AIRCRAFT COMPLETIONS CENTRE (PTY) LTD v ROSSOUW AND OTHERS 2004 (1) SA 123 (W)

Citation	2004 (1) SA 123 (W)
Case No	23790/2001
Court	Witwatersrand Local Division
Judge	Stegmann J
Heard	April 29, 2003
Judgment	April 29, 2003

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Flynote : Sleutelwoorde

Costs - Attorney and own client costs - Legitimacy of agreement or order that party to pay costs of another taxed as between 'attorney and own client' - Legal position settled by Appellate Division as far back as 1946 but obscured by contemporaneous statement in C textbook - South African law knowing only three bases of taxation of attorney and client costs, being costs due to an attorney by his own client, attorney and client costs out of a common fund and costs due by one party to his adversary - Appellate Division in 1946 case having borrowed the concept of 'intermediate' D costs from English law and adapted it to our system - Costs lawfully recoverable from costs debtor limited - Order (or agreement) for taxation as between attorney and own client not achieving more than order that costs be paid between attorney and client - Court having discretion, but such not extending to create a new basis of taxation.

Costs - Taxation - Review E of - Statement of case by Taxing Master in terms of Rule 48(1) of Uniform Rules of Court - Where dissatisfied party having, in terms of Rule 48(2)*(a)*, identified certain items to be reviewed, but having failed, without good cause, to comply with Rule 48(2)*(b)*, *(c)* and *(d)* in respect of those items, Taxing Master under no obligation to state case - No question of dissatisfied party having right to make submissions in terms of Rule 48(5)*(a)*. F

Costs - Taxation - Discretion of Taxing Master - Special order for taxation of costs as between attorney and client - Whether justifying departure from tariff - Rule 70(5)*(a)* of Uniform Rules of Court - Taxing Master given discretion to depart from tariff where 'extraordinary or exceptional' circumstances present - Special costs order, although strong indicator G that 'extraordinary or exceptional' circumstances indeed present, not necessarily conclusive - Taxing Master might find, despite special costs order, that case not extraordinary or exceptional, or that adherence to tariff would not be inequitable, and thus decided not to order departure therefrom - If deciding that departure justified, Taxing Master to go on to determine extent thereof. H

Costs - Taxation - Discretion of Taxing Master - Agreement by one party to pay costs of other as between attorney and client - Whether justifying departure from tariff - Rule 70(5)*(a)* of Uniform Rules of Court - Taxing Master given discretion to depart from tariff where 'extraordinary or exceptional' circumstances present - Existence of agreement not necessarily I establishing that case 'extraordinary or exceptional' as intended, or that adherence to tariff inequitable - Taxing Master still having to apply mind to bill to decide said questions - If deciding that departure justified, to go on to determine extent thereof.

Costs - Taxation of - Tariff for appearance by attorney in High Court or for performance of other functions of advocate in terms of Right of Appearance J

in Court Act 62 of 1995 - Fixing of rate per hour - Such A appropriate for aspects of attorney's work for which tariff in Rule 70 of Uniform Rules making provision for time-related charges, but not for situation in which attorney appearing in the High Court or performing any of other functions of advocate - Rule 69(3) and (5).

Headnote : Kopnota

The fixing of a rate per hour is appropriate for those aspects of an attorney's work for which the tariff in Rule 70 makes provision for B time-related charges, but it would not be appropriate for a situation in which the attorney appears in the High Court or performs any of the other functions of an advocate. (Paragraph [35] at 138A - A/B.)

Where a dissatisfied party has, in terms of Rule 48(2)*(a)*, identified certain items to be reviewed, but has failed, without good C cause, to comply with Rule 48(2)*(b)*, *(c)* and *(d)* in respect of those items, the Taxing Master has no obligation to state a case. If the Taxing Master has rightly refrained from stating a case, there can be no question of the dissatisfied party's having a right to make submissions in terms of Rule 48(5)*(a)*. That right is confined to items on the bill in respect of which the Taxing Master has duly stated a case in accordance with Rule 48(3). (Paragraph [44] at 140E - F/G.) D

Our law of costs knows only three principles or bases of taxation of attorney and client costs. Stated briefly, in ascending order of strictness (or descending order of generosity to the costs creditor), they are: (1) taxation of a bill for payment of an attorney by his own client (also known as 'pure' attorney and client taxation); (2) taxation of a bill for payment of attorney and client costs out of a common fund; and (3) taxation of a bill for payment of attorney and client costs by one party to another. (Paragraph [116] at E 183I/J - 184B.)

The proposition that basis (3) gives little more than taxation as between party and party has never reflected the law anywhere in South Africa, at least not since the decision of Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597. Nel laid down the basis on which such a taxation was to proceed, dubbing it F 'intermediate' because it is intermediate, as regards strictness or generosity, between basis (1) and a party and party taxation. This intermediate basis is, in origin, basis (3), derived from English law and adapted by Nel to the needs of our own legal system. (Paragraph [116] at 184B - D.)

The misperception (traceable to F J Roos's influential 1947 edition of Taxation of Bills of Costs in Superior Courts in South G Africa) that basis (3) suffers from the shortcoming that it gives little more than a taxation between party and party, has led to the current situation in which attempts are frequently made, by way of agreements and by way of prayers and orders in trial actions and in motion proceedings, to compensate for the supposed deficiency in basis (3) by means of a hybrid order. (Paragraph [116] at 184D - E.) H

This hybrid is the order that one party (the costs debtor) is to pay the costs of another (the costs creditor), taxed as between attorney and own client. It is a hybrid because it inappropriately conflates basis (1) and basis (3). It purports to order and to permit a taxation that will condemn the costs debtor to pay all of the costs that the costs creditor may be obliged to pay to his own attorney. (Paragraph [116] at 184E - F.) I

The objective of the hybrid order cannot lawfully be achieved because the law, as authoritatively stated in Nel, recognises that any client (such as a costs creditor claiming costs from his costs debtor) may become bound to pay his own attorney certain costs that cannot justly, and therefore cannot lawfully, be recovered from a costs debtor in any circumstances. (Paragraph [116] at 184F/G - G/H.)

The principles of Nel set a limit on the costs that can lawfully be recovered from J

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a costs debtor. The Courts do not have the discretionary power to create a new basis of taxation, previously A unknown to the law, that obliges Taxing Masters to tax bills of costs in a manner that circumvents the limits placed on the costs justly and lawfully recoverable by one party from another by the Appellate Division in Nel. A Court is therefore not entitled to issue an order (such an order that a costs debtor should pay the costs of a costs creditor taxed on a scale 'as between attorney and own client') that would oblige the Taxing Master to allow a B costs creditor to recover a greater amount from a costs debtor than can lawfully be recovered in accordance with a taxation on the intermediate basis established in Nel for purposes of a taxation between two parties on a scale as between attorney and client. As Nel has set legal limits beyond which no costs can lawfully be taxed against or recovered from a costs debtor, an order designed to outflank those limits is legally ineffectual, at least to the extent that it seeks to go beyond the legal limit. (Paragraph [116] at 184G/H - 186H.) C

Therefore an order in the hybrid form that one party should pay the costs of another 'taxed as between attorney and own client', does not, as a matter of law, achieve anything more than an order in the established form that one party should pay the costs of another 'taxed as between attorney and client'. Equally, an agreement D in the hybrid form takes the matter no further than an agreement to pay 'attorney and client' costs. (Paragraph [116] at 186H - I/J.)
A Taxing Master is therefore obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and own client' in exactly the same way as he is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and client'. As a matter of law, there is no E difference between them. Both orders are for a taxation on the intermediate basis in accordance with Nel v Waterberg Landbouwers Ko-operatieve Vereeniging (supra). (Paragraph [116] at 187A - B.)
It follows that, although costs are a matter within the discretion of the Court, that discretion does not extend to the power of creating a new basis of taxation previously unknown to the law. If any need for a new basis of taxation should emerge (as I do not think has occurred), F it would be a matter for the Legislature, or perhaps the Rules Board, to remedy. (Paragraph [116] at 187B/C - C/D.)
In terms of Rule 70(5)*(a)*, it is for the Taxing Master to decide whether 'extraordinary or exceptional' circumstances justifying a departure from the tariff are present, whether they have affected the costs incurred by the costs creditor, and whether strict adherence to the tariff would be inequitable. When a Judge has made a G specific finding that the costs debtor has conducted his case in a manner deserving of the Court's censure by means of a special order for costs to be taxed as between attorney and client, it is generally a strong indicator to the Taxing Master that in the Judge's view the costs debtor has probably caused the costs creditor to incur unnecessary costs that may not be recoverable on a taxation as between party and party. Such a finding would therefore often lead the Taxing Master to conclude that the case is indeed an extraordinary or H exceptional one for the purposes of Rule 70(5)*(a)*, and that a consideration of the bill of costs will show that strict adherence to the tariff would be inequitable. If the Taxing Master finds that the case is an exceptional or extraordinary one, and that strict adherence I to the tariff would be inequitable, his finding will both require and justify the application of the intermediate basis of taxation in the generous manner contemplated by Nel. In such a case, the Taxing Master must address his mind to the question of the extent to which the extraordinary or exceptional nature of the case caused the costs creditor reasonably to incur extra costs that are not recoverable on a taxation as J

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between party and party. He will allow those extra costs and will only tax them off to the extent that there would A otherwise be injustice to the costs debtor. On the other hand if, despite the special costs order, a consideration of the bill of costs satisfies the Taxing Master that the case was not extraordinary or exceptional, or that adherence to the tariff would not be inequitable, even the intermediate basis of taxation cannot yield much, if anything, more than a party and party basis of taxation, as was shown in the case B of Loots. Moreover, even if the Taxing Master finds that the case was extraordinary or exceptional, the particular bill of costs may yet reveal that the costs creditor did not in fact incur any more costs than were in any event recoverable on a taxation as between party and party. In that particular event, the taxation on the intermediate basis recognised by Nel will obviously not yield anything more than a party and party taxation. Finally, the mere agreement of a party C to pay another party's costs taxed as between attorney and client does not, of itself, establish that the case was exceptional or extraordinary for the purposes of Rule 70(5)*(a)*, or that adherence to the tariff would be inequitable. The Taxing Master has still to apply his mind to the bill, and to the circumstances of the litigation that gave rise to it, in order to decide those questions. If he holds that Rule 70(5)*(a)* applies, he must go on to determine the extent (if any) to which a departure from the tariff may be justified. (Paragraphs [92] - [94] at 161E/F - 162F.) D

Cases Considered

Annotations

Reported cases

AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd 2000 (1) SA 639 (SCA): discussed E

Ben McDonald Inc and Another v Rudolph and Another 1997 (4) SA 252 (T): discussed and approved

Brooks v Taxing Master and Another 1960 (3) SA 225 (N): criticised

Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T): explained and criticised F

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A): referred to

City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd and Another 1973 (1) SA 93 (N): distinguished

Delfante and Another v Delta Electrical Industries Ltd and Another 1992 (2) SA 221 (C): criticised G

Enslin v Gallo 1984 (1) PH F27 (D): discussed and applied

Fidelity Bank Ltd v Three Women (Pty) Ltd and Others [1996] 4 B All SA 368 (W): not followed

Giles v Randall [1915] 1 KB 290 (CA): referred to

Gross v Svirsky 1923 TPD 422: dictum at 425 approved and applied

Law Society of the Cape of Good Hope v Windvogel 1996 (1) SA 1171 (C): approved H

Loots v Loots 1974 (1) SA 431 (E): discussed and applied

Markman v Richardson 1969 (3) SA 465 (E): compared

Mondi Paper Co v Dlamini [1996] 4 B All SA 92 (N): referred to

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597: discussed and applied

Price Waterhouse Meyernel v The Thoroughbred Breeders' Association of South Africa 2003 (3) SA 54 (SCA) I ([2002] 4 B All SA 723): dicta in paras [15] and [26] applied

Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A): referred to.

Statutes Considered

Statutes

The Right of Appearance in Court Act 62 of 1995: see *Juta's Statutes of South Africa 2002* vol 1 at 1-200. J

Rules Considered

Rules of Court A

The Uniform Rules of Court, Rules 48(1), 48(2)*(a)* - *(d)*, 48(5)*(a)*, 69(3), 69(5), 70 and 70(5)*(a)*: see *The Supreme Court Act and The Magistrates' Courts Act and Rules* (2003, Juta) at 66, 84 and 85.

Case Information

Review of taxation in terms of Rule 48 of the Uniform Rules of Court. The facts appear from the reasons for judgment. B

Judgment

Stegmann J:

[1] This is a review in terms of Rule 48 of a taxation of a bill of costs. A question has arisen as to the basis of taxation to be applied when one party ('the costs debtor') has been ordered, or has C agreed, to pay the costs of the other ('the costs creditor') taxed on a scale as between 'attorney and own client'.

The questioned legitimacy of an agreement or order that one party is to pay the costs of another taxed as between 'attorney and own client'.

[2] In the matter of *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA), Harms JA observed at 648G - I, para [20]: D

> 'It has become notable that a practice has taken root in some jurisdictions of making awards of costs on an attorney and own client scale where someone other than the own client or his privy is involved. Whether such orders are justified or justifiable in the light of decisions of this Court (such as *Nel v Waterberg Landbouwers* E *Ko-operatieve Vereeniging* 1946 AD 597) may be questionable. Further, sight appears to have been lost of the fact that they may have unexpected or unforeseeable consequences *(Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T)).' F

[3] These remarks seem to have introduced a different approach from that which had been adopted by the Appellate Division in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) and in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A).

[4] In *Cape Pacific*, at 807C - D, Smalberger JA, delivering the judgment of the majority of the Court, dealt with a G request by the appellant for the costs in the Court below to be paid 'on an attorney and own client scale'. The learned Judge referred to the distinction formulated in *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) between an order that one H party pay the costs of another 'on an attorney and own client scale' and an order for such costs 'on an attorney and client scale'. The order made (at 808B, para *(d)*) was that the appellant's costs in the Court below should be paid 'on a scale as between attorney and client'. The legal basis for the distinction was not critically examined. I would respectfully suggest that the mere I reference to the distinction as formulated in *Cambridge Plan* did not make that distinction a part of the *ratio decidendi* of the judgment in the Appellate Division in *Cape Pacific*.

[5] In *Sentrachem* at 22B - E, Eksteen JA, in the course of delivering the judgment of the Court, discussed the question of making an order that one party pay the costs of his opponent taxed as between attorney and J

'own' client as if it was an established institution in our law, to which a Judge was free to resort in the exercise of his discretion. However, there was no decision to that effect. The decision of the Court below not to make any special costs order was upheld in the Appellate Division at 24I - J.

Law Society of the Cape of Good Hope v Windvogel B

[6] Before the *AA Alloy Foundry* case, a Full Bench of three Judges in the CPD had refused, in the case of *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C), to order a losing party to pay the winner's costs taxed as between 'attorney and *own* client', and had ordered taxation as between 'attorney and client'. The essential reason was that, when C the costs were to be paid by one party to another, the effect of either of the two orders could only be the same as the other. No purpose would therefore be served by making the confusing order that the costs should be taxed as between 'attorney and *own* client'. Foxcroft J, in whose judgment Selikowitz J and Brand J concurred, said: [1] D

> 'The suggestion that an order in these terms, namely attorney and own client, entitles a winning litigant to recover more on taxation is a recent phenomenon in the Cape Provincial Division.'

The learned Judges recognised that a different conclusion had been reached by Swart J in *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T), and they disagreed with the latter decision, [2] stating at the end of this passage: E

> '(T)he attempt to elevate a direction that costs be paid as between attorney and own client to a different species of order from that of attorney and client cannot achieve what it purports to do. . . . (A) direction that he [the Taxing Master] treat the losing party as if he stood in the same position *vis-à-vis* the winner's attorney as the winner himself could never result in a F taxation on that simple basis.'

Ben McDonald Inc and Another v Rudolph

[7] Before the *AA Alloy Foundry* case, the practice of ordering a costs debtor to pay the costs of a costs creditor on a scale G as between attorney and 'own' client had also been questioned by van Dijkhorst J in *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T). At 255J - 257A the learned Judge drew attention to the fact that there should not be room for any categories or scales of taxation other than 'party and party' and 'attorney and client'. He stated that Rule 70(3) of the Uniform Rules [3] H

> 'is based on the premise that a party who has been awarded an order for costs

> should be afforded ''a full indemnity for all costs reasonably incurred by him in relation to his claim or defence'' and A instructs the Taxing Master to allow ''all such costs, charges and expenses . . . necessary or proper for the attainment of justice or defending the rights of any party . . .''. Normally a successful party would therefore be fully indemnified by an order for party and party costs. . . .

> There may, however, be costs which are not strictly necessary or ''proper'' (gepas) but yet are reasonable. In the absence of an order in favour of the successful party these costs are only taxable B between an attorney and his client. [4] The test of reasonableness is applied. . . .
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> One would have expected that these two categories are all-embracing. There should be no room for a further one. Yet we find that in the last decade the phrase ''attorney and own client costs'' has insidiously replaced the phrase ''attorney and client costs'' in contracts and mortgage bonds and that in litigation orders are increasingly sought for an award of costs on the ''attorney and own client'' basis. . . . C
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> The term ''own client'' is a misnomer. . . .
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> It is immediately evident that when an order is made in favour of a successful party that his opponent pays the costs on the basis of attorney and own client, the customary safeguards against sharp practice are absent. A client against whom his own attorney taxes his D bill of costs will know whether there was an agreement to pay to counsel a fee higher than the usual or to do work of an unusual nature and he will vehemently object if that is not so. Should the attorney and client costs have to be paid by his opponent, however, he will take no interest in the taxation and probably rejoice in an exorbitant assessment. The unsuccessful party may be taken to the cleaners. This E is the danger that lurks in an order that the losing party pays costs on the attorney and own client scale.' [5]

[8] In *Ben McDonald*, at the outset of the litigation, the respondents had signed a written agreement with their own attorneys in terms of which they had agreed to pay their attorneys' fees and disbursements in accordance with the tariff under Rule 70, except that the tariff was not to apply in respect of specified items of work. The specified items thus exempted from the F tariff effectively covered most of the work that had to be done. The excepted items, to which the respondents and their attorney agreed that the tariff should *not* apply, included

> 'consultations, perusal of documents, instructions to draft affidavits and the drafting thereof, correspondence, waiting fees at Court, telephone calls, copying of documents, searches, drafting of bills of costs and attendance on taxation'. G

In respect of these excepted items of work, rates of remuneration appreciably higher than those provided for in the tariff were agreed upon.

[9] The applicants in *Ben McDonald* were unsuccessful in the litigation and were ordered to pay the respondents' costs taxed as between H

STEGMANN J

'attorney and own client'. I shall refer to the applicants as 'the costs debtors'. The attorney for the respondents (whom I shall call 'the costs creditors') drew a bill based on the inflated rates of remuneration for which he had stipulated and which the costs creditors, as his clients, had agreed to pay him.

