthermore, with the passage of time and as the declared policy of increased socialism takes effect in Zimbabwe, subtle ideological differences may also arise. Before it can be suggested that such a conclusion is inequitable and in conflict with the principle objective of an D award of costs (as to which see Rule 70 (3)), I hasten to add that a Zimbabwean attorney's bill of costs (and any other foreign attorney's bill) can certainly be taken into account in a South African taxation of a domestic bill of costs. A South African Taxing Master will consider such a foreign bill in exactly the same way as he would consider any voucher for work E done in connection with a law suit, the costs of which he is obliged to tax. He will not take it at face value. He will scrutinise the foreign bill and will, depending upon the circumstances, place a greater or lesser degree of reliance upon a certificate emanating from the office of his opposite number in the foreign Court. Thus, in the instant case, the F Taxing Master would be entitled to scurtinise the Zimbabwe bill of costs in the knowledge that the Deputy Registrar of the High Court of Zimbabwe, which shares a common tradition with the Supreme Court of South Africa, has certified that the fees set opposite the various items in that bill are in accordance with the prevailing Zimbabwean tariff. As far as all foreign bills of costs are concerned, I am in agreement with the G learned authors of *Jacobs and Ehlers (loc cit* at 264), that:

> "A Taxing Master is entitled to scrutinise the bill of a foreign attorney and should not accept it as a mere voucher without any attempt to tax the various items."

(See also *May v Federal Supply and Cold Storage Co Ltd* (1904) 25 NLR 244 at 250, 251.)

H It follows from what I have said, that I am of the view that the difference of opinion between the plaintiff's legal representatives on the one hand and the Taxing Master and the defendant's attorney on the other, is not merely one of semantics. If the Zimbabwean bill had been a bill of costs capable of taxation in terms of Rule 70 (1) *(a)* it would have I been possible for the Taxing Master to have taxed it notwithstanding the completion of the Johannesburg bill of costs. As it is not capable of such independent taxation but must form part of the Johannesburg bill of costs, it could not be taxed by the Registrar once the Johannesburg bill had been completed and its *allocatur* had been signed.

That, however, does not conclude the matter. The plaintiff's J contention that the defendant consented to the separate taxation of the

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Zimbabwean bill still falls to be considered. It will be A recalled that that contention is based on the defendant's initial insistence that the Zimbabwean bill be redrafted, read with the two subsequent letters from the defendant's attorney to the plaintiff's attorneys. *Jacobs and Ehlers (op cit*) are, as I have said, of the view that the Taxing Master is *functus officio* once he has signed the *allocatur* whereas *Roos (op cit*) B holds the view that a reopening by consent is possible. I incline to the view that *Roos'* more practical approach is correct. I can see no reason in principle why a party in whose favour a ruling has been made by a Taxing Master, even if such ruling has been formally certified with a signature, cannot consent to its reversal. After all, the signature denotes certification and not sanctification. that is also the view of C the Taxing Master in this case.

The question then is whether the defendant did indeed consent to the separate and subsequent scrutiny of the Zimbabwean bill once it had been presented. It seems clear to me that the defendant either consented to such separate and subsequent scrutiny of the Harare bill and, if necessary, reopening of the D Johannesburg bill to make allowance for the sum allowed by the Taxing Master after such scrutiny, or deliberately lulled the plaintiff into a false sense of security. His initial demand that the Harare bill be redrawn, at the same time co-operating in the taxation of the Johannesburg bill, manifested an intention on the part of the defendant's attorney to permit subsequent debate of the Harare bill. That impression is E confirmed by the following passage in the letter from the defendant's attorney to the plaintiff's attorneys dated 26 August 1983:

> "It was clearly intended, however, that your client would proceed with the taxation of the bills of costs to finality.
>
> My client has at all times been willing to effect payment of the costs as taxed and you are urged to advise me as to your F intentions in regard to your bill which has already been taxed but as far as I am aware, not yet signed, as well as that of your correspondent. My client shall immediately tender to your client a cheque in respect of such taxed costs..."

The use of the plural "bills' and the specific reference to the bill "of your correspondent", followed by the tender immediately to furnish a cheque in payment of the taxed costs, G evidences, at least, an undertaking to pay the costs reflected in both bills after due taxation. The letter of 13 December 1983, written by the defendant's attorney to the plaintiff's attorneys at a stage when it was known that the Johannesburg bill had been completed and signed by the Taxing Master and after review proceedings in respect thereof had been initiated, equally evidences consent on the part of the defendant to H taxation of the Zimbabwean bill. In the context of the facts as they were then known to both parties, that must inevitably have entailed a consent on the part of the defendant to scrutiny and debate of the Zimbabwean bill and the inclusion of the amount finally allowed in the formal taxed and recoverable bill of costs, ie the Johannesburg bill. It is also significant I that the defendant at no stage has sought to deny the consent alleged by the plaintiff.

In the result the matter is referred back to the Taxing Master, who is directed to disallow items 241, 242, 243 and 252 in the plaintiff's bill of costs. He is further authorised and directed to proceed to scrutinise the bill of costs presented by the plaintiff's attorneys in respect of the work done by the J Zimbabwean attorneys, applying the criteria and principles

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A applicable to the evaluation of disbursements claimed in a bill of costs submitted for taxation in this Division and paying particular regard to the risk of duplication of charges. As far as the costs of this review are concerned, Rule 48 (3) affords me a discretion. The defendant has been successful

in setting aside four items totalling R312,50 whereas the plaintiff's measure of success is at this stage not yet B determinable. The Zimbabwean bill that was submitted for taxation in March of this year reflects a total sum in respect of fees and disbursements of $1179,40.

Whether and to what extent that figure will be reduced upon its perusal by the Taxing Master cannot be predicted with any degree of certainty. That there is a likelihood of considerable C sums being taxed off appears clear from a superficial examination of the two bills. Thus each of them reflects a substantial item in respect of the initial instructions to institute proceedings. The possibility of substantial duplication is also apparent from the items in each of the bills dealing with the plaintiff's discovery. That being so, I run the risk of doing an injustice to the defendant if I were, merely on the face value of the Zimbabwean bill, to hold that D the plaintiff, in succeeding in having it included in the overall bill, has been substantially successful. I accordingly make no order as to the costs of these proceedings.

Plaintiff's Attorneys: *Bowman, Gilfillan - Hayman, Godfrey*. E Defendent's Attorney: *Jack I Cohen*.

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