[10] At the taxation of the bill of costs, the case put forward on behalf of the costs creditors was that by reason of the order for B costs as between 'attorney and own client', the costs debtors were obliged to pay the costs at the same rate as the costs creditors had agreed to pay their own attorney; and that the Taxing Master was obliged to tax the bill on that basis. The Taxing Master did not accept that she was bound to enforce the provisions of the agreement between C the costs creditors and their attorney against the costs debtors in this way. She regarded some of the rates agreed upon as unreasonable. For example, the information before the Taxing Master indicated that attorneys of approximately the same standing as the attorney for the costs creditors were at that time charging their clients fees at a rate of R300 to R350 per hour for professional work (but not for mere D waiting at Court). Yet the attorney had stipulated for, and the costs creditors had agreed to pay him, R420 per hour both for time spent on professional work and also for mere waiting at Court. At that time the tariff allowed R50 per half hour for an attorney's waiting time at Court. E

[11] The Taxing Master took the view that it would be unreasonable to enforce the terms of the agreement between the attorney and his own clients against the costs debtors in this way. Taxing the bill as between 'attorney and own client', but conscious of the fact that the bill would have to be paid by the costs debtors (who had not F been party to that agreement), the Taxing Master allowed the items of professional work done by the attorney at the rate of R350 per hour, and waiting time at Court at the rate of R50 per half hour.

[12] The Taxing Master's decision was taken on review in terms of Rule 48. On the basis indicated above, Van Dijkhorst J declined to G interfere with the Taxing Master's exercise of her discretion. The decision is authority for the proposition that when an order is made for a costs debtor to pay costs taxed as between attorney and 'own' client to a costs creditor, an agreement between the costs creditor and his attorney for fees exceeding the tariff rates (being an agreement to which the

costs debtor is not a party) does not bind H either the Taxing Master or the costs debtor. The Taxing Master, whilst not necessarily bound by the tariff, will tax on the basis of remuneration that is reasonable in all the circumstances.

[13] *Cambridge Plan* is, of course, a decision in which Swart J, in the course of a review of the taxation of a bill of I costs pursuant to an order made by another Judge for the costs to be taxed as between attorney and own client, formulated a thoughtful and substantial distinction between an order that one party pay the costs of another 'as between attorney and client' and such an order 'as between attorney and own client'. That J

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formulation of the distinction has found support in a number of cases. There is, for example, the A judgment of Gauntlett AJ in *Delfante and Another v Delta Electrical Industries Ltd and Another* 1992 (2) SA 221 (C) at 230G - 233G, a case in which the respondents were ordered to pay the costs of the applicants taxed as between attorney and own client. However, it would seem that *Delfante* has, by implication, been overruled by the decision of the Full Bench in *Law Society* B *of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C).

[14] The distinction as reflected in *Cambridge Plan* was also supported by the judgment of Cloete J (as he then was) in *Fidelity Bank Ltd v Three Women (Pty) Ltd and Others* [1996] 4 B All SA 368 (W) at 405*g* - 414*a*. At C 408*f* the learned Judge preferred the judgment of Swart J in *Cambridge Plan* to the judgment of the Full Court in the CPD in *Windvogel* on the basis that the former had the support of the Appellate Division. 6 However, Cloete J decided not to grant costs as between attorney and own client. It is therefore not entirely clear to me that any formulation of the D distinction (or, as I would respectfully prefer to say, the supposed distinction) constitutes the *ratio decidendi* of *Three Women*.

[15] In any event, it is apparent that there is disagreement between various Courts about the question whether the distinction, or supposed distinction, between an order that one party pay the costs of E another 'taxed as between attorney and client' and such an order for costs 'taxed as between attorney and *own* client', exists in reality or has any legal basis or validity. It will be necessary to discuss the legal position further. Before doing so, I turn to the facts relating to the present review.

The facts giving rise to the present review F

[16] On 31 May 2002, the Taxing Master taxed two bills of costs relating to different but related matters between the same parties. The first bill concerned the costs of case No 22612/01 in this Court. That case was an ex *parte* application brought by Aircraft Completions Centre (Pty) Ltd as a matter of urgency for the attachment G of certain specified items. It has been described as an *Anton Piller* application. No doubt its purpose was to preserve evidence known to be in the hands of the respondents. The bill comprised the fees and disbursements of Messrs Eiser & Kantor incurred during the period from 10 September to 21 November 2001, as attorneys for the applicants. H

[17] The present applicants were the costs creditors in respect of the *Anton Piller* application. The bill was one drawn as between attorney (Messrs Eiser & Kantor) and own client (the applicants). It was I

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nevertheless to be taxed for payment by the five respondents in that application to the applicants. The A parties to the application had apparently reached a settlement and, in terms of their settlement agreement, the five costs debtors had undertaken to pay the costs of the costs creditors taxed as between 'attorney and *own* client'.

[18] As drawn, the bill of costs relating to the *Anton Piller* application ('the first bill') was for a total amount of B R66 528,80. In terms of the Taxing Master's *allocatur* a total of R31 278,56 was allowed. The balance of R35 250,24 was taxed off. The taxation of this first bill has not been challenged in this review. The Taxing Master has included it in his stated case because he considers that the taxation of the first bill provided the basis for C the taxation of the second bill.

[19] The second bill relates to case No 23790/01 in this Court. That case was also an application brought by the present applicants, Aircraft Completions Centre (Pty) Ltd, as a matter of urgency. The relief sought, evidently based, in part at least, on evidence obtained or preserved by virtue of the *Anton Piller* application, was D an interdict enforcing a restraint of trade. This bill ('the second bill') comprises some 103 items relating to the fees and disbursements of Messrs Eiser & Kantor incurred during the period from 3 October to 30 November 2001, as attorneys for the applicants, and the costs of drawing and taxing the bill. The applicants are also the costs E creditors in respect of this application for an interdict. Like the first bill, the second bill is drawn as between attorney and *own* client. It is nevertheless for payment to the applicants by some or all of the nine respondents in the application, five of whom had evidently been the respondents in the *Anton Piller* application. As in the case of the *Anton Piller* F application (case No 22612/01), the parties to the interdict proceedings (case No 23790/01) evidently reached a settlement and, in terms of their settlement agreement, the respondents, or at least three of them, had undertaken to pay the costs of the applicants, to be taxed as between 'attorney and *own* client'. That agreement was made an order of Court. G

[20] As drawn, the second bill was for a total amount of R89 852,79. In terms of the Taxing Master's *allocatur*, a total of R58 554,57 was allowed. The balance of R31 298,22 was taxed off. H

The notice to state a case

[21] On 24 June 2002 the applicants, being dissatisfied with the taxation of eight particular items in the second bill, gave notice to the Taxing Master in terms of Rule 48(1) to state a case for the decision of a Judge in respect of such items. The items in question were numbered 10, 16, 18, 22, 32, 40, 67 and 71 in the second bill. The I Taxing Master was not required to state a case in respect of the taxation of the first bill relating to the *Anton Piller* application.

[22] It seems that the applicants, or their attorney, had engaged a J

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taxation consultant in the matter, the late Mr Marco Francesconi. [7] Their notice in terms of Rule A 48(1) referred to the following unfortunate complication:

> 'The applicant is unable to comply with each of subrules (2)*(b)*, *(c)* and *(d)* as the taxation consultant who appeared for it at the taxation was regrettably killed in a motor accident within hours of completion of taxation, before the applicant's attorney became aware of the outcome of the taxation or B had an opportunity to discuss any aspect of the items referred to herein with him.'

[23] The applicants' notice then proceeded to identify the eight items in respect of which the Taxing Master's decision was to be challenged. Instead of setting out the particulars required by Rule 48(2) *(b)*, *(c)* and *(d)*, [8] the notice contained certain submissions as to what the late Mr Francesconi would presumably have C submitted to the Taxing Master in the course of the taxation in relation to each of them.

[24] I propose to deal with the review item by item. First, I shall set out all of the contentions relating to the first of the eight D items that have been challenged. It is item 10 on the second bill. A number of the submissions are general and relate to most, or all, of the items that have been challenged. The main points of principle that arise in this review have been raised under item 10. I shall deal with item 10 fully, including the general aspects that also apply to other items. After disposing of item 10, E

I shall describe each of the next seven items that have been challenged, noting such differences in the A issues as may arise.

First challenge: item 10

[25] The item reads:

'10.01/11/01	Perusing all relevant documentation, preparation and drafting of founding affidavit in respect of interdict proceedings (44A4) (15hrs 30mins).'	13 175 B	

[26] The Taxing Master deducted R8 775 and allowed a fee of R4 400.

[27] In their Rule 48(2) notice requiring the Taxing Master to state a case, the applicants said: C

> '1. Item 10: The deduction of R8 775. The effect of the deduction is that notwithstanding the complexity of the matter and that this is an attorney and own client bill of costs, the Taxing Master disallowed in excess of 11 of the 15,5 hours actually spent in preparing the founding affidavit, where there was no justification for so doing and where there were contemporaneous notes D in support of the time actually spent. Argument would have been addressed by the late taxation consultant in support of the time spent as reflected in the bill.'

[28] It will be noticed that the applicants failed to comply with Rule 48(2) in the following respects: E

(a) they did not allege that they had objected at the taxation to the deduction of R8 775, or that the Taxing Master had disallowed it *mero motu*;

(b) they did not set out the grounds of objection relied on at the taxation (without argument); F

(c) they did not identify any finding of fact that they contend that the Taxing Master had made and which they intended to challenge in the review, stating the ground of challenge (without argument).

[29] Instead, the applicants drew an argumentative notice in which they may perhaps be understood, by implication instead of by G express compliance as is obviously required by the Rule, to have met the requirements of Rule 48(2) to the following limited extent only:

(a) They duly identified the deduction of R8 775 as the decision relating to a part of item 10 that was to be reviewed.

(b) On the basis that Mr Francesconi had died before being able to inform them what had happened at the taxation, they H surmised that, as a matter of probability, he would have argued at the taxation that the claim for 15 hours 30 minutes of work should be allowed. The implication was that the full period should have been allowed at the rate agreed between the applicants and their own attorney (R850 per hour) or at least at the rate fixed by the Taxing Master (R750 per hour). The further implication was that Mr Francesconi I must have objected to the disallowance, or that the Taxing Master must have disallowed it *mero motu*.

(c) I can find no implication that there were any grounds on which Mr Francesconi could have relied at the taxation for the objection that it is supposed that he would have made. J

(d) The applicants' argumentative propositions may perhaps be understood to imply that they contend that the Taxing Master A found as a fact that only 4 hours 30 minutes of work were spent, or justifiably spent, on preparing the founding affidavit (that is, the difference between the 15 hours 30 minutes claimed for and the 11 hours alleged to have been disallowed); and that the grounds for challenging B this finding of fact is that the applicants' attorney actually, and justifiably, spent 15 hours 30 minutes hours on the work because

(i) that period was necessarily or reasonably so spent;

(ii) the matter was one of complexity; C

(iii) the taxation was as between attorney and own client.

The Taxing Master's stated case

[30] Notwithstanding the failure of the applicants to comply fully with the requirements of Rule 48(2)*(b)*, *(c)* and *(d)*, the Taxing Master stated a case in terms of Rule D 48(3)*(a)* relating to all eight items that had been challenged. This stated case (which is misleadingly headed 'Taxing Master's Report') [9] was addressed to Messrs Eiser & Kantor as attorneys for the applicants, and signed for by them on 31 July 2002. It was also addressed to Mr E Goss, apparently as E attorney for the second

and third respondents, and signed for on their behalf on 6 August 2002. As will be seen, they responded with submissions on behalf of the second and third respondents. Finally, the stated case was also addressed to Messrs Schonees, Belling & Georgiev, apparently as attorneys for the first respondents. Although it was not signed for, I assume that it was received by them. They have not made submissions in the matter. I turn to consider the F general aspects of the case that are applicable to all eight items with a view to deciding, first of all, the outcome for item 10.

The applicant's non-compliance with Rule 48(2)*(b)*, *(c)* and *(d)*

[31] The Taxing Master does not accept that the applicants were unable to comply with the requirements of Rule 48(2)*(b)*, G *(c)* and *(d)*. He is aware of the fact that the late Mr Francesconi, who attended the taxation at the instance of the applicants, died in a motor collision shortly afterwards. However, he has stated that the applicant's attorney, Mr Eiser, had nevertheless been in a position to comply with Rule 48(2) because he, Mr Eiser, had H also been present at the taxation and had

himself argued virtually the entire case on taxation for the applicants, despite having engaged Mr A Francesconi in the matter.

[32] The position, as set out in the Taxing Master's stated case, was that both the first and second bills had been presented for taxation at 09:00 on 16 May 2002. The applicants had then been represented by the late Mr Francesconi and the respondents by Mr Wandrag, another costs consultant. At the request of Mr Francesconi the B Taxing Master had waited for Mr Eiser himself to arrive. Mr Eiser had eventually arrived at 09:30 and had made an introductory address of some length in the course of which he had impressed upon the Taxing Master the complexity of an *Anton Piller* application, and the extent of his own experience and capabilities. Mr Wandrag had C contended that the law was fairly settled. Mr Eiser had replied stressing the importance of the particular matter to his clients.

The applicants' agreement with their own attorney relating to his fees D

[33] Before coming to specific items in the first bill, Mr Eiser had produced a letter establishing that his clients, the applicants, had agreed to pay his fees at the rate of R850 per hour. Mr Wandrag had contended that this agreement, to which the respondents had not been parties, was not binding on the Taxing Master. The Taxing Master has recorded that he had exercised his discretion and had ruled that E the rate to be applied in the taxation for payment of the first bill by the respondents would be R750 per hour.

The distinction between an attorney's fees for doing attorney's work and his fees for doing the work of an advocate F

[34] The fixing of a rate per hour was appropriate for those aspects of an attorney's work for which the tariff in Rule 70 makes provision for time-related charges. It would not be appropriate for a situation in which the attorney appears in the High Court or performs any of the other functions of an advocate. In this regard, item 10 of s A of the current Tariff of Fees of Attorneys [10] provides: G

> '10. Appearance by an attorney in Court or the performance by an attorney of any of the other functions of an advocate, in terms of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995). . . . The tariff under Rule 69 shall apply.'

Rule 69(3) makes provision for the tariff in the Rules of the H magistrates' courts to apply in certain circumstances in respect of advocates' appearances in the High Court, and in respect of other work performed by advocates and related to litigation in the High Court. Otherwise, the fees of advocates (including attorneys performing the functions of advocates) as between party and party are regulated by Uniform Rule 69(5). It provides: I

> '69(5) The taxation of advocates' fees as between party and party [11] shall be effected by the Taxing Master in accordance with this Rule and, where J

> applicable, the tariff. [12] Where the tariff does not apply, he A shall allow such fees (not necessarily in excess thereof) as he considers reasonable.'

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[35] In determining the reasonable fees of an advocate, or of an A attorney performing the functions of an advocate, the calculation of fees on a time-related basis has not been approved. Room has been left for a change in this approach, but the change has not yet occurred. In *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) ([2002] 4 B All SA 723) Howie JA, delivering a judgment concurred in by four other Judges of Appeal, said: B

> '[15] We were also informed that it is the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related and, in so far as appeals are concerned, for counsel to charge separately for preparation, heads of argument and time in Court. C
>
> . . .
>
> [26] Counsel for plaintiff also pressed upon us the submission that the Court should lend its approval to the determination of fees on taxation on a time-related basis, given the prevailing tendency in the profession to charge on that footing. In *J D van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) this D Court disapproved of that approach to fee assessment for taxation purposes and held that the established practice was to fix a globular first day fee for heads, preparation and appearance. A departure from what was said there - even a re-appraisal of that practice - would require evidence and argument far beyond that with which we have been presented in this matter.'

[36] In the present matter, therefore, fixing a rate per hour for the work of the applicant's attorney that can be charged on a E time-related basis in terms of the tariff in Rule 70 was appropriate. It has not been suggested in this review that the rate of R750 per hour fixed by the Taxing Master was unreasonable. However, the rate per hour could not appropriately be applied to work done by the applicant's attorney in the performance of the functions of an advocate. For such work, a reasonable fee had to be determined on the basis used for the determination of advocates' fees. F

[37] In para 1.1 of their submissions in terms of Rule 48(5)*(a)*, the applicants have accepted that the rate of R750 per hour was fixed in respect of the first bill (concerning the *Anton Piller* matter), and that it had been agreed that it should also apply in respect of the second bill (the subject of this G review).

[38] In para 1.3 of their submissions, the applicants went further. They alleged that a charge for telephone calls had been established for purposes of the first bill, and that there had been agreement at the H

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taxation of the first bill that the same charge would apply in respect of the second bill. They did not say what charge had A been agreed. It appears from the second bill that the Taxing Master allowed telephone calls at the rate of R80 each.

Mr Eiser's further participation in the taxation B

[39] According to the stated case, the taxation had proceeded, next, to the individual items on the first bill. Many items had been opposed, and they had been debated in some detail between Mr Eiser and Mr Wandrag. The Taxing Master has recorded that the contribution of the late Mr Francesconi had been 'minimal'. After two-and-a-half hours, and at 12 noon, at the request of Mr Eiser, the taxation had been C adjourned to 31 May 2002. By that time, item 22 on the first bill (which comprised a total of 54 items) had been reached.

[40] On 31 May 2002, the applicants had again been represented at the resumed taxation of the first bill by both Mr Eiser D and the late Mr Francesconi, and the respondents by Mr Wandrag. The taxation had proceeded more quickly because many of the remaining items on the first bill could be dealt with on the basis of previous rulings made by the Taxing Master. However, two items concerning Mr Eiser's appearances in Court, first, to obtain the *Anton Piller* order *ex parte* (item 37); and, secondly, to resist the E opposition on the return day (item 53), had occasioned considerable debate. Mr Eiser had submitted that he should be remunerated at a rate applicable to senior counsel.

The taxation of the second bill

[41] According to the stated case, when the taxation of the first F bill was complete, and to accommodate Mr Eiser, the taxation of the second bill [13] had been approached in an unusual way. Mr

Eiser had wanted to leave. It had appeared to be common cause that the second bill would, to a large extent, be taxed on the same basis as the first. However, Mr Wandrag had indicated on behalf of the respondents that as the second bill related to an opposed application, and was different from the *ex parte* application G for the *Anton Piller* order to which the first bill had related, he would contend that different rates should apply to the Court attendances that had been brought up as items 40 and 67 in the second bill, and also to the perusing and drafting brought up in items 10 and 18. It had therefore been arranged that those four items in the second bill would be dealt with first, to enable Mr Eiser to H make his submissions and then to leave the taxation. The representation of the applicants in the debate about the remaining items in the second bill would be left to Mr Francesconi alone.

[42] Mr Eiser had accordingly made his submissions to the Taxing I Master in respect of items 10, 18, 40 and 67, and certain others. After hearing Mr Wandrag for the respondents, the Taxing Master had made his rulings on the few items that had been argued. Mr Eiser, after hearing J

the rulings, had then excused himself from the taxation proceedings. Mr Francesconi had taken his place as the representative A of the applicants. The major differences had by then been resolved. The taxation had been completed speedily, on the basis of the rulings already made by the Taxing Master in Mr Eiser's presence. Mr Francesconi had not made any submissions to the Taxing Master after Mr Eiser had left. B

The applicants' submissions in terms of Rule 48(5)*(a)*

[43] In the further submissions on behalf of the applicants, Mr Eiser has stated, in para 1.2:

> 'The Taxing Master is mistaken when he says . . . that Mr Eiser . . . was present when items 10, 18, 40 and 67 were taxed. He C left before the taxation thereof. Mr Eiser cannot comment on what Mr Francesconi did or did not say after he left, but in the light of the terms of Rule 48(5)*(a)* that a party may make submissions in respect of any item disallowed nothing turns on this.'

[44] This bald contradiction of one officer of the Court by another on a question of fact is most unfortunate. I shall have to D return to it if it becomes necessary to do so. In any event, Mr Eiser's proposition that nothing turns on it because Rule 48(5)*(a)* entitles a party to make submissions in respect of any item disallowed, is plainly too wide. Where a dissatisfied party has, in terms of Rule 48(2)*(a)*, identified certain items to be reviewed, but has failed, without good cause, to comply with Rule E 48(2)*(b)*, *(c)* and *(d)* in respect of those items, the Taxing Master has no obligation to state a case. If the Taxing Master has rightly refrained from stating a case, there can be no question of the dissatisfied party having a right to make submissions in terms of Rule 48(5)*(a)*. That right is confined, in my view, to items on the bill in respect of which the Taxing Master has duly stated a case in accordance with Rule 48(3). F

[45] In the present matter, the Taxing Master has, despite the failure of the dissatisfied party to comply fully with Rule 48(2)*(b)*, *(c)* and *(d)*, found it possible to state a case relating to each of the eight items in the bill that the applicants have challenged and brought on review. In these unusual circumstances, I consider that I can and should proceed G with the review. However, I shall bear in mind that the applicants failed to comply fully with the relevant requirements of Rule 48(2)*(b)*, *(c)* and *(d)* and, if this should lead to difficulties, it will have to be the applicants and not the respondents who suffer any adverse consequences. H

The main issue of principle: whether the Taxing Master rightly taxed the bills of costs on the 'intermediate basis' defined in *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597, or whether he was bound to approach the taxation on the basis set out in *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) I

[46] In the stated case the Taxing Master set out his approach in the following terms:

> 'In terms of *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 608 my duty was to tax the applicant's bills on the intermediate basis and J

> allow costs on a more generous basis than as between party and party. In terms of the A *Cambridge* judgment, referred to below, I had to have regard to the agreement between the attorney and his client. This I did to the best of

my ability in taxing both the bills presented to me.

Item 10 [14]

In the exercise of my discretion and following the cases referred to at the taxation, I applied the High Court tariff to this item and allowed the drawing of the affidavit at R100 per page. This may also be seen against the background of the amounts allowed in items 2 to 9 (a total of R5 744) [15] that also could be B regarded as gathering of information to incorporate in the founding affidavit. In a bill taxed as between party and party less than R6 000 would have been allowed for these items. The total allowed on the intermediate attorney and client basis was almost double that amount. Mr Eiser presented the argument in regard to this item and was still present when I made my ruling. Refer to the case C cited [16] and debated by Mr Eiser and Mr Wandrag at the taxation.'

[47] In other words, the applicants' attorney had erred in law in suggesting that item 10 was to be taxed on a time-related basis. A fee for drawing up affidavits is to be calculated per D page. [17] The applicants' attorney had also erred in fact in suggesting that the Taxing Master had disallowed 11 hours of the 15 hours 30 minutes that the applicants' attorney claimed for 'Perusing all relevant documentation, preparation and drafting of founding affidavit'. The drafting was allowed at the tariff rate, however long it may have taken. 'Perusing' is to be brought up in a E bill at a rate per page. [18] The applicants failed to state the number of pages alleged to have been perused. As for the time said to have been spent in 'preparation', this is a vague and unspecific claim for which no provision is made in the tariff.

[48] The Taxing Master gave his reasons for adhering to the tariff rate for drawing up the founding affidavit in a taxation 'as F between attorney and own client'. He considered that he was bound to apply the principles of *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* (which sanction a

departure from the tariff where appropriate) and also to have regard to (without being bound by) the A agreement between the applicants and their own attorney in respect of time-related charges, as required by *Cambridge Plan*. Taking this approach, the Taxing Master was of the opinion that the applicants' attorney, having spent 2 hours 40 minutes taking instructions for the preparation of the application for an interdict B (item 2), another 4 hours copying the contents of the computer discs and documents that had been seized in terms of the *Anton Piller* order (both of which sources contained copies of the applicants' own material that could not have been new to the applicants or their attorney) (item 5), and having received the further instructions in the seven telephone calls (items 3, 4, 7, 8 and 9) would be sufficiently rewarded for item 10, on the attorney and client C scale, by an amount of R4 400, representing the drawing of 44 pages of affidavits at R100 per page. In arriving at this conclusion, the Taxing Master took account of the fact that on a party and party basis no more than a total of R6 000 would have been allowed for items 2 to 10 altogether; and that, taxing them as between attorney and own client, D he had decided that a total of R10 144 for all of these items was fair and reasonable.

The alleged misdirections on the part of the Taxing Master

[49] The applicants contended, in their Rule 48(5)*(a)* submissions, that the Taxing Master had misdirected himself in three E important respects, namely:

1. He had incorrectly applied the 'intermediate' basis of taxation, [19] instead of the basis identified in *Cambridge Plan*, [20] as being F applicable when a bill that is to be paid by one party to another is to be taxed 'as between attorney and *own* client'.
2. He had incorrectly accepted the proposition that 'his duty was to tax on a scale more generous than between party and party' (ie on the 'intermediate basis') when, in terms of *Cambridge Plan*: G
   (1) he should have 'taxed on the first of the *Roos* scales'; [21]
   (2) he should have recognised that an attorney and *own* client award entitled the successful party 'to recover luxuries subject to them not being unreasonable', [22] and
   (3) he should have recognised that:

   'In agreeing to the order in the settlement agreement incorporated in the order of Court, the first to third respondents, on the advice of their attorneys were mindful of the H

> limitations on recoverability in an attorney and client award, and that the A limitations inherent therein should not apply.' [23]

3. He had incorrectly applied the test of 'over-caution' to the applicants' attorney's work, when 'over-caution is not the test in attorney and own client bills'.

[50] The applicants' attorney also made further submissions relating to the nature, the complexity and the importance of the matter B to the applicants, and to the implications of the fact that the respondents had agreed to pay the costs taxed as between attorney and *own* client. Before addressing the individual items, he concluded his general submissions as follows:

> 'In all the circumstances of this matter as set out above, this is a proper case for the Taxing Master, if he had not so thoroughly C misdirected himself, to have departed from the tariff and allowed the full amount charged in each item which is the subject of the review. In this connection reference is made to what was held in the *Cambridge* case in para *(f)*(i) on page 598.' [24] D

The submissions made on behalf of the second and third respondents in terms of Rule 48(5)*(a)* A

[51] Mr E Goss, an attorney acting on behalf of the second and third respondents, has made submissions that support the Taxing Master's approach and disagree fundamentally with the applicants' attorney's submission that the Taxing Master had misdirected himself in the respects set out above. In summary, the submissions for the B respondents are that:

1. An agreement or order that a bill of costs that is to be paid by one party to another is to be taxed as between 'attorney and *own* client' does not, and as a matter of law cannot, require the Taxing Master to apply any basis of taxation other than that described in *Nel v Waterberg Landbouwers Ko-operatieve* C *Vereeniging* 1946 AD 597 in respect of a bill to be paid by one party to another that is to be taxed as between 'attorney and client'.
2. This principle has been recognised in three cases: *Shaw v Connectivity Technologies (Pty) Ltd* (unreported judgment dated 22 June 1995 in WLD case No 9741/1995); *Law Society of the* D *Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C); *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T).
3. By implication, *Cambridge Plan* is in error to the extent that it cannot be reconciled with *Nel v Waterberg* or the above-mentioned cases. E
4. The Taxing Master did not misdirect himself in respect of any of the eight items objected to by the applicants.

The Taxing Master's report in terms of Rule 48(5)*(a)* F

[52] On 8 October 2002 the Taxing Master delivered his report in terms of Rule 48(5)*(a)*. [25] In this report the Taxing Master remains of the opinion that he did not misdirect himself in any of the respects suggested by the applicants. He has also commented that the applicants had failed to provide any acceptable explanation for their failure to comply with the requirements of Rule 48(2) *(b)*, *(c)* and G *(d)*. He has asked for a decision in this review on the following questions:

1. Whether the Taxing Master has misdirected himself or acted on a wrong principle; H
2. whether the Taxing Master should have allowed the applicants' attorney's fees (to be paid by the respondents) at the rate of R850 per hour on the strength of the agreement between the applicants and their own attorney, to which agreement the respondents were not parties; and whether in this regard the Taxing Master should have ignored the passages in *Cambridge Plan* that indicate that the Taxing Master is not bound by such an agreement but should take I

> it into account as one of the factors relevant to the exercise of his A discretion to determine a fee that is fair and reasonable in the circumstances; [26]

3. whether the Taxing Master was misguided in his understanding of the position where, on the one hand, the applicants' attorney had relied upon an agreement to charge his client at a rate of R850 per hour and, on the other, had submitted that he was entitled to B remuneration, as against the respondents, as if he had been senior counsel. [27]

[53] I turn now to consider the main point of contention raised in this review. It is whether the Taxing Master rightly taxed item 10 (and the other items challenged in this review) on the 'intermediate' basis of taxation defined in *Nel v Waterberg Landbouwers* C *Ko-operatieve Vereeniging* 1946 AD 597 *('Nel')*; or whether, as held in *Cambridge Plan*, the order for taxation 'as between attorney and own client' meant that a basis of taxation more generous to the costs creditor than the 'intermediate' basis was to be applied. D

The main issue: taxation on the 'intermediate' basis of *Nel* or the 'more generous' (to the creditor) basis of A *Cambridge Plan?*

[54] The effect of the decision in *Ben McDonald* (above) is in my view that an order that one party ('the costs debtor') should pay the costs of the other ('the costs creditor') taxed on a scale as between 'attorney and own client' simply refers the Taxing Master back to the 'intermediate' scale of taxation identified by Tindall JA in *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* B 1946 AD 597 at 607 - 8: 'intermediate', that is, between the party and party scale and the scale applicable when a Taxing Master is required to tax a bill of costs for payment to an attorney by his own client. [28] Tindall JA emphasised the need to differentiate between the scale of taxation when an attorney and client C bill is payable by a client to his own attorney, by virtue of the contractual relationship of attorney and client, and when the same bill is payable by one party, against whom

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an order for payment of costs as between attorney and client has been made, to another. That A differentiation, he said, is 'essential . . . to prevent injustice' to the costs debtor.

[55] The same concept is central to the decision of van Dijkhorst J in *Ben McDonald*. There is no room for an order B that, by apparently attempting to compel a costs debtor to pay, without limit, whatever fees and disbursements a costs creditor may have committed himself to pay to his own attorney, is apparently designed to outflank the Rule laid down by the Appellate Division in *Nel*, namely, the Rule that an 'intermediate' basis of taxation is essential 'to prevent injustice' to the costs debtor. [29] C

The distortion produced by F J Roos's *Taxation of Bills of Costs in Superior Courts in South Africa* (1947)

[56] As observed in *AA Alloy Foundry* (above) and in *Ben McDonald* (above), recent years have seen a great D increase in standard forms of contract that impose an undertaking to pay costs taxed as between 'attorney and *own* client', and in summonses and applications claiming costs taxed as between 'attorney and *own* client'. However, this trend has not necessarily been driven by sheer greed or by a desire to oppress the costs debtor or to do him an injustice. The motive has probably more E often been an attempt to escape from a perceived limitation on the effectiveness of an order for costs taxed as between 'attorney and client'. There is a widespread belief, mistaken in my view, that an inter-party taxation as between attorney and client 'gives little if anything more than a party and party taxation'. F

[57] Some years ago I traced the history of this question in the case of *Shaw v Connectivity Technologies (Pty) Ltd* WLD case No 9741/1995, in a judgment delivered on 22 June 1995. [30] What emerges is that an error had been made in a book on costs which, though published in 1947, made no G reference to the crucially important decision of the Appellate Division in *Nel* (above), which had been reported during the previous year, 1946, after the judgment had been delivered on 29 May 1946. The book, which has had considerable influence in respect of the law of H costs, and in particular on the question that is presently relevant, is F J Roos's *Taxation of Bills of Costs in Superior Courts in South Africa* 1st ed (1947) *('Roos')*. The preface to *Roos* was written in September 1946. By then the book was no doubt substantially complete. It is most unfortunate that

it was not found possible to include any reference to *Nel* in the book. A brief but important passage in the book was in fact inconsistent with I the decision in *Nel*.

[58] With regard to 'attorney and client' costs, *Roos*, relying on English authority, differentiated between three types of attorney and client J

taxation. At 9 the learned author wrote (in a passage to which I have added emphasis in order to mark the A propositions that are inconsistent with *Nel*):

> 'There are various principles of taxation as between attorney and client which are applicable in the following cases:
>
> (1) Where the costs are payable by the client to his attorney; or where the costs are payable out of a fund belonging entirely to the B client.
>
> (2) Where the costs are payable out of a general or common fund.
>
> (3) Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest, or where the costs are payable by one party to another.
>
> The taxation in the cases of (1) is more generous than in the case of C (2) and (3), while in the case of (2) the taxation is not so generous as in the case of (1). The taxation in the case of (3) is the strictest, *and, in effect, gives little more than a taxation between party and party, except that any necessary letters to and attendance on the client are allowed*. (Porter and Wortham *Guide to Costs* 13th ed at 915.) This is the English practice *and is followed in the Union*.'

[59] The italicised passages have sometimes been taken, erroneously, to reflect the South African law of costs in this regard. D It is precisely because an order that one party pay costs of another taxed as between attorney and client has been believed, wrongly, to be substantially ineffectual, that the tendency to try to 'compensate' for its supposed deficiencies has emerged. This unnecessary 'compensation' has often taken the form of an agreement, or a prayer, or an order, for costs payable by one party to another to be taxed 'as E between attorney and *own* client'.

[60] However, the italicised passages in the quotation from *Roos* do not reflect South African law. This is because they are inconsistent with the decision in *Nel*. They overlook the fact that in *Nel* the Appellate Division held expressly that South African law differed in the relevant respect from what was then F the English law on the subject; and that in South Africa the purpose of an order that one party pay the costs of another, taxed as between attorney and client, is that

> 'the Court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of judgment for party and party costs that the successful party will not G be out of pocket in respect of the expense caused to him by the litigation'. [31]

In other words, in South Africa, when a Court makes the 'extraordinary or exceptional' [32] order that one party to pay the costs of his opponent 'taxed as between attorney and client', the Court's aim is *not* that the H

costs debtor (whose reprehensible conduct relating to the litigation may have put A the costs creditor to extra expense that he would not ordinarily be able to recover on a party and party taxation), should not be liable for any more costs than the costs creditor could recover on a taxation between party and party (with the addition of nothing more than the costs of any necessary letters to and attendance on the costs creditor by his own attorney), as suggested by *Roos*. On the contrary, B as *Nel* makes plain, the Court's intention, when it makes such a special order, is that the costs creditor should receive a fuller indemnity than a party and party taxation would provide, for all additional reasonable costs to which the defendant's conduct that received the Court's reproaches may have put the costs creditor. C

[61] This means that in an inter-party taxation, on a scale as between attorney and client, any and every item on the bill can, if it has been inflated in consequence of the reprehensible conduct of the costs debtor, be taxed with greater generosity to the costs creditor than in a party and party taxation. It also means that every item on the bill should receive the Taxing Master's consideration for that purpose. If, for instance, the Taxing Master is satisfied that the D unworthy conduct of the costs debtor caused the costs creditor reasonably to have more consultations or longer consultations with his legal advisers than would have been allowed in a party and party taxation, the costs of

those extra or lengthier consultations should be E allowed against the costs debtor in a taxation as between attorney and client, except to the extent that an injustice may be done to the costs debtor. The Taxing Master should accept that that was the intention of the Court that made the special costs order, unless the Court has expressed its intention otherwise. Moreover, if the legal advisers of the costs creditor have charged fees at rates exceeding the tariff in F Rule 70, the Taxing Master should consider allowing rates exceeding the tariff, provided that they are not unreasonable in the particular circumstances and that they do not inflict injustice upon the costs debtor. That, too, was the intention of the Court that made the special order, unless it expressed its intention otherwise. The same principles apply to all items on the bill. G

[62] It must be emphasised that *Roos* overlooked (doubtless because the author was writing before *Nel* had been reported) the following aspects of the decision in *Nel*: H

1. *Nel* recognised that the objective of an order for costs taxed as between attorney and client was to ensure that the costs creditor was *indemnified*, more completely than could be achieved by an order for party and party costs, in respect of the costs to which the I

litigation had put him. The costs creditor was not to be left out of pocket in respect of any of his reasonable expenses. A The objective would largely be defeated if *Roos*' suggestion that such a taxation 'gives little more than a taxation between party and party, except that any necessary letters to and attendance on the client are allowed' were a correct summary of the position in South African law after *Nel*, whatever the position may then have been in English law. Indeed, that proposition in *Roos* cannot B be reconciled with *Nel*. In other words, the Taxing Master is left free, in South Africa (although the English Taxing Master was not free), to tax the bill on the basis that would give the costs creditor the full indemnity in respect of all reasonable costs that a Court C order for costs taxed as between attorney and client intended him to have.

2. *Nel* recognised that in the English law of costs there was a specific Rule of Court which, in *Giles v Randall* [1915] 1 KB 290, the English Court of Appeal had criticised on the ground that it

> 'went too far in the extent to which it required the Taxing Master to disallow items of an attorney and client bill of costs where D such costs were payable not by the client himself to his attorney but by the other party'. [33]

It was emphasised in *Nel* that *no such restrictive Rule of Court applies in South Africa*. [34] In other words, the Taxing E Master is left free, in South Africa (although the English Taxing Master was not free), to tax the bill on the basis that would give the costs creditor the full indemnity in respect of all reasonable costs that a Court order for costs taxed as between attorney and client intended him to have.

3. *Nel* established, and *Roos* overlooked, that the full indemnity which an attorney and client costs order F intended the costs creditor to have, was limited, not in the manner described by *Roos*, [35] but only by the considerably less stringent criterion that costs of a kind for which the costs creditor had incurred liability unreasonably should be disallowed as against the costs debtor 'to prevent injustice' to him. [36] One or two examples of such unreasonable costs were given in *Nel*. The costs creditor might have G incurred liability by agreeing to pay 'exceptionally high fees to counsel'. [37] To prevent injustice to a costs debtor who must pay a bill taxed as between attorney and client, the excessive part of counsel's fee must be taxed off. Or (an example taken from Van der Linden *Jud Prac* 1.2.8.4), a client who had troubled his practitioner 'with arbitrary and unnecessary H consultations thereby increasing the bill of costs with a number of extraordinary entries'. A client was free to do this, but only at his own expense, and not at the expense of the costs debtor. [38] These and other luxurious and unreasonable expenses are to be taxed off

a bill that a costs debtor has been ordered to pay after taxation on a scale as between attorney A and client. Any other course would perpetrate an injustice against the costs debtor. But apart from costs that would amount to such an injustice, the costs creditor was to have a full indemnity.

4. In stating that a taxation as between attorney and client of a bill to be paid by the opposing party 'gives little more than a B taxation between party and party, except that any necessary letters to and attendance on the client are allowed' *Roos* overlooked the 'intermediate' basis of taxation established by *Nel*. That intermediate basis was *not* the same as the unduly restrictive basis that the English Rule of Court had established within C the jurisdiction of the English Courts, and which had been criticised both by the English Court of Appeal in *Giles Randall*, above, and by the Appellate Division in *Nel*.

5. The intermediate basis of taxation identified in *Nel* does not have its origin in English law. It is a feature of South D African law and practice confirmed by the decision in *Nel*. It allows the costs creditor who has an order for payment by his opponent of costs taxed as between attorney and client, to recover from the costs debtor what may, depending upon the circumstances of the particular case, amount to a substantially fuller indemnity than he could recover on a party and party taxation. Within the bounds of E reasonableness in the circumstances of the case, the Taxing Master is expected to tax such a bill generously. He should allow rates that may reasonably exceed the tariff if the work was of some complexity and was made unduly burdensome by whatever conduct on the part of the costs debtor caused the Court to make an order for attorney and client costs. F On the same basis, the Taxing Master should allow periods of time for consultations, and for other work ordinarily charged on a time basis, that may reasonably exceed the time that he would allow if taxing strictly as between party and party. Indeed, the Taxing Master should remain aware that it is the intention of the Court that has ordered a G taxation as between attorney and client that the costs creditor should have a full indemnity for the costs to which the litigation has put him, except for luxurious, extravagant, unnecessary and other types of unreasonable expense that it would be an injustice to impose upon the H costs debtor.

The 1956 Supplement to *Roos*

[63] In 1956, ten years after the decision in *Nel*, Roos and a co-author, A Brink, published a supplement to the first edition I (1947) of *Roos*. The supplement contained two references to *Nel*. The learned authors appreciated that *Nel*, by recognising, or perhaps introducing, the 'intermediate' scale of taxation, had the consequence that South African law knows and applies a scale of taxation of attorney and client costs with features that were not, at that time, a feature of the English law of costs. J

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[64] To the three categories of attorney and client taxation A specified at 9 of the 1947 edition of *Roos*, and quoted above, the 1956 Supplement added a fourth, namely:

> '(4) Where the attorney and client costs are to be paid by the opposite party: *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 608.'

Regrettably, the learned authors did not there indicate how this category was to be distinguished from category (3). B

[65] What was required, in my respectful view, was a statement that category (3), although recognised in English law as yielding little more than a party and party taxation, had that effect by virtue of an English Rule of Court that had been adversely criticised by the English Court of Appeal, [39] and that had never C been adopted as a Rule of Court anywhere in South Africa. The anomalous position in English law had been recognised by Tindall JA in *Nel*; and the decision in *Nel* had established that in this respect South African law differed from English law. In South Africa, the basis of taxation of a bill of costs to be paid by one party to another, and to be taxed as between attorney and client, is one that falls, in order of strictness, between a 'pure' attorney and D client taxation (for a bill to be paid by a client to his own attorney) and a party and party taxation. It had therefore been dubbed the 'intermediate' basis of taxation. That this was the position was not made plain in the 1956 Supplement to *Roos*. E

[66] The 1956 Supplement added a second reference to *Nel*. The penultimate para on p 9 of the 1947 edition of *Roos* had drawn attention to an important difference between an attorney and client taxation for payment of the bill by a client to his own attorney, and an attorney and client taxation for payment of the bill by one party to another. In the former case, a client who has F insisted on taxation knows the facts of what occurred between himself and his attorney. He is therefore in a

position to attend the taxation and give reasons to the Taxing Master for objecting to items in the bill. In the latter case, the costs debtor, and his attorney, cannot know what passed between the costs creditor and his attorney and, because of that ignorance, neither the costs debtor nor his attorney G can be of much assistance to the Taxing Master. To that paragraph in the 1947 edition of *Roos*, the 1956 supplement added a reference to *Nel* in the following terms:

> 'In this case the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid by the H client to his attorney. Thus the award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation: *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 608.'

[67] This way of putting it failed to reveal to readers the fact that, as shown by the reasons for the decision in *Nel*, the I proposition in *Roos* that an attorney and client taxation for payment by one party to another 'gives little more than a taxation as between party and party, except that

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any necessary letters to and attendance on the client are allowed' was not, and never had been, a A correct reflection of the law in South Africa.

[68] The unfortunate and curious result of all this has been that *Nel* has tended to be ignored or misunderstood, and that the erroneous propositions in the 1947 edition of *Roos* have surprisingly had more influence in the Courts than the somewhat ineffectual summary of *Nel* in the 1956 Supplement to *Roos*. B

The consequences of the error propagated in *Roos Brooks v Taxing Master*

[69] The above-quoted passage from *Roos*, including the propositions that cannot be reconciled with *Nel* (but C ignoring the 1956 Supplement that referred to *Nel*) was quoted *and adopted* by Burne AJ in *Brooks v Taxing Master and Another* 1960 (3) SA 225 (N) at 230B - E. That was a case in which the questions that arose were, first, whether the fees charged by counsel in an unopposed application for the judicial management, and D later the winding-up, of a company, to be paid as costs in the winding-up, should be taxed as between party and party or as between attorney and client. The Taxing Master decided to tax as between party and party and he did so. The creditor who had made the applications took that decision on review. Burne AJ, after approving the E above-quoted passage on 9 of *Roos*, decided that the fees should have been taxed as between attorney and client, and that the second scale or 'principle' of taxation of attorney and client costs was applicable, namely for attorney and client costs payable out of a general or common fund. It was therefore not necessary for the learned Judge's decision for him to have approved what I have indicated to be the erroneous passage in *Roos* that related only to the third F such scale or 'principle'. [40] The erroneous passage in *Roos* was not part of the *ratio decidendi*, and it was not imported into our law by that decision. In any event, the decision of the Appellate Division in *Nel* precluded the adoption of that passage in our law by any Division of the Supreme Court other than the Appellate Division itself. G

City Real Estate Co v Ground Investment Group

[70] The same passage in *Roos* was quoted by Harcourt J, with approval, in *City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd and Another* 1973 (1) SA 93 (N) at 96D - F, in the context of a reference to *Nel*, above, and without drawing attention to the discordance between them. However, in the context of H *City Real Estate* the discordance was not relevant. It was a case of a 'pure' attorney and client taxation (that is, the taxation of a bill for payment of an attorney's fees and disbursements by his own client). The decision is therefore not of assistance in the present I

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case of an 'inter-party' attorney and client taxation (that is, the A taxation of a bill for payment by one party to another).

Loots v Loots

[71] *Loots v Loots* 1974 (1) SA 431 (E) was another case in which the above-quoted passage from *Roos* was quoted, apparently with approval. *Loots* was an undefended divorce B action in which the defendant had consulted an attorney, but had not entered an appearance to defend the action. The attorney had stipulated that the defendant, as his client, should agree to pay his fees calculated in

accordance with a tariff of fees to be charged by attorneys for 'consultation, drafting etc' that the Law Association of Port Elizabeth had laid down in 1971. This tariff evidently exceeded the tariff then contained in Rule 70. The attorney C assisted the defendant in arriving at a settlement with the plaintiff. The settlement was embodied in a consent paper and was then incorporated in the divorce order, as happens routinely in such matters. The consent paper included an undertaking on the part of the plaintiff to pay the defendant's costs taxed as between attorney D and client. The defendant's attorney drew a bill of costs in accordance with the Law Association's tariff that exceeded the rates laid down by Rule 70. The taxation was therefore an inter-party attorney and client taxation (that is, for payment by one party to E another). At the taxation the Taxing Master declined to allow any material departure from the tariff in Rule 70, and refused to allow the excess charged in accordance with the more generous tariff agreed between the Port Elizabeth attorneys.

[72] The defendant took this taxation on review on the basis that, whereas the order incorporating the parties' agreement had required taxation as between attorney and client, the Taxing Master had F in substance taxed as between party and party. The Taxing Master's attitude was that he had taxed the bill as between attorney and client in accordance with the 'intermediate' basis of taxation established in *Nel*.

[73] Eksteen J (as he then was) declined to interfere with the Taxing Master's decision. At 433C - E, the learned Judge set out the G above-quoted passage from *Roos* at 9, recording the three bases of taxation of costs as between attorney and client as known to the English law, and including *Roos'* observation, based on an English law text book, that where the attorney and client costs are payable by one party to another, taxation as between attorney and client 'is the strictest and in effect gives little more than a H taxation as between party and party, except that any necessary letters to and attendance on the client are allowed'. The learned Judge added the following comment at 433E - F:

> 'The basic principle underlying this approach to the taxation of attorney and client bills was approved in *Nel v Waterberg* I *Landbouwers Ko-operatieve Vereeniging* 1946 AD 597.' [41]

Eksteen J quoted from the judgment of Tindall JA in *Nel*, above at 608. He also noted (at 433) the conclusion of Tindall JA that: J

> 'The award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation.' A

Eksteen J approved the Taxing Master's application of the intermediate basis of taxation, and held, at 434E - F of *Loots*, that

> 'the mere fact that these fees were not allowed on a more liberal or higher scale than those laid down in the Rules of Court does not mean that he failed to apply this intermediate basis. It is apparent B from the authorities quoted by me above that the Taxing Master is bound to apply, or at least to be guided fairly rigidly by, the scale of fees provided in the tariff, and only to depart from them when in his discretion extraordinary or exceptional cases present themselves where strict adherence would be inequitable. [42] The existence of a different tariff which a law association of local C attorneys regards as a desirable one to operate as between themselves and their clients does not, to my mind, in the circumstances of the present case, constitute such an exceptional or extraordinary case.'

[74] In my respectful view, the judgment of Eksteen J must not be misunderstood. The learned Judge did not say that the proposition in *Roos* to the effect that an inter-party taxation as between D attorney and client yields little more than a party and party taxation, had been approved in *Nel*. That would not have been possible. When *Nel* was decided and reported in 1946, *Roos* (1947) had not been published. The surprising fact is that *Roos*, though published in 1947, contained no reference to *Nel*. Therefore, *Nel* did not directly approve anything in *Roos*, and Eksteen J did not suggest that it had. E

[75] As I understand the proposition of Eksteen J in *Loots*, the learned Judge was saying that the same principle of an 'intermediate' basis of taxation is to be found both in *Nel*, where it was laid down authoritatively, and in *Roos*, despite the absence of any reference to *Nel*, except in the 1956 Supplement. F

[76] Inasmuch as Eksteen J applied the principles of *Nel, Loots* is in my respectful view further authority for the propositions that:

1. When a bill drawn as between attorney and client is to be taxed, the basis of taxation varies according to whether the costs debtor who must pay the bill is the attorney's own client or the G opposing party. A stricter basis of taxation applies when the opposing

party must pay ('inter-party attorney and client taxation') than when the attorney's own client must pay ('pure attorney and client taxation'). This is to avoid injustice to the opposing party. This stricter (inter-party attorney and client) basis of taxation is H referred to as an 'intermediate' basis because, though 'stricter' (ie less generous to the costs creditor) than the taxation of a bill to be paid by a client to his own attorney, it is nevertheless in principle more generous (to the costs creditor) than the party and party taxation of a bill to be paid by a costs debtor, in the ordinary way - a taxation that must adhere strictly to the tariff I in Rule 70 (unless the case is one contemplated by Rule 70(5)*(a)*, so that the Taxing Master may, in his discretion, depart from the tariff).

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2. The 'intermediate' (inter-party attorney and client) basis of taxation applies whether the costs debtor has been *ordered* A to pay attorney and client costs, or whether he has merely *agreed* to do so (cf *Loots* (above at 433H); and *Markman v Richardson* 1969 (3) SA 465 (E) at 467C - D).

3. The 'intermediate' basis of taxation does not justify departures from the tariff in Rule 70 except, in terms of subrule B (5)*(a)* 'in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable'. [43]

4. The mere fact that one party ('the costs debtor') has agreed to pay the costs of another ('the costs creditor') taxed as between C attorney and client does not necessarily constitute an 'extraordinary or exceptional' case within the meaning of that phrase in Rule 70(5)*(a)*; [44] nor does the fact that a law association of local attorneys has agreed amongst themselves upon a tariff higher than that contemplated by Rule 70. [45] D

[77] *Loots* was a run-of-the-mill, undefended divorce case. There were no extraordinary or exceptional features. Therefore, although the intermediate basis of taxation was applied, there was no room for such a taxation to saddle the costs debtor with heavier costs than would have been allowed on a party and party taxation. However, it does not follow that, and *Loots* did not decide that, as E suggested by *Roos*, the inherent nature of an inter-party attorney and client taxation is that it 'gives little more than a taxation between party and party, except that any necessary letters to and attendance on the client are allowed'.

[78] On the contrary, it is a corollary of the decision in *Loots* that, when the Taxing Master finds that extraordinary F or exceptional circumstances, as contemplated by Rule 70(5)*(a)*, are indeed present, the intermediate basis of taxation as defined in *Nel* must be generous to the full extent there required, so as to give the costs creditor the full indemnity envisaged in *Nel*, which, to the extent that is justified by the circumstances of the case, may substantially exceed G the party and party indemnity (and will not be limited to the mere additional allowance of the letters and attendances referred to by *Roos*).

Nel reconciled with *Loots*: the practical realisation of the objective of an inter-party attorney and client costs order H

[79] *Nel* contemplates that when a trial Court makes a 'special' costs order that one party should pay the costs of another taxed as between attorney and client, it does so for either or both of the following two reasons, the first of which has regard to the conduct of the party ordered to pay the costs, and the second of which takes account of the effect which that party's conduct *may* (but not *must*) have had on the costs that the other party or I parties became obliged to incur:

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(1) The first reason, but not the main reason, for such a special order, is punitive. [46] It is an expression of A the Court's censure of reprehensible conduct on the part of the costs debtor that caused the litigation or that made the proceedings unduly burdensome. Such censure is in itself punitive. It brings with it the further punitive consequence that the costs debtor's liability for B costs will be increased by the amount that the Taxing Master finds to be justified in the light of the second and main reason for the special order.

(2) The second and main reason (or 'true explanation') [47] is that the Court or Judge making the order considers it likely that, when the costs come to be taxed, it will be found by

the Taxing Master that the reprehensible conduct of the costs debtor that was censured by the Court, was conduct C that caused the costs creditor reasonably to incur extra costs that would not be recoverable on a strict party and party taxation; and that the Court considers it to be just in the circumstances of the case 'to ensure more effectually than it can do by means of a judgment for party D and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation . . . the Court will try to ensure, as far as it can, that the successful party is recouped. I say ''as far as it can'' because there may be a considerable difference between the amount of the attorney and client E bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party.' [48]

[80] The Taxing Master is therefore required to look to the circumstances in which the Court came to order one party to pay the F costs of another taxed as between attorney and client. He must do so in order to be able to consider whether, and to what extent, the conduct of the costs debtor that resulted in the special costs order also resulted in the costs creditor's having in fact incurred additional expenses that would not have been incurred but for the misconduct of the costs debtor. G

[81] Broadly speaking, there are at least two different sets of circumstances that result in such an order: [49]

(1) where the parties have agreed the one should pay the costs of the other taxed as between attorney and client; and

(2) where there has been no such agreement, and where the Court has H found that the conduct of one of the parties that gave rise to the litigation, or his conduct of the litigation itself, was reprehensible, and that it deserved the censure of the Court. As was held in *Nel*, such an order is not merely punitive. [50] It implies that, to the extent that the inappropriate conduct of one of the party may, I

on a taxation of the costs, be found by the Taxing Master to have resulted in the other A party's having reasonably incurred extra costs that would not be recoverable on a taxation as between party and party, such other party (the 'innocent' party, or the 'victim' of the inappropriate conduct of the other party) should be afforded a fuller indemnity for the costs that he has reasonably incurred than he would receive on a party and party taxation. [51] B

[82] *Loots* decided that even when one party has been ordered to pay the costs of another taxed as between attorney and client, the Taxing Master

'is bound to apply, or at least to be guided fairly rigidly by, the scale of fees provided in the tariff, and only to depart from them when in his discretion extraordinary or exceptional cases present themselves where strict adherence would be inequitable'. [52] C

[83] It is, I suggest, self-evident that either a case in category (1) above (a Court order giving effect to an agreement to pay attorney and client costs) or a case in category (2) above (a Court order for attorney and client costs, without agreement on it between the parties) D may, when the particular circumstances of the case are considered by the Taxing Master, be found to be an 'extraordinary or exceptional' case within the meaning of Rule 70(5)*(a)*. In the exercise of his discretion, therefore, the Taxing Master may be released, by the provisions of Rule 70(5)*(a)*, from strict adherence to the tariff in either of these two categories of cases. [53] E

Agreement to pay costs taxed as between attorney and client

[84] With regard to category (1), the fact remains that the mere agreement of one party to pay the costs of the other as between attorney and client does not necessarily make the case F 'extraordinary or exceptional' within the meaning of Rule 70(5)*(a)*. Nor does the mere fact that the Court has made an order that gives effect to such an agreement. That taxation of costs as between attorney and client does not necessarily justify any departure from the tariff was recognised long before Rule 70(5)*(a)* was promulgated. In *Gross v Svirsky* 1923 TPD 422, Curlewis J said (of a bill taxed for payment by a client to his own attorney), at 425: G

'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 A 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.'

[85] The logic of this proposition is unassailable. It applies with equal force to the taxation of a bill payable by one party to B another that is to be taxed as between attorney and client. [54] 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 C 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. D

[86] There need not be anything 'extraordinary or exceptional' about a case in which the costs are to be taxed as between attorney and client. When there is nothing extraordinary or exceptional, or if adherence to the tariff would in any event be equitable, the Taxing Master will rightly adhere to the tariff. *Loots* is an example of such a case. E

[87] On the other hand, a case in which the parties have agreed that one should pay the other's costs taxed as between attorney and client, and a case in which such an agreement has been made an order of Court, may, on consideration of the circumstances, turn out to have features that make it 'extraordinary or exceptional' within the F meaning of Rule 70(5)*(a)* and one in which strict adherence to the tariff would be inequitable. When that is shown to be the position, the Taxing Master will be free to depart from the tariff to the extent justified by the circumstances. G

Attorney and client costs ordered without agreement between the parties

[88] Similarly, with regard to category (2), there need not necessarily be anything 'extraordinary or exceptional', for the purposes of Rule 70(5)*(a)*, about a case in which a Court has, without agreement between the parties, ordered one of them to pay the costs of another, taxed as between attorney and client. As H indicated above, the Court or Judge may have used such an order as a means of censuring one of the parties ('the costs debtor') for his inappropriate conduct of the litigation by making such an order in the expectation that, when it comes to taxation of the costs, the Taxing Master may very well find that the inappropriate conduct of the costs I debtor has caused the costs creditor reasonably to incur costs that are not recoverable on a strict taxation as between party and party. However, if, despite the Court's censure of the costs debtor, J

a consideration of the details of the bill of costs, in the light of the A inappropriate conduct of the costs debtor, satisfies the Taxing Master that the costs creditor was not in fact put to any extra costs that are not recoverable in accordance with the tariff, no good reason for departure from the tariff will have been shown. If, in such circumstances, the Taxing Master should adhere to the tariff, the result will not necessarily be inequitable. Nor will it necessarily B mean that the Taxing Master taxed the bill as between party and party when he was required to tax it as between attorney and client. As *Loots* has shown, if it turns out, in the course of an inter-party attorney and client taxation, that the case is not an 'extraordinary or exceptional' one, there will be no good reason for the Taxing Master to depart from the tariff. C

[89] On the other hand, a Taxing Master should never overlook the fact that, as a general rule, when there has not been agreement between the parties that the costs be taxed as between attorney and client, a Court or a Judge only makes such a special costs order in circumstances that, in the opinion of that Court or Judge, mark a case D as one of the 'exceptional or extraordinary cases' contemplated by Rule 70(5)*(a)*. In making such an order, the Judge anticipates that, when the Taxing Master comes to tax the costs, he will be likely to find that strict adherence to the provisions of the tariff would be inequitable. Generally, the Judge will have indicated in his or her judgment that the reason why one of the parties (the E costs debtor) has been ordered to pay the costs of another taxed as between attorney and client is that the costs debtor has made himself guilty of

reprehensible conduct relating to the litigation. The general nature of the inappropriate conduct will usually have been set out in the judgment. F

[90] For example, the judgment may indicate that a special costs order was made because the costs debtor had inappropriately made dangerously plausible, but unjustified, imputations of fraud against the costs creditor. Such conduct may well have produced the reasonable G consequence that the costs creditor incurred considerable extra expense, not all recoverable on a party and party taxation, in numbers of witnesses interviewed and called, in numbers of consultations held and the length of consultations, in the rates paid to his legal advisers, and in the length of the trial, all in a justifiably determined effort to ensure that no kind of stigma of fraud would H remain attached to his name after the litigation was over. In such circumstances, the Court expects the Taxing Master to keep in mind, in his consideration of each item in the bill of costs, the conduct of the costs debtor that was the cause of the special costs order; to recognise the extraordinary and exceptional nature of the case in the intensely damaging threat with which it confronted the costs creditor; I and to acknowledge the need to ensure that the strictness of the tariff does not result in the costs creditor being out of pocket as a result of the reprehensible conduct of the costs debtor. Therefore, every item in the bill must be examined to see whether equity requires that it should be allowed on a basis more generous to the costs creditor than that of the J

tariff. It may be that not all items will pass this test. But the Taxing Master should apply his or her mind to each item on the A bill in order to determine the question.

[91] Other examples include cases that are 'extraordinary or exceptional', within the meaning of Rule 70(5)*(a)*, and have resulted in a special order for attorney and client costs, because the B costs debtor has acted frivolously or vexatiously; or because he has drawn out the case with a large number of unmeritorious allegations or defences; or because he has indulged in over-lengthy and unjustified cross-examination; or has burdened his opponent, or the record, with a mass of irrelevant documents; and so on. In each case, it is for the Taxing Master to apply his mind to the question whether, and to what C extent, the particular inappropriate conduct of the costs debtor that has been censured by the Court, reasonably caused the costs creditor to incur extra expense that is not recoverable on a taxation as between party and party, and to what extent equity requires a departure from the tariff to ensure that, in accordance with the intermediate basis of taxation established in *Nel*, the costs creditor is not left D out of pocket. No item on the bill should be left out of this consideration. It is the intention of the Court that the costs creditor should have a full indemnity, limited only by the need to ensure that injustice is not done to the costs debtor in the possible ways illustrated in *Nel*. E

The discretion of the Taxing Master

[92] In terms of Rule 70(5)*(a)*, it is for the Taxing Master to decide whether 'extraordinary or exceptional' circumstances are or are not present, whether they have or have not affected the F costs incurred by the costs creditor, and whether strict adherence to the tariff would or would not be inequitable. When a Judge has made a specific finding that the party ordered to pay the costs (the costs debtor) has conducted his case in a manner deserving of the Court's censure by means of a special order for costs to be taxed as between attorney and client, it is generally a strong indicator to the Taxing G Master that in the Judge's view the costs debtor has conducted his case in such a way as to be likely to have caused the costs creditor to incur costs that ought to have been unnecessary and that may not be recoverable on a taxation as between party and party. Such a finding by the Judge would therefore often lead the Taxing Master to conclude that the case is indeed an extraordinary or exceptional one for the purposes H of Rule 70(5)*(a)*, and that a consideration of the bill of costs will show that strict adherence to the tariff would be inequitable. If the Taxing Master finds that the case is an exceptional or extraordinary one, and that strict adherence to the tariff would be inequitable, his finding will both require and justify the application I of the intermediate basis of taxation in the generous manner contemplated by *Nel*. In such a case, the Taxing Master must address his mind to the question of the extent to which the extraordinary or exceptional nature of the case caused the costs creditor reasonably to incur extra costs that are not recoverable on a taxation as between party and party. He will J

allow those extra costs and will tax them off only to the extent that there would otherwise be A injustice to the costs debtor.

[93] On the other hand if, despite the special costs order, a consideration of the bill of costs satisfies the Taxing Master that the case was not extraordinary or exceptional, or that adherence to the tariff would not be inequitable, even the intermediate basis of taxation cannot yield much, if anything, more than a party and party basis of taxation, as was shown in the case of *Loots*. Moreover, even if the Taxing Master finds that the case was B extraordinary or exceptional, the particular bill of costs may yet reveal that the costs creditor did not in fact incur any more costs than were in any event recoverable on a taxation as between party and party. In that particular event, the taxation on the intermediate basis C recognised by *Nel* will obviously not yield anything more than a party and party taxation.

[94] Finally, the mere agreement of a party to pay another party's costs taxed as between attorney and client does not, of D itself, establish that the case was exceptional or extraordinary for the purposes of Rule 70(5)*(a)*, or that adherence to the tariff would be inequitable. The Taxing Master has still to apply his mind to the bill, and to the circumstances of the litigation that gave rise to it, in order to decide those questions. If he holds that Rule 70(5)*(a)* applies, he must go on to determine the extent (if any) to which a departure from the tariff may be justified. E

The further influence of the error in *Roos*

Jacobs and Ehlers *Law of Attorneys' Costs and Taxation Thereof* (1979)

[95] In Jacobs and Ehlers *Law of Attorneys' Costs and Taxation Thereof* (1979) at 56, the learned authors also quote the F above-quoted passage from *Roos* at 9, including the proposition that a taxation as between attorney and client where the costs are payable by one party to another 'gives little more than a taxation between party and party except. . .'. They add that guidance as to the application of the principles set out in G *Roos* is to be found in certain remarks in the judgment of Tindall JA in *Nel*, above. With all due respect to the learned authors, they have failed to recognise that the last-mentioned proposition in *Roos* is irreconcilable with the decision in *Nel*. This question is not taken further in the 1983 Supplement to *Jacobs and Ehlers*. H

[96] At 60 of the 1979 edition of *Jacobs and Ehlers* the learned authors base themselves on the assumption that the proposition in *Roos* is correct, rather than on the decision in *Nel* to the effect that an order for costs as between attorney and client expresses the Court's intention that the successful party should receive a substantially fuller indemnity for his expenses than he would receive on a party and party taxation. On this erroneous assumption, they pose the following question: I

> 'In the light of the fact that an award of attorney and client costs gives one little more than a taxation as between party and party, the question arises whether there is any real purpose in making an award on this basis and whether the time has not arrived when effect be given to such an order in the true sense in which J

> it is meant, which is to provide a party in an appropriate case with full indemnity in regard A to that party's costs.' [55]

In my respectful view, there is no room for doubt about the correct answer to the question. It is simply that the reform envisaged by the learned authors' question was effected as long ago as 1946, by the decision in *Nel*. The confusion that has arisen subsequently is the consequence of the uncritical repetition of the proposition in *Roos* that taxation as between attorney and B client 'gives little more than a taxation as between party and party'. That proposition may reflect English law as once it was (but no longer is), but it has never been the law anywhere in South Africa, as was plainly shown by the reasoning and the decision in *Nel*. C

Attorney and *own* client orders

Enslin v Gallo 1984 (1) PH F27 (D)

[97] Didcott J had evidently made an order in *Enslin v Gallo* that the respondent in an application should pay the D costs of the applicant, taxed as between 'attorney and *own* client'. The question of what such an order meant came before Magid AJ (as he then was), presumably in the course of a review of the taxation of the costs. Magid AJ referred to the passage in *Nel*, above, at 607 - 8, in which Tindall JA had emphasised the 'considerable difference' that could arise 'between the amount of the attorney and E client bill which a successful party is bound to pay to his own attorney and the

amount of an attorney and client bill which has been taxed against the losing party'. An example of how such a 'considerable difference' could arise was afforded by 'charges in the nature of luxuries incurred with the approval of the client' which the client, by reason of his agreement with his own attorney, would be F obliged to pay. The 'intermediate' basis of taxation that was recognised in *Nel* would nevertheless require such charges to be taxed off a bill to be paid by the losing party, despite the fact that the basis of taxation was 'as between attorney and client'. To avoid injustice to the costs debtor, the 'considerable difference' could not be eliminated. G

[98] Magid AJ also quoted the above-quoted passage from p 9 of *Roos*, relating to the three principles, or types, of taxation of bills as between attorney and client, including the proposition that where one party has been ordered to pay the costs of another taxed as between attorney and client, the taxation 'gives little more than a taxation as between party and party'. In the light of that consideration, the learned Judge held that Didcott J, by H ordering the respondent to pay the applicant's 'costs as between attorney and *own* client' had

> 'clearly intended to order the respondent to pay such costs as would normally have been payable by the applicant to his own attorney; I that is to say, type (1) of *Roos's* analysis *supra*. But it seems to me that the apparent breadth of that order must nevertheless be qualified by the knowledge that the respondent was not a J

> party to the contract between the applicant and his attorney and accordingly had no say whatever in relation to the A terms of that contract.
>
> It is my view therefore that even where, as here, an unsuccessful litigant is ordered to pay the other party's costs as between attorney and own client, that order must be subject to the qualification that he is not obliged to pay costs which are ''in the nature of luxuries'' of the type referred to by Tindall JA in *Nel's* case *supra*.' B

[99] So far as appears from the report of *Enslin v Gallo*, the attention of Magid AJ was not drawn to the fact that, for the reasons set out above, the proposition in *Roos* that a taxation as between attorney and client gives little more than a taxation between party and party, even if it reflected English law at C the time, did not reflect the law applicable in South Africa as it had been stated in *Nel*.

[100] In these circumstances, I consider that the reasoning in *Enslin v Gallo* may be summarised as follows:

1. When one party has been ordered to pay the costs of another, taxation as between attorney and client affords little more D than taxation as between party and party: see *Roos* at 9. [56]
2. The intention of Didcott J was not that the respondent's liability for the applicant's costs should be limited in accordance with the last-mentioned proposition in *Roos*: the intention of the learned Judge was rather that the applicant should receive a E full indemnity in respect of all costs that the applicant would have to pay to his own attorney in accordance with a taxation for payment by a client to his own attorney, that is, a taxation of type (1) of the three types referred to in *Roos* at 9.
3. Therefore Didcott J avoided making an order for taxation of the costs as between 'attorney and client'; and the learned Judge F compensated for the supposed deficiencies of such an order by making an order for taxation as between 'attorney and *own* client'.
4. Nevertheless, having regard to the law as stated in *Nel*, even an order that one party is to pay the costs of G another taxed as between 'attorney and *own* client' does not render the costs debtor liable for costs that must be taxed off in accordance with *Nel*. A rich man may agree to render himself liable to his own attorney for the cost of luxuries but, in terms of the decision in *Nel*, justice does not allow such a liability to be imposed upon the losing party who has become the costs debtor. H
5. In other words, when an order that one party is to pay another's costs taxed as between 'attorney and *own* client' is made in preference to an order that the costs be taxed as between 'attorney and client' (for the purpose of avoiding the supposed limitation that the costs creditor will receive 'little more than a taxation as between party and party' would yield, as suggested in *Roos*), another limitation is at once encountered. It is I the limitation imposed by our own law as stated in *Nel*: when one party is ordered

to pay the costs of another taxed as between attorney and client, justice, as defined by the decision in A *Nel*, obliges the Taxing Master to disallow certain of the costs that the costs creditor may be obliged to pay to his own attorney. The costs to be disallowed include, in particular, the costs of luxuries that the costs creditor may have bound himself by contract to pay to his own attorney. In terms of the decision in *Enslin v* B *Gallo*, such costs must be taxed off even when the order is that one party should pay the costs of another taxed as between 'attorney and *own* client'. The latter formula does not enable a costs creditor to circumvent the requirement of justice to the costs debtor, as defined in *Nel*. An 'attorney and *own* client' costs order relating to a bill to be paid by one party to another is C therefore no more than a direction to tax the bill on the 'intermediate' basis recognised in *Nel*.

6. Therefore, for practical purposes, there is no difference between

(1) an order that one party should pay the costs of another taxed as between 'attorney and *own* client'; and D

(2) an order that one party should pay the costs of another taxed as between 'attorney and client' in accordance with *Nel* (being a taxation that must ignore the inapplicable English law limitation referred to in *Roos*, to the effect that such a taxation 'gives little more than a taxation between party and party'). E

[101] In my respectful view, the result of *Enslin v Gallo* is undoubtedly correct even though the reasoning starts from the incorrect premise based on *Roos*. When that incorrect premise is left aside, the conclusions that must be reached are: F

(1) when one party is ordered to pay the costs of another, taxed as between 'attorney and client', the costs must be taxed with the generosity to the costs creditor of the 'intermediate' basis of taxation as described in *Nel*, affording him the fuller indemnity there allowed (and not restricting him to 'little more than G a taxation between party and party'), while ensuring at the same time that costs not recoverable from the costs debtor in terms of *Nel*, such as luxurious expenses, are taxed off to avoid injustice to the costs debtor, even though the costs creditor may remain obliged to pay such irrecoverable expenses to his own attorney in terms of an agreement between them; and H

(2) when one party is ordered to pay the costs of another, taxed as between 'attorney and *own* client', the costs must be taxed on precisely the same 'intermediate' basis described in *Nel*, with exactly the same fuller indemnity to the costs creditor and the same limitation of recoverable expenses to avoid injustice to the costs debtor. I

[102] The conclusion reached in the last paragraph is, I suggest, consistent with the decision later made by Van Dijkhorst J in *Ben McDonald v Rudolph* (above) in 1997. Although the reasoning in *Enslin v Gallo* was different (because of the incorrect premise taken from *Roos*), J

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the result arrived at was nevertheless essentially the same. The result was consistent with A *Nel* in both cases.

The three types of attorney and client taxation restated

[103] In my view *Nel*, as applied in *Enslin v Gallo* and in *Ben McDonald v Rudolph*, establishes the B position in our law to be that only the following three categories or scales of taxation as between attorney and client are known to our law. The first two are as reflected in the first edition of *Roos* (1947) at 9. The third corrects the error made in *Roos* and is the 'intermediate' basis or scale recognised and established by *Nel*. The suggestion in the 1956 Supplement to C *Roos* that *Nel* introduced a fourth category or scale of attorney and client taxation cannot be supported. The three are:

(1) Where the costs are payable by the client to his attorney. [57] This scale, sometimes referred to as the scale of a 'pure' attorney and client taxation, is the most D generous of the three to the costs creditor (who in this instance is the attorney himself). It allows an attorney to recover from his client even certain costs, such as luxuries that the client has

agreed to pay for, that are not recoverable by that client from another party to litigation with him. [58] It is the *only* scale or basis of taxation that is properly called E 'attorney and *own* client' in our law. Generous though this scale is, it is not without limitation. The mere fact that the taxation is between attorney and own client does not of itself imply that the Taxing Master must ignore the tariff in Rule 70: a departure from F

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the tariff is justified only if the client has so agreed, or in an A 'extraordinary or exceptional case', within the meaning of Rule 70(5)*(a)*. [59]

(2) Where the costs are payable to a litigant out of a general or common fund (*Brooks v Taxing Master and Another* 1960 (3) SA 225 (N)). [60] B

(3) Where the costs are payable by one party to another (extending also to the rarer situations in which the costs are payable out of a fund which belongs to other parties and in which the party to be paid has no interest). This is the 'intermediate' scale or basis of taxation recognised and established as a feature of the South African law of costs by *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607 - 8. It is incorrect to state, as C was stated in *Roos* in 1947, that this third scale 'gives little more than a taxation between party and party'. It is also incorrect to state, as was stated in the 1956 Supplement to *Roos*, that *Nel* introduced a fourth scale or basis of taxation as between attorney and client. The fact is that *Nel* recognised that the English Rule of Court that had D resulted in the third scale yielding little more than a party and party taxation in England, had never applied anywhere in South Africa, and that the South African law and practice of inter-party taxation as between attorney and client was different from the English law and practice. In South Africa, the objective of such a taxation was, and still remains, a substantially fuller indemnity for the costs creditor E than would be achieved by a party and party taxation in the circumstances. 'As far as it can', [61] such a taxation is to afford the costs creditor a complete recoupment of the costs for which he is liable to pay his own attorney on a 'pure' attorney and client taxation referred to in (1) above. However, the limitation 'as far as it can' means that certain kinds of costs allowable on a 'pure' attorney and client taxation must be taxed off F in an inter-party attorney and client taxation. The costs to be taxed off in such an 'intermediate' taxation are those of the kind disapproved in *Nel* for recovery by one party from another, such as, for example, luxurious expenses that a client may have bound G himself by agreement to pay to his own attorney, including special fees to counsel and fees to the attorney calculated at rates that the Taxing Master, after duly taking into account the Court's intention that the costs creditor should have a full indemnity short of injustice to the H costs debtor, adjudges, in the exercise of his discretion, to be unreasonable.

Whether the Court's discretion relating to costs empowers it to devise a new type of attorney and client costs order, not falling A within one of the three types referred to above

Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T) B

[104] In my respectful view, Swart J came to the conclusion in *Cambridge Plan* that the Court's discretionary powers relating to costs orders are wide enough to allow the Court to devise a previously unknown scale of taxation that would facilitate the taxation of a bill payable by one party to another on a new basis. C

[105] The learned Judge was called upon, in a review of the taxation of a bill of costs, to interpret an order that one party pay the costs of another 'taxed as between attorney and *own* client'. [62] As I understand the judgment, the learned Judge held, in effect, that the order was to be interpreted as having directed the Taxing Master to tax the bill on a new scale of D taxation that would yield the costs creditor more than the 'intermediate' basis of taxation recognised in *Nel* and referred to in category (3) above, but possibly less than the amount of a 'pure' attorney and client taxation referred to in category (1) above. If I have correctly grasped and summarised the essence of this

most carefully considered decision, I would, with the greatest of respect, disagree with it for the reasons that follow. E

[106] In *Cambridge Plan*, Swart J reviewed the taxation of a bill of costs relating to what he described as 'admittedly a complicated trade mark matter'. [63] The respondents had been ordered to pay the costs of the applicants taxed 'on the scale applicable between an attorney and his own client'. The judgment on F review does not seem to contain any other reference to the grounds or reasons given by the Court that made the costs order ('the trial Court') for having made such a special order. In the absence of any suggestion of any specific kinds of impropriety on the part of the costs debtor in the conduct of the proceedings, the likelihood seems to be that the special costs order was made on the general basis that the G costs debtor had infringed the trade marks of the costs creditor in certain ways, and had then gone further and defended the infringement proceedings in a manner that had led to great complexity in bringing the facts to light and in applying the law. H

[107] The complications resulting from the respondents' conduct were presumably of such an order that the trial Court was of the view that, when the bill of costs had been drawn and came to be taxed, the Taxing Master would be likely to find that the costs creditors had incurred, reasonably, an amount of costs that exceeded the costs recoverable on a party and party taxation. The order must mean that the trial Court intended to make a costs order that would afford the costs creditors a full I

indemnity in respect of the costs that they were obliged to pay to their own attorney, 'as far as it A [could]', that is, as far as the law would allow. The limitations implicit in the words 'as far as it can' [64] are inescapable. As appears from *Nel*, that limitation is 'to prevent injustice' [65] to the costs debtor.

[108] It is unthinkable, in my view, that our law of costs could be without such a limitation. Our legal system could not accommodate a B costs order that was designed to permit the costs creditor, or his attorney, or the Taxing Master, to draw, tax and allow a bill of costs that was designed to impose an *unjust* liability on the costs debtor. The limitation of the assessment of a liability for costs to a *just* liability is, in my view, fundamental and inescapable. C

[109] Yet as I shall try to indicate below, with great respect to the learned Judge, it would appear that Swart J interpreted the costs order in *Cambridge Plan* as bearing the meaning that the protection of the costs debtor against injustice was to be removed to a certain extent: in other words, the learned Judge held that a certain degree of injustice to the costs debtor had been authorised by the Court's order, but not entirely without limitation. D

[110] In my respectful view, the costs order cannot support such an interpretation. Even if it could, it would mean that the costs order, so interpreted, travelled beyond the framework of our law of costs and was consequently *ultra vires*. E

[111] As I shall try to demonstrate, the reason why the learned Judge made this decision appears to be that both the trial Court that had made the order for taxation 'as between attorney and *own* client', and Swart J himself in deciding the review, F had been misled by the proposition in *Roos* that taxation 'as if between attorney and client' of a bill of costs to be paid by another party 'gives little more than party and party taxation'. Evidently believing that an attorney and client taxation in accordance with the principles set out in *Nel* would likewise 'give little more than a party and party taxation', the trial Court that G made the 'attorney and *own* client' costs order signalled that such a limitation was not to apply, and Swart J interpreted the order accordingly.

[112] The attempt to escape from that supposed limitation inherent in the basis of taxation according to the third scale in *Roos* and, so it was apparently accepted, in the basis of H taxation defined by *Nel*, confronted Swart J with what evidently appeared to the learned Judge to be a new problem. If the effect of an order to tax 'as between attorney and *own* client' a bill that was to be paid by one party to another was to free the Taxing Master from the limitations in *Roos* and *Nel*, was the result that the costs creditor and his attorney were at the same time left free to exploit the situation (and to I oppress the costs debtor) by agreeing between themselves upon extraordinarily high fees to counsel, and also

on an exceptionally generous rate of remuneration for the attorney? If not, where was the Taxing Master to draw the line? A

[113] Features of the taxation in *Cambridge Plan* included the following:

(1) The applicants (whom I shall sometimes refer to as 'the costs creditors') had made an agreement with their own attorney to pay him at the rate of R250 per hour, a rate that exceeded the rate then B applicable in terms of the tariff in Rule 70. [66]

(2) The fees committee of the Transvaal Law Society had written to the applicants' attorney expressing the opinion that, having regard to the circumstances placed before them, a fee as between attorney and client of R250 per hour for the attorney's professional services was C reasonable. [67]

(3) Senior counsel had provided the applicants with a memorandum setting out how the Taxing Master should approach her task. In the memorandum, counsel had said amongst other things that, notwithstanding the order that the bill was to be paid by the respondents to the applicants, the Taxing Master should tax the bill as if it was to be D paid by the applicants themselves to their own attorney, that is, according to the first of the categories of attorney and client taxation mentioned in *Roos*, at 9. The only exception that counsel is said to have mentioned was that if the agreement between the E applicants and their attorney had led to costs in the nature of luxuries, the luxuries should be taxed off and disallowed for payment by the respondents as the costs debtors. Counsel said further that the Taxing Master would misdirect herself if she merely applied the tariff in Rule 70, and that she would be obliged to apply her mind to the agreed rate of R250 per hour in the light of all the circumstances, F including the opinion of the fees committee that it was a reasonable rate in the circumstances. [68]

Comment: It appears to me that counsel's advice was in substance that the order for taxation 'as between attorney and G *own* client' of a bill to be paid by one party to another required taxation in accordance with *Nel*, that is in accordance with an order for taxation of such a bill 'as between attorney and client' *without regard to the erroneous proposition in Roos to the effect that an attorney and client taxation gives little more than taxation between party and party*. To the extent that H this was indeed what counsel's advice boiled down to, it was in my view correct advice.

(4) The Taxing Master nevertheless held herself to be bound by the tariff in Rule 70. [69] She taxed the bill accordingly.

[114] The applicants, as costs creditors, felt that the Taxing Master had in effect ignored the special costs order; that she had in substance taxed the bill as between party and party; and that in so I doing she had allowed

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them only to recover a substantially smaller proportion of their costs than the costs order had entitled them to. A They accordingly instituted the review of the taxation.

[115] Features of the review proceedings in the *Cambridge Plan* case before Swart J were:

1. The review judgment, which includes summaries of the submissions of the parties, does not disclose the nature of the conduct of the costs debtor that had caused the Court to make a special costs B order. So far as can be seen, the Taxing Master did not give, and Swart J was not asked to give, and for want of the necessary information could not give, consideration to the question of how, or to what C extent, the conduct of the costs debtor had caused the costs creditor reasonably to incur additional costs that would not have been recoverable on a taxation as between party and party.

Comment: In my respectful opinion, the rationale of the intermediate basis of taxation recognised in *Nel* is D precisely that a special costs order is not merely punitive: it is essentially to indemnify the costs creditor not only for party and party costs but also for such additional costs as he may reasonably have incurred as a result of the particular conduct of the costs debtor of which the Court disapproved and that caused the Court to make the special costs order. When such a special costs order is made, it is E necessary, in my view, for the Taxing Master to make inquiries, and to form a view, about the

degree to which the reprehensible conduct of the costs debtor caused the costs creditor reasonably to incur costs exceeding those that would have been recoverable on a taxation as between party and party. If such a comparison is not made, there is no F criterion by which to measure the costs incurred by the costs creditor that exceeded the party and party costs, or to gauge the reasonableness or otherwise of those extra costs.

2. In stating her case for the purposes of the review in *Cambridge Plan*, the Taxing Master referred to Jacobs and G Ehlers *South African Law of Costs* and in particular to the apparent approval by Eksteen J in *Loots v Loots* (above) of the three scales of attorney and client costs as set out in *Roos*, including the proposition in *Roos* that the third of such scales (an inter-party attorney and client taxation) 'gives little more than a party and party taxation'. [70] H

STEGMANN J

Comment: In this regard, the Taxing Master in A *Cambridge Plan* was, for understandable reasons, misled by the erroneous proposition in *Roos*. As indicated above, although the incorrect proposition in *Roos* was quoted by Eksteen J in *Loots*, it formed no part of the *ratio decidendi* of the case; nor could it have, because it was fundamentally at odds with the authoritative statement of our law in *Nel*. [71] B

3. Swart J considered his first task to be to interpret the costs order for payment by one party to the other of costs taxed 'as between attorney and *own* client'. [72]

4. The learned Judge inferred that the trial Court that had made the costs order had had 'the intention . . . to allow the applicant C to be recouped more fully than would have been the case in an ordinary attorney and client order, the implications of which must have been well known to the Court'. [73]

5. Swart J did not specify the implications that he had in mind as being well known to the trial Court that had made the special costs D order. Having regard to later passages in his judgment, [74] it appears that one of the assumed 'implications' to which the learned Judge was probably alluding was the erroneous proposition in *Roos* to the effect that an inter-party taxation as between attorney and client 'gives little more E than a taxation between party and party'. As I understand the above-quoted proposition of Swart J, its essence was that the trial Court that had made the special costs order had assumed that 'an ordinary attorney and client order' had the inherent shortcoming that it would give the costs creditor 'little more than a taxation between F party and party'; and that the trial Court had therefore ordered taxation 'as between attorney and *own* client' in order to compensate for the assumed shortcoming of an 'ordinary attorney and client order', and to ensure that the costs creditor would recoup his expenses more fully. G

STEGMANN J

Comment: In my respectful view, Swart J may well have been correct in his belief that the Court that had made the order for A taxation of the costs as between 'attorney and *own* client' had done so in order to compensate for the perceived (but in reality non-existent) shortcoming of an order for costs to be taxed 'as between attorney and client', as alleged in *Roos*. For the reasons I have already given, I consider that the way to deal with that B situation was to point out the error made by *Roos* (an error that was evidently acted upon by the trial Court that made the 'compensating' costs order in *Cambridge Plan*); to point out further that an order for costs taxed 'as between attorney and client' was not to be interpreted in the parsimonious and self-defeating manner suggested in *Roos*, but in the C appropriately generous, meaningful and just manner authoritatively laid down in *Nel* (above) as the 'intermediate' basis of taxation; that there was therefore no need for the 'compensation' apparently aimed at by the trial Court that made the order for the costs to be taxed 'as between attorney and *own* client' in D *Cambridge Plan*; and that the apparent objective of that Court would be achieved, as far as it could be achieved within the limits of the law, by taxing the bill according to the 'intermediate' basis recognised in *Nel*. However, this was not the solution found in *Cambridge Plan*. E

6. Swart J considered the crux of the review before him to be whether the Taxing Master had been right or mistaken in taking the approach that *(a)* she had remained bound by the tariff; and at the same time, and *(b)* had taxed the bill on the third of the '*Roos*' scales. [75]

Comment: F

(1) I would respectfully comment that such an approach, in terms of which *(a)* and *(b)* are satisfied simultaneously, could not ordinarily be valid in any case which is 'extraordinary or exceptional' within the meaning of Rule 70(5)*(a)*. In terms of the law as stated in *Nel*, and as applied in *Loots*, it is only in a case such as *Loots* (in G which the special costs order was made by agreement, and which had no 'extraordinary or exceptional' feature that caused the costs creditor reasonably to incur extra costs not recoverable on a party and party taxation) that a taxation as between attorney and client will be the same as a taxation in accordance with the tariff. In such a case there is nothing to justify a departure from the tariff. It is therefore only H in such a case, of which *Loots* is an example, that *(a)* and *(b)* above can be satisfied simultaneously.

(2) Cases such as *Cambridge Plan*, in which there has been no agreement between the parties that one party should pay the costs of the other as between attorney and client, tend to be I different. The Court evidently imposed the special costs J

order without agreement between the parties. A Court does so, generally speaking, A only on the ground of some form of reprehensible conduct on the part of the party ordered to pay the costs; or it may do so if there is some other good reason to afford the costs creditor, at the expense of the costs debtor, a more complete indemnity for his costs than is given by taxation between party and party. In such a case, there are generally serious grounds to justify a finding by the Taxing Master that the B matter is indeed an 'extraordinary or exceptional case' contemplated by Rule 70(5)*(a)*. When that is his finding, the Taxing Master is free to depart from the tariff, and indeed must so depart if equity requires it. C

(3) The special costs order is ordinarily an indication that the Court or Judge who made the order expects that, when the bill of costs has been drawn and comes to be taxed, the Taxing Master will be likely to find that the case is indeed 'extraordinary or exceptional' within the meaning of Rule 70(5)*(a)*. The Judge's expectation would be based on the view that the bill, when drawn, will probably reveal D that the improper conduct of the costs debtor caused the costs creditor, acting reasonably, to incur additional costs that he would not be able to recover on a taxation between party and party. The Judge makes the special costs order precisely because he intends that the E costs creditor should have an indemnity in respect of such additional costs as well as the party and party costs.

(4) This can be done only in accordance with the intermediate basis of taxation recognised in *Nel*, which aims at full recoupment F of the expenses of the costs creditor, short of expenses that would inflict injustice on the costs debtor. It is not within the power of the Judge to order taxation on any basis that will enable the costs creditor, or his attorney, or the Taxing Master, to inflict injustice on the costs debtor. Our law of costs knows no form of order that can G lawfully enable one party to recover from another costs of the kind that were held in *Nel* to be irrecoverable by one party from another.

7. In *Cambridge Plan*, Swart J reached a number of conclusions. I shall refer to some that are presently relevant. First, the learned Judge stated that the Taxing Master had H

'taxed the bill on the third of the *''Roos''* scales. As far as I can gather, this is also the ''intermediate basis of taxation'' referred to in the *Nel* matter, that is something between a party and party basis and the basis applicable where an attorney seeks to recover from his own client.' [76]

Comment: In my respectful opinion, a taxation on the I third scale in *Roos* can be equated correctly with one on the 'intermediate' basis in *Nel* only if the error of *Roos'* observation

that such a taxation will 'give little more than a taxation between party and J

party' is recognised at the same time. The 'intermediate' basis in *Nel* was specified A by the Appellate Division to give a much more extensive indemnity to the costs creditor: it was to afford the costs creditor a full indemnity in respect of attorney and client costs 'as far as it can', that is, subject only to the limitation of not inflicting injustice of the kind explained in *Nel* on the costs debtor. If *Roos'* observation is taken to be correct, his third basis B or 'principle' of attorney and client taxation is obviously very different from the 'intermediate' basis laid down in *Nel*. In my respectful view, it appears that in *Cambridge Plan* the attention of Swart J was not drawn to the fact that *Roos'* observation that an inter-party attorney and client taxation 'gives little more than a party and party taxation' was incorrect and could C not be reconciled with the intermediate basis of taxation recognised and established by *Nel*. Unless I have misunderstood the position, the learned Judge was misled into the acceptance of the propositions, first, that *Roos'* third basis of attorney and client taxation was the same as the 'intermediate' basis established by *Nel* and, secondly, that both were qualified by *Roos'* observation that such a taxation 'gives little more D than a party and party taxation'. For the reasons I have given, I consider that the second proposition is incorrect, and that if it is accepted as correct it also vitiates the first proposition. To the extent that Swart J appears to have been led to accept that both of these propositions are correct, and based his interpretation of the costs order in *Cambridge Plan* on them, I am respectfully of E the opinion that the learned Judge's interpretation of that order cannot be supported. F

8. A further conclusion reached by Swart J [77] on the basis of the erroneous equation between *Roos'* third principle of attorney and client taxation and the 'intermediate' basis in *Nel*, on the footing of *Roos'* incorrect observation about the effect of the taxation may be summarised as follows:

   (1) The learned Judge said that (as had been recognised in *Nel*, at 607) 'there is a difference (which may be vast) G between what a successful litigant can recover from the loser and what his own expenses are'. [78]

   (2) Further 'this discrepancy is due to the protection offered to the unsuccessful litigant because of considerations of fairness and equity by the institution and the law of H taxation'. [79]

   (3) The learned Judge went on to hold that 'reprehensible conduct on the part of one of the parties' may 'make it unfair or inequitable that a litigant should be afforded the normal protection', so that 'a litigant by his conduct has placed himself substantially outside the ambit of fair play', and 'the Court voices its displeasure by I *pro tanto* lifting the shield of

protection, allowing the successful party to recover more of his expenses resulting from A claiming his rights.' [80]

   (4) The idea of removing the law's protection of the costs debtor against injustice (a protection entrenched by the Appellate Division in *Nel* [81]) led the learned Judge to a further conclusion expressed as follows: B

> 'The present order was obviously motivated by such an approach. Indeed, the form of the order proclaims it. Not only were party and party costs not awarded, but attorney and client costs were not awarded. The Court must be taken to have been aware of the limitations on recoverability in an attorney and client award and C obviously intended, insofar as it could be achieved, that those limitations should not apply and that the applicant should be entitled to recover its expenses. At the same time I have no doubt that the order also comprises important, albeit unexpressed, qualifications:
>
> . . .
>
> (iii) that lifting the shield of protection does not mean discarding it. Only to the extent of the order must the respondents D be mulcted. They are still entitled to be treated fairly and equitably within the ambit of the wider costs order.'

Comment: In my respectful view, the idea of lifting the shield of protection against injustice so as to allow a certain E measure of injustice against the costs debtor, but no more injustice than is fair and equitable, is difficult to grasp in principle, and impractical to apply. Save where discretionary powers are concerned, our system of law does not generally invest the Courts with the power to temper law with what a particular Court may take to be equitable in the peculiar circumstances of a particular case. The dichotomy between F law and equity that was once a feature of the English legal system has never been a feature of our own. I would respectfully suggest that this aspect of the decision in *Cambridge Plan* is not a correct reflection of our law of costs.

9. Swart J also raised the question whether the *Roos* analysis was wide enough to cover an order for costs to be paid by one G party to another, taxed as between attorney and own client; and the further question whether the Taxing Master, by taxing the bill in accordance with the third *Roos* scale, had implemented that order. [82] At this point the learned Judge stated, in respect of the third attorney and client scale in H *Roos*: 'the third scale, which admittedly provides (and did in this case provide) little more than a taxation between party and party'. [83] This statement reveals beyond doubt that the learned Judge was indeed misled by the fallacious proposition in *Roos*.

10. The learned Judge considered that the costs claimed did I 'technically, fall under the third scale, but simply to leave it at that loses

sight of the fact that: (i) the Court expressly awarded costs . . . on the first of *Roos*' scales, that is between A an attorney and his own client; (ii) that *Roos*' scales do not provide for the order made in this case'. [84]

11. The learned Judge went on to hold *(a)* that if, as appeared to him to be the position, the Taxing Master had interpreted the order as directing a taxation on the third of the *Roos* B scales, she had misdirected herself; [85] and *(b)* that the Taxing Master had also erred in considering herself bound by the tariff. [86]

12. In the light of these findings, Swart J came to the conclusion that (without laying down any rules that would necessarily be applicable to *all* such orders) any order that a bill of C costs to be paid by one party to another is to be taxed as between attorney and *own* client, should be interpreted in the light of the particular circumstances of the case together with certain general propositions set out by the learned Judge in paras *(g)*(i), (ii) and (iii). [87] I deal with them in sequence: D

(1) Paragraph *(g)*(i): inter-party taxation on the first scale: In the words of Swart J: [88]

> '. . . the ostensible purpose of the order . . . is to recompense the successful litigant as far as it can be done. To that end, subject to such qualifications as may follow, taxation should take place on the first of the ''*Roos*'' scales. If it be E accepted that, as the practice now stands, an attorney and client order between parties is not intended to provide full recompense, and if the *Roos* classification is valid, the Court order can only be implemented by taxing this bill on the first of the aforesaid scales.'

Comment: F

(a) I respectfully agree with the first proposition (that the purpose of an order for taxation of an inter-party bill of costs 'as between attorney and *own* client', is to recompense the successful litigant as far as can be done; that is, as far as is lawful within the limits set by *Nel*). However, with due respect to the learned Judge, I would point out that the G proposition that an inter-party taxation should take place on the attorney and client scale that is applicable when an attorney is to be paid by his own client (the first scale) cannot be reconciled with *Nel* precisely because it tends to lead to injustice against H the costs debtor in the ways referred to in *Nel*. The most obvious injustice flows from the fact that the costs debtor may in this way be saddled with the burden of paying extravagant special fees agreed upon between the attorney and his client in terms of an agreement to I

which the costs debtor was never a party.

(b) Nel accepted that our law and practice A relating to costs derived from the English law, in which the three scales of taxation of attorney and client costs were recognised. However, *Nel* also recognised a crucial difference between the English law and our own law of costs that *Roos* B overlooked. There was an English Rule of Court that 'went too far in the extent to which it required the Taxing Master to disallow items of an attorney and client bill of costs where such costs were payable not C by the client himself to his attorney but by the other party'. [89] No equivalent rule has ever been adopted anywhere in South Africa. That unsatisfactory English Rule of Court gave rise to the comment in an English textbook, [90] relied on by *Roos*, that the third attorney and client scale of taxation (applicable to a bill payable by one party to another) 'gives little more than a taxation as D between party and party, except that any necessary letters to and attendance on the client are allowed'. It was the absence, in South Africa, of any such unsatisfactory Rule of Court that left the E Appellate Division free to determine, as they did determine in *Nel*, that taxation of a bill of costs on the attorney and client scale for payment by one party to another (the third attorney and client scale referred to by *Roos*) permits of a full indemnity to the costs creditor, limited only by the danger of injustices to the costs debtor of the kinds referred to in *Nel*. In South Africa, such a taxation is not restricted in F the way that it was in England at the time; and the comment that it 'gives little more than a taxation as between party and party', even if once true in England, has never, or at least not since *Nel*, been true in South Africa. G

(c) On the analysis of Swart J, if two propositions are correct, effect can be given to an order for payment by one party to another of costs taxed as between attorney and *own* client only by taxing the bill as if it were an attorney's bill to be paid by his own client (the first basis of attorney and client taxation). The two propositions are: H

(i) that, 'as the practice now stands, an attorney and client order between parties is not intended to provide full recompense'; and (ii) 'if the *Roos* classification is valid'. I

(d) For the reasons I have already given, I am respectfully of the view that the correct analysis of the position shows, J

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in respect of *(c)*(ii) above, that there is nothing A invalid about the classification of attorney and client taxations into three categories. They are (in abbreviated form): (i) where an attorney claims payment from his own client; [91] (ii) where the payment is to be made from a common fund; [92] and (iii) where the payment is to be made by one party to another. [93] B

What is wrong is the idea spread by *Roos* that taxation in terms of the third category 'gives little more than a taxation as between party and party'. This mistaken idea has given rise to unnecessary attempts to 'compensate' for the perceived (but C non-existent) shortcomings in an inter-party attorney and client costs order, by stipulating for contractual undertakings to pay another party's costs 'taxed as between attorney and *own* client', and by praying for orders in similar terms. When *Nel* is properly understood and applied, it is seen that the latter type of D agreement or order cannot possibly yield any more costs than the former type. In terms of *Nel*, the former type of order gives the costs creditor as full an indemnity as is legally possible, stopping short of injustice to the costs debtor. No room remains for the latter type of order to yield anything more to the costs creditor. E

(e) For the same reasons, the proposition in *(c)*(i) above cannot, with due respect to the learned Judge, be supported. It is *not* the current practice that an order that one party should pay the costs of another taxed as F

between attorney and client 'is not intended to provide full recompense'. A Correct current practice is not founded on *Roos'* erroneous proposition. It is founded on *Nel*. The intention behind such an order is therefore that the taxation should afford the costs creditor a full indemnity for all his costs, including costs not ordinarily recoverable on a taxation between party and party, limited B only by considerations of justice towards the costs debtor as indicated in *Nel*.

(f) I am therefore respectfully of the view that when a bill to be paid by one party to another has been ordered to be taxed as C between attorney and *own* client, the first approach proposed in *Cambridge Plan* to such a taxation (para *(g)*(i)) is not correct: the Taxing Master is *not* required to tax the bill on the first of the *Roos* scales, ie as if he were taxing the bill for payment to an attorney by that attorney's own client.

(2) Paragraph *(a)*(ii): the measure of the liability of the costs creditor to his own D attorney: [94] The second step proposed by Swart J in the approach to an inter-party taxation as between attorney and *own* client was to ascertain what the attorney of the costs creditor would be able to recover from the costs creditor, in E order to determine what the costs debtor should pay to the costs creditor. The learned Judge went on to discuss *expenses* and *fees* separately.

Comment:

(a) In my respectful view, this approach cannot be reconciled with the decision in *Nel*. It appears to me to F overlook the following important passage in *Nel*: [95]

> '. . . the Court in a particular case considers it just . . . to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. . . . (A) party may have incurred expense which is G reasonably necessary but is not chargeable in the party and party bill. . . . Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say ''as far as it can'' because there may be a considerable difference H between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party.'

(b) As is apparent from the remainder of the judgment in *Nel*, the limits beyond which the Court's powers do not I reach (implied by the words 'as far as it can') are limits imposed by considerations of justice towards the costs debtor. The Court has no power to order a taxation on J

a basis that may, in terms of *Nel*, inflict injustice on the costs debtor. Therefore an A order for an inter-party taxation 'as between attorney and *own* client' does not, as a matter of law, authorise the Taxing Master to go any further than an order for an inter-party taxation 'as between attorney and client' as explained in *Nel*. Accordingly, the proposition in *Cambridge* B *Plan*, para *(g)*(ii), that the Taxing Master should first ascertain what the attorney of the costs creditor can recover from his own client in order to determine what the costs creditor can recover from the costs debtor, appears to me to be partly inconsistent with *Nel*. C

(c) Generally, the bill presented by the costs creditor in an inter-party taxation will include all fees and disbursements that the costs creditor is obliged to pay to his own attorney. Indeed, it may include more. Items that may be taxed off on the basis that the costs creditor is not obliged to pay them to his own attorney are D obviously not recoverable by the

costs creditor from the costs debtor. However, when that exercise has been completed, the bill has *not* been taxed in accordance with the limits established and recognised in *Nel*. In an inter-party taxation (even if the E order is for taxation as between attorney and *own* client), the question confronting the Taxing Master is not, as suggested in *Cambridge Plan*, para *(g)*(ii), 'How much must the costs creditor pay his own attorney?' It is, 'How much is the costs debtor obliged to pay the costs creditor to afford the latter the full F indemnity envisaged by *Nel*, whilst bearing in mind the just limits recognised in *Nel*?'

(3) Paragraph *(g)*(iii): the role of an agreement between the costs creditor and his own attorney: [96] In this passage, Swart J has G set out guidelines as to how far the Taxing Master, for purposes of an inter-party taxation as between attorney and *own* client, should have regard to any agreement on fees and disbursements that may have been arrived at between the costs creditor and his own attorney.

Comment:

(a) To the extent that this passage is consistent with *Nel*, I respectfully adopt it. I find nothing in H *Nel* that is inconsistent with the following words of Swart J:

'I am of the opinion that the agreement cannot be treated as if it does not exist . . . . (A)s far as the agreement is concerned, there must be this qualification, namely that . . . it cannot be enforced against the [costs debtor] insofar as, objectively I speaking, it is unreasonable. An agreement would be unreasonable if, for instance, it authorised unprofessional fees or work or expenses which were unreasonable or unnecessary in J

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the sense I have indicated above. As far as expenses are concerned, they would, for instance, be A unreasonable if they were not in broad accordance with, say, counsel's professional fees or the normal fees of investigators and so forth, and were incurred with the approval of the client to simply load the dice against his opponent.' B

For the reasons I have already given, I consider that there is no difference between an inter-party taxation 'as between attorney and client' and 'as between attorney and *own* client'. Therefore, it seems to me that the above-quoted passage is equally applicable in both situations. C

(b) Nel recognised that in an inter-party taxation as between attorney and client, the Taxing Master is not necessarily confined to the tariff. Tindall JA said (with emphasis added by me): [97]

'Theoretically, a party and party bill *taxed in accordance with the tariff* will be reasonably sufficient for that D purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill.'

The implication that the more complete recoupment envisaged by *Nel* contemplated departures from the tariff, is plain. E

(c) The costs incurred by the costs creditor are always based on some form of agreement between him and his attorney, and in some instances also on agreements with third persons, such as expert witnesses. Agreements for fees exceeding the tariff are by no means unusual. It appears to be inevitable that the Taxing Master, when F assessing the more complete indemnity envisaged by *Nel* for a costs creditor, will from time to time have to apply his mind to the question whether such an agreement was within the fair and just limits permitted by *Nel*, or whether the agreement, in some respects at least, went beyond those limits and provided for 'luxuries' of a kind disapproved in *Nel*. Obviously, not every departure from G the tariff amounts to such an irrecoverable 'luxury'. As accepted in *Nel*, the circumstances may render departures from the tariff 'reasonably necessary' (and therefore recoverable by one party from another on a taxation as between attorney and client) even though not H recoverable on a taxation as between party and party.

(d) At 602I Swart J said:

'The prime indicator must, however, be the agreement and not the tariff.' I

This statement seems to me to have related to the particular facts of the case before the learned Judge and, J

if that is correct, I have no comment. At the same time, I would respectfully point out that A it would not be correct to read these words as laying down that whenever a costs creditor has an agreement with his own attorney relating to costs, and when the costs debtor is obliged to pay costs taxed as between attorney and client (or attorney and *own* client), that agreement, and not the tariff, is to be regarded as the starting point (or 'prime indicator') for the determination of what B is reasonable for the costs debtor to pay in the particular circumstances of the case. The question is one to be determined by the Taxing Master in the exercise of his discretion. In exercising that C discretion, he is required to take due account of all relevant factors without over-emphasising any of them. The tariff is always one of the relevant factors. Also relevant are all indications that the case is 'extraordinary' or 'exceptional' within the meaning of Rule D 70(5)*(a)*, and indications that adherence to the tariff would be inequitable. Any agreement by the costs creditor to pay his attorney at rates exceeding the tariff, and particularly the reasons for such an E agreement, are obviously relevant to the question whether adherence to the tariff would be inequitable; and due consideration must be given to such an agreement and the reasons for making it. But there is, in my view, no room for any general rule of law or practice to the effect F that any agreement that the costs creditor may have made with his own attorney to pay fees at rates exceeding the tariff must serve as the 'prime indicator', or principal guideline, for determining what amounts to a reasonable rate of remuneration to be paid by the costs debtor. Any such rule or practice would obviously be open to abuse and G would facilitate the unjust oppression of the costs debtor inconsistently with *Nel*.

Summary of conclusions in respect of the supposed distinction between the taxation of a bill for payment by one party to another *(a)* between attorney and client, and *(b)* between attorney and own client H

[116] I turn to sum up my conclusions with regard to the proposition in *Cambridge Plan* that, when one party is to pay the costs of another, there is a real distinction between a taxation 'as between attorney and client' and a taxation 'as between attorney and *own* client'. I am respectfully of the opinion that: I

1. Our law of costs knows only three principles or bases of taxation of attorney and client costs. Stated briefly, in ascending order of strictness (or descending order of generosity to the costs creditor), they are: J

(1) taxation of a bill for payment of an attorney by his own A client; [98]

(2) taxation of a bill for payment of attorney and client costs out of a common fund; [99] and

(3) taxation of a bill for payment of attorney and client costs by one party to another. [100] B

2. The proposition that basis (3) gives little more than taxation as between party and party has never reflected the law anywhere in South Africa, at least not since the decision of *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597. *Nel* laid down the basis on which such a taxation was to proceed, and dubbed it 'intermediate' because it is intermediate, as regards strictness C or generosity, between basis (1) and a party and party taxation. This intermediate basis is in origin basis (3), derived from English law and adapted by *Nel* to the needs of our own legal system.

3. The misperception (traceable to *Roos*) that basis (3) suffers from the shortcoming that it gives little more than a D taxation between party and party, has led to the current situation in which attempts are frequently made, by way of agreements, and by way of prayers and orders in trial actions and in motion proceedings, to compensate for the supposed deficiency in basis (3) by means of a hybrid order. E

4. This hybrid is the order that one party (the costs debtor) is to pay the costs of another (the costs creditor) taxed as between attorney and *own* client. It is a hybrid because it inappropriately conflates basis (1) and basis (3). It purports to order and to permit a taxation that will condemn the costs debtor to pay all of the costs that the costs creditor may be obliged to pay to his own F attorney.

5. The objective of the hybrid order cannot lawfully be achieved because the law, as authoritatively stated in *Nel*, recognises that any client (in the present case, a costs creditor claiming costs from his costs debtor) may become bound to pay his own attorney certain costs that cannot justly, and therefore cannot lawfully, be recovered from a costs debtor in any circumstances. G

6. The principles of *Nel* set a limit to the costs that can lawfully be recovered from a costs debtor. To the extent that the decision in *Cambridge Plan* departs from the legal limits set by *Nel*, it is, in my respectful view, erroneous. In H particular, the decision in *Cambridge Plan* departed from the legal limits set by *Nel*, and therefore erred in five principal respects in holding (as I understand the substance of the decision, and express it in my own words) -

   (1) that Courts have the discretionary power to create a new basis of taxation, previously unknown to the law, that obliges Taxing Masters to tax bills of costs in a manner that I

circumvents the limits placed on the costs justly and lawfully recoverable by one party from another by A the Appellate Division in *Nel*;

(2) that a Court can use such power to issue an order that will oblige a Taxing Master to enable a costs creditor to recover a greater amount from a costs debtor than can lawfully be recovered in accordance with a taxation on the intermediate basis established in *Nel* B for purposes of a taxation between two parties on a scale as between attorney and client;

(3) that an order that a costs debtor should pay the costs of a costs creditor taxed on a scale 'as between attorney and *own* client' is an order that, lawfully, enables a costs C creditor to recover more than he could recover on a taxation on the intermediate basis of *Nel*;

(4) that an 'attorney and client' order (such as was considered in *Nel*) is designed to deal with 'a litigant [who] by his conduct has placed himself substantially outside the ambit of fair D play', [101] so that it would be 'unfair and inequitable that [such] a litigant should be afforded the normal protection' [102] that is ordinarily afforded to him 'because of considerations of fairness and equity by the institution and law of taxation'; [103] that there are 'limitations on recoverability in an attorney and client E award' [104] (being an award of the kind considered in *Nel*, with limitations of a kind recognised and established as law by the decision in *Nel*, for example luxurious costs and costs unreasonably incurred); that the Court is entitled to see to it 'that those limitations should not apply and F that the applicant should be entitled to recover his expenses'; [105] that the Court can enable a costs creditor to escape from the limitations imposed by *Nel* by means of an order for costs to be taxed 'as between attorney and own client'; and that the effect of such an order is that of 'lifting the shield of protection' without 'discarding it' as the costs G debtor is 'still entitled to be treated fairly and equitably within the ambit of the wider costs order'. [106]

(5) The principal errors in the *Cambridge Plan* propositions in (4) are, in my respectful view: H

(a) that the limitations on the recoverability of costs taxed on the intermediate basis established by *Nel* were wrongly identified in *Cambridge Plan*.

(b) It was assumed in *Cambridge Plan*, that (as wrongly stated in *Roos*) the limitations on such a taxation resulted I

in it yielding little more than a party and party taxation. This was an error. The true limitation in *Nel* has A no such consequence.

(c) The true limitation in *Nel* is no more than that a taxation as between attorney and client (an inter-party taxation on the intermediate basis) should preclude the costs creditor from recovering from the costs debtor all such costs as it would be B unjust to impose on the latter, even if the costs creditor has become obliged to pay those irrecoverable costs to his own attorney. Examples of such irrecoverable costs were given, including luxurious costs and costs unreasonably incurred. It is for the Taxing Master (freed from the provisions of the tariff once he is satisfied C that - as anticipated by the order for taxation between attorney and client - the case is an 'extraordinary or exceptional' one, 'where strict adherence to [the] provisions [of the tariff] would be inequitable') [107] to determine where the dividing line between justice and injustice to the D costs debtor is reached. That limit has to be set with due regard to the objective of the special costs order as indicated in *Nel*, namely to ensure that the costs creditor receives as full an indemnity for all of the expenses that he has reasonably E incurred in the relevant circumstances of the case as is consistent with stopping short of injustice to the costs debtor in the relevant circumstances.

(d) Cambridge Plan therefore errs in finding that there is a need for, or any legal room for, a costs order designed F to enable a costs creditor to circumvent the legal limit established by the decision in *Nel*, and thereby to recover more costs from a costs debtor than are lawfully recoverable in terms of the intermediate basis of taxation in *Nel*. *Nel* has set a legal maximum. There is no room, as a matter of law, to recover more. G

7. As *Nel* has set legal limits beyond which no costs can lawfully be taxed against or recovered from a costs debtor, an order designed to outflank those limits is legally ineffectual, at least to the extent that it seeks to go beyond the legal limit. H

8. Therefore, an order in the hybrid form that one party should pay the costs of another 'taxed as between attorney and *own* client', does not, as a matter of law, achieve anything more than an order in the established form that one party should pay the costs of another 'taxed as between attorney and client'. Equally, an agreement in the hybrid form takes the matter no further than an agreement to pay 'attorney and client' costs. [108] I

9. For all of these reasons, a Taxing Master is obliged to act on A an order that one party is to pay the costs of another 'taxed as between attorney and *own* client' in exactly the same way as he is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and client'. As a matter of law, there is no difference between them. Both orders are for a taxation on the intermediate basis in accordance with *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging*. B

10. It follows, in my respectful view, that, although costs are a matter within the discretion of the Court, that discretion does not extend to the power of creating a new basis of taxation previously unknown to the law. If any need for a new basis of taxation should emerge (as I do not think has occurred), it would be a matter for the C legislature, or perhaps the Rules board, to remedy.

Conclusion in respect of item 10

[117] I have already dealt with most aspects of item 10, and have found that there is no substance in certain of the grounds on which the D Taxing Master's ruling appears to have been challenged by the applicants. What remains is only the major question of whether the Taxing Master acted on a wrong principle when he taxed item 10 on the intermediate basis established in *Nel*, and refrained from taxing it on the first of the *Roos* scales in accordance with *Cambridge Plan*. In other words, should the Taxing Master E have allowed the applicants as much against the respondents as the applicants had obliged themselves to pay to their own attorney, subject only to such limitations as were recognised in *Cambridge Plan*?

[118] In my judgment, for the reasons I have set out above, there is no room for doubt about the answer to this question. Although F the order required taxation of a bill to be paid by the respondents to the applicants 'as between attorney and *own* client', the order had no meaning in law beyond the requirements of an order to tax 'as between attorney and client'. The Taxing Master was accordingly obliged to tax the bill on the intermediate basis G established by *Nel*. In respect of item 10, he had to determine, not the amount that the applicants' attorney might have obliged his own clients to pay to him in terms of the contract between them (as would have been the case if the first scale in *Roos* had provided the criterion) but, bearing that amount in mind as one of H the relevant factors to be taken into account, he had, in the exercise of his discretion, to determine:

(1) whether a consideration of the bill of costs, in the light of the special order for taxation as between attorney and (own) client, I

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justified the conclusion that the case was indeed 'extraordinary or A exceptional . . . where strict adherence to [the] provisions [of the tariff] would be inequitable', within the meaning of Rule 70(5)*(a)*;

(2) if so, in respect of which of the items on the bill a departure from the tariff was justified, and to what extent, bearing in mind the B need to give the costs creditor as full an indemnity as possible for all his costs reasonably incurred, without permitting any unjust oppression of the costs debtor, in accordance with *Nel*.

[119] In response to the applicants' challenge (which fell short of the requirements of Rule 48(2)*(b)*, *(c)* C and *(d)*) the Taxing Master has set out and explained the context of the surrounding circumstances in which he decided that, for item 10, a fee in accordance with the tariff, for the drawing up of the founding affidavit, was what was required to indemnify the applicants for their costs reasonably incurred as between attorney and client, without inflicting injustice on the respondents. In the light of D his explanation, the mere fact that he applied the tariff to item 10 does not lead to the conclusion that he failed to tax the bill, or this item, on the intermediate scale; nor does it show that he taxed it on the party and party scale. The applicants have failed to establish the ground of their objection. They have not shown that the Taxing Master exercised his discretion on any wrong principle. Therefore, in my judgment the challenge to the Taxing Master's ruling in respect of E item 10 must fail.

Item 16

[120] As set out in the bill of costs, this item reads:

'16. 06/11/01 Attending at sheriff's office for further copying of relevant information (sales and purchases, outstanding quotes, orders etc) 2hrs.' 1 700 F

[121] The Taxing Master disallowed an amount of R900, and allowed the balance of R800.

[122] The applicants' notice in terms of Rule 48(1) does not comply with Rule 48(2). It reads: G

'2. Item The Taxing Master disallowed R750 being one of the hours claimed for this necessary attendance by the applicants' attorney, notwithstanding that there is a contemporary file note confirming the time spent as two hours. Argument in

16	support of the two hours would have been addressed by the late taxation consultant.' H

[123] In his stated case the Taxing Master has recorded:

> 'Item 16
>
> As Mr Eiser was not present when this item was taxed, it is unclear why he submits that I disallowed R750 being one hour. What I I did allow was 2 hours, but at the normal High Court tariff rate of R400 per hour. As there was no need for the exercise of a legal mind for the simple job of making copies, I exercised my discretion and taxed off R900. (*Cambridge Plan AG v Cambridge Diet* above and at 603H - I, 606F - 608G and a number of further instances where the honourable Swart J applied the tariff in preference to the agreed rate.)' J

STEGMANN J

[124] In terms of Rule 48(5)*(a)* the applicants' attorney has submitted: A

> 'Item 10 [meaning 16]:
>
> Having allowed the full R750 for item 5, apart from the gross misdirection, no cogent reason has been advanced for allowing this second part of the exercise at a lower rate, and it should be allowed as claimed less R200, for the reduced rate per hour.' B

[125] Item 5 related to the attorney's attendance at the sheriff's office on 30 October 2001 when he spent four hours copying the contents of disks and documents that had been seized by the sheriff in terms of the *Anton Piller* order. He had claimed R3 400 for this purely clerical work and been allowed R3 000. With regard to item 16, he seems to have been trying to say that because of the remarkably generous treatment he had received in respect of item 5, C he was entitled to the same degree of generosity for the similar clerical work claimed for in item 16.

[126] In terms of the tariff, copying documents is not an item chargeable on a time-related basis. Section D1 provides for a rate per A4 size page. The tariff rate is R1 per page. The exercise of the Taxing Master's discretion resulted in the applicants' attorney being D treated with remarkable generosity, not only in respect of item 5 but also in respect of item 16. There is no substance whatever to the challenge to the Taxing Master's decision. If the Taxing Master erred at all, it was in his generosity to the applicants at the expense of the respondents. E

Item 18

[127] In the bill of costs, this item reads:

'18/11/01	Perusing all necessary documents and drafting confidential affidavit in respect of, *inter alia*, privileged documentation (6.5hrs)'	R5 251 F

[128] So far as appears from the bill, what happened at the taxation is unclear. An amount of R276,50 was taxed off, but that deduction may have related to item 19. If so, there is no indication that anything was taxed off item 18. However, if the R276,50 came off item 18, the balance that was allowed was R5 248,50. G

[129] In respect of this item, too, the applicants' notice in terms of Rule 48(1) does not comply fully with Rule 48(2). It merely states:

'3. Item 18	The Taxing Master disallowed one-half of the amount of time actually spent despite the presence of a contemporaneous note supporting the time claimed. Argument would have been addressed by the late taxation consultant in support of the allowance of the amount claimed.' H

[130] Despite this shortcoming, the Taxing Master has found it possible to state a case as follows: I

'Item 18

The confidential affidavit was only three pages. On tariff this would have been allowed at R300. As perusal of documents had been allowed previously and it was not clear which documents were claimed for here, I may even have been too generous in allowing what would amount to almost seven hours at J

tariff. As stated above, Mr Francesconi did not address any argument in support of this item. As an experienced A costs consultant and attorney, he would have realised that the amount I allowed was more than reasonable.'

[131] In his Rule 48(5)*(a)* submissions, the applicants' attorney states:

'8. Item 18

The confidential affidavit was an integral part of the founding affidavit and was issued at the same time as the founding affidavit. B The perusals previously allowed were for the annexures to the founding affidavit, not the confidential affidavit, as the Taxing Master well knows. The length of the affidavit does not necessarily dictate the time spent in perusing the documents and preparing the affidavit, and the Taxing Master does not state that the time spent was unreasonable, which is the test as enunciated in the *Cambridge* case at 601, in the context there mentioned. Over generosity is not a test C recognised in cases such as this. Therefore it is submitted that the full amount claimed should be allowed.'

[132] The facts relating to this item have been too vaguely stated to be fully comprehensible. This is the fault of the applicants for D their failure to comply properly with Rule 48(2)*(b)*, *(c)* and *(d)*. According to the Taxing Master, Mr Eiser was indeed present and presented the applicants' case in respect of this item, and he was therefore in a position to have complied fully with Rule 48(2). Mr Eiser's bald denial of his presence is not convincing in the light of the Taxing Master's circumstantial account of what occurred. E

[133] Nevertheless, enough is apparent to be able to see that this item is similar to item 10, dealt with above. The drawing up of the affidavit should have been claimed on the basis of a rate per page, even if the rate claimed exceeded the tariff rate of R100 per page (s 82*(c)*). Only three pages were involved. Perusal, too, F should have been charged on a rate per page, even if the rate exceeded the tariff (section C1*(c)*). The applicants' failure to indicate the number of pages perused [109] entitled the Taxing Master to disregard the vague and unspecific claim for perusal, and to allow only a reasonable fee for drafting the three-page affidavit. No case seems to have been made for asking the G Taxing Master to depart from the tariff's requirement that perusal and drafting should be charged at a rate per page or to allow a time-related charge in its place. One thing that stands out clearly is that the applicants have not made out any case for interfering with whatever decision the Taxing Master may have made in respect of item 18. H

Item 22

[134] In the bill of costs, this item reads:

'22. 08/11/0	Attending to sort arrange paginate and index papers and annexures to same 2,5hrs.	2 125'

[135] The applicants' notice in terms of Rule 48(1) does not comply I

fully with the requirements of Rule 48(2)*(b)*, *(c)* and *(d)*. It merely states: A

'4.	The Taxing Master disallowed one half of the time actually spent despite the presence of a contemporaneous note supporting the time claimed. Argument

Item22	would have been addressed by the late taxation consultant in support of the allowance of the amount as claimed.' B

[136] The Taxing Master has nevertheless found it possible to state a case in the following terms:

'Item 22

It is not clear how it can be stated that I allowed one half of the amount claimed. Mr Eiser was not present when this item was taxed. I allowed R1 000 on the basis of the High Court tariff of R400 per C hour. (See *Cambridge* judgment.)'

[137] In his submissions in terms of Rule 48(5)*(a)*, Mr Eiser has said:

'9. Item 22

The allowance alleged by the Taxing Master was based on the gross misdirections set out above. He should have departed from the tariff for the reasons set out above and deducted only R250.' D

[138] The challenge to the Taxing Master's decision is evidently based on the applicants' major objection in principle, to the effect that the Taxing Master erred in applying the intermediate basis of taxation in *Nel*, and was obliged to apply the basis of E taxation for 'attorney and *own* client' bills identified in *Cambridge Plan*. For the reasons set out above, I hold that, as a matter of law, the Taxing Master had no choice but to apply the intermediate basis of taxation in *Nel*, and that he did not err.

Item 32 F

[139] The entry in the bill of costs is:

'32. 13/11/01	Attending to transcript of taped conversation and attending in consultation with client discussing and drafting supplementary affidavit 4hrs 10min'	3 541,67 G

[140] The Taxing Master taxed off R2 041,67 and allowed the balance of R1 500.

[141] The applicants' notice in terms of Rule 48(1), which did not comply properly with Rule 48(2) in respect of this item, contained the following: H

'5. Item 32 The Taxing Master disallowed two hours and 10 minutes of time actually spent on this item, which involved the listening to of a most important tape recording of a telephone conversation involving the first respondent, the existence of which came to light only after service of the notice of motion and founding affidavit, when there are contemporary notes of the time actually spent on this I necessary attendance. Argument would have been advanced by the late taxation consultant in support of allowance of this item as claimed.'

[142] Despite the applicants' non-compliance with the Rule, the Taxing Master found it possible to state a case on this item as follows: J

STEGMANN J

'Item 32 A

The transcript of the tape recording was three pages and the affidavit was four pages. I now recall that Mr Eiser advised that it was not a very clear tape recording and that it involved listening to the tape over and over in order to correctly transcribe it. I believe, therefore, that this was also one of the items that was identified for argument before Mr Eiser's departure. In the exercise of my discretion, I allowed two hours at the rate of R750 per hour.' B

In terms of Rule 48(5)*(a)* the applicants' attorney, Mr Eiser, submitted:

'10. Item 32.

1. Mr Eiser was not there when this item was taxed. It is so that the tape was not clear and had to be listened to over and over again, but this is the case with all conversations between two persons who do C not know that they are being recorded as they talk at the same time, lower and raise their voices and do not speak clearly. To be generous to the Taxing Master his alleged recollection of Mr Eiser's presence is the result of reverse reasoning, to place him there when he was not there.

2. Because of the difficulty getting a clear transcript, the full time claimed was spent and only R483.33 would be deducted.' D

[144] There does not appear to be any good reason for this item to have been brought up in the bill as attorney's work done on a time-related basis. Most legal typists have experience in making sense of unclear tape-recordings. No reason has been advanced as to why the main task of unravelling this particular tape, and producing the E transcript of three pages, could not have been left to such a typist. The applicants' attorney would then reasonably have been entitled to a fee for perusing three pages, at a rate exceeding the tariff rate of R20 per page (s C1*(c)*) because of the need to check the accuracy of the typescript against the recording. F

[145] Drawing up the supplementary affidavit of four pages should have been brought up in the bill at a rate per page (s 82*(c)*), and the Taxing Master should have been asked to consider a rate exceeding the tariff rate of R100 per page. G

[146] That the Taxing Master exercised his discretion in favour of the applicants not only by departing from the tariff rate, but even by departing from the tariff's requirement of a rate per page, with the number of pages specified, and that he allowed the item on the basis of two hours at the rate of R750 per hour, totalling R1 500, illustrates again, in my view, that if the Taxing Master erred at all, H he erred on the side of generosity to the applicants at the expense of the respondents. No sound basis to the challenge to the decision of the Taxing Master has been established. I

Item 40

[147] In the bill of costs this item is: J

STEGMANN J

'40.	Attending at Court (on fee basis as for senior counsel) on A opposed interdict application and when respondents given further opportunity to deliver answering affidavits including preparation of five hours - matter postponed to 27/11/01.'	15 000

[148] The Taxing Master taxed off R7 500, and allowed the balance of R7 500. B

[149] The applicants' notice in terms of Rule 48(1), again not complying fully with Rule 48(2), contained the following: C

'6. Item 40 The Taxing Master disallowed all of the five hours of preparation time for which there are contemporary notes, and which were justified in the circumstances. At the hourly rate of R750 which the Taxing Master determined as being justified in this matter, another R3 750 should have been allowed. In addition a senior counsel would have been justified in charging at least R12 000 for this appearance. Argument would have been addressed by the late taxation consultant in support of the amount as claimed.' D

[150] Despite the non-compliance, the Taxing Master stated a case on this item as follows:

1. In para 3.1 of the stated case, the Taxing Master wrote:

'I reduced the amount of R15 000 charged in item 40 by R7 500 and allowed R7 500. In the exercise of my discretion in E allowing this amount I had reference to the Bar Council parameters but also to the time spent in Court and the fact that five hours were claimed in the item for preparation. A further consideration was that, as Mr Wandrag also pointed out, Mr Eiser was the one who consulted with his client and who had prepared all the papers and, as such claimed fees for such consultation, reading and drafting of papers. Although some of the items relating to consultation, perusal and drafting of F papers were reduced, there was still ample provision for reasonable and fair remuneration for these services. In the exercise of my discretion I was of the view that the respondents would be unfairly burdened should I allow all the items where it was clear that Mr Eiser's efforts could possibly be regarded as over-cautious.'

2. Under the heading 'item 40' the Taxing Master continued: G

'This is another of the items argued by Mr Eiser personally. I refer to my comments above (para 3.1) and confirm that I exercised my discretion weighing up both time spent, the bar council parameters and the items allowed in terms of consultation, perusal and preparation of the affidavits. The fact that a senior counsel may have charged R12 000 is of no importance as no counsel was employed. The respondents were aware of this fact when they agreed to pay H attorney and own client costs and it might have been a consideration. They

may not have been prepared to agree to costs of senior counsel had they been faced with the possibility. In any event the R1 500 allowed is not only within the parameters for day fee of a junior counsel but also the starting point of senior counsel's day fee.' I

[151] The submission of the applicants' attorney in terms of Rule 48(5)*(a)* is:

'10. Item 40

1. Mr Eiser was not present.

2. Apart from the gross misdirections, the Taxing Master ignored the judgments in *Mondi Paper Co v Dlamini* [1996] 4 B All SA 92 (N) and the J

unreported judgment of Van Dijkhorst J on 11 March 1997 in *Promine Agentskap & Konsultasie Bpk v Du Plessis en* A *'n Ander*, TPD case No 20028/69, he having been referred to both, which state that an attorney is entitled to what would have been allowed for counsel.

3. The Taxing Master declines to adopt this approach in this item, although in para 3.1 of the stated case he applies the correct compensation principle. B

4. The full amount of R15 000 should have been allowed. The respondents agreed that all the applicant's costs would be taxed on the attorney and own client basis, and would not have focused on any particular item thereof. For the Taxing Master to have speculated about this speaks volumes for his approach to the matter.'

[152] As I understand Mr Eiser's contention on behalf of the applicants it is that, in respect of Mr Eiser's attendance at Court on C 14 November 2001, the applicants were entitled to recover from the respondents a total amount of R15 750, made up of two sub-items, less a discount of R750. The two subitems are: (1) A fee of R3 750 for five hours' preparation, at R750 per hour; and (2) a first-day fee of R12 000. D

[153] As to the contention that the applicants' attorney (charging on the same basis as counsel for doing the work of counsel) was entitled to both a preparation fee and, in addition, a first-day fee, it was and is in my view incorrect. I have quoted above the decision of the supreme Court of appeal on this question in *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) ([2002] 4 B All SA 723). Counsel's E first-day fee is, and until the law is changed must remain, a globular fee that must include all preparation.

[154] As to the submission that the applicants' attorney was entitled to a first-day fee of R12 000 because such a fee would have been charged by some senior counsel, the following points must be made: F

(1) The applicants' attorney has accused the Taxing Master of refusing to assess a fee for an attorney performing the functions of an advocate on the same basis as he would assess a fee for an advocate. In my view, that accusation was not justified. G

(2) Section A10 of the tariff in Rule 70 makes provision for the assessment of the fees of an attorney when performing the functions of an advocate. As indicated above, I consider that the words 'The tariff under Rule 69 shall apply' must not be construed so as to lead to absurdity. It cannot be, and is not, the intention of the Rule that H attorneys appearing in the High Court are limited to the fees recoverable under the tariff in the magistrates' courts' rules unless the Court orders otherwise. The Taxing Master did not make any such error.

(3) What is intended is that the fees of attorneys performing the functions of advocates in the high Court are to be determined in I accordance with Rule 69 (of the Uniform Rules) in cases to which that Rule applies. The Rule makes the tariff of the magistrates' courts applicable only in certain limited circumstances that do not arise in the present case. Otherwise, in terms of Rule 69(5), where the magistrates' courts' tariff does not apply, the Taxing Master is required, in the taxation of advocates' fees as between party and J

party, [110] to allow such fees (not necessarily in excess of the magistrates' courts' tariff) as he considers A reasonable.

(4) The applicants' bald assertion that the Taxing Master refuses to assess and allow a fee for their attorney, when performing the functions of an advocate, in the same way as he

is bound to assess and allow a fee for an advocate, is unsubstantiated by any evidence. What the Taxing Master has refused to do is to allow the applicants' B attorney a first-day fee of R15 000 or even R12 000. That refusal had nothing to do with the fact that he was an attorney performing the functions of an advocate.

(5) There is nothing before me to suggest that if an advocate had charged a first-day fee of R12 000 in this matter, after earning all C the other fees already earned by the applicants' attorney for taking instructions, perusing the documents, drawing the affidavits and in this way becoming thoroughly familiar with every aspect of the case, including inevitably the relevant provisions of the law that would have had to be considered in the process, the Taxing Master would have allowed the advocate's first-day fee in that amount. On the contrary, D the attitude adopted by the Taxing Master indicates that he would have regarded such a fee as unfairly burdensome to the respondents, liable though they are for costs as between attorney and (own) client. The Taxing Master's approach, which seems to me to have been entirely proper, was that such a fee would have been unfairly burdensome because E the advocate would then have been in a position (like that of the applicants' attorney on the facts of this case) in which a good deal of the work necessary to prepare for the hearing had already been done and charged for and could not justly be allowed a second time as part of an inflated first-day fee. F

(6) The fact that the Taxing Master took account of the parameters made available by the Bar Council is a weighty indication that he assessed and allowed the fee of the applicants' attorney for performing the functions of an advocate in a manner comparable to that he would have adopted when assessing and allowing a fee for an advocate G in circumstances comparable to those surrounding the applicants' attorney at the time.

[155] In my judgment, no fault has been shown in the Taxing Master's exercise of his discretion. The challenge to his decision in respect of item 40 cannot succeed. H

STEGMANN J

Item 67 A

[156] In the bill of costs, this item reads:

'67.	Attending at Court on application for security for costs (on a fee basis as for junior counsel), including preparation of one hour - matter postponed to 26/11/01	6 000'

[157] The Taxing Master taxed off R3 000 and allowed the balance of R3 000. B

[158] The applicants' notice in terms of Rule 48(1), which again failed to comply properly with Rule 48(2)*(b)*, *(c)* and *(d)*, contained the following: C

> '7. Item 67
>
> The Taxing Master disallowed the preparation time of one hour and thus an additional amount of R750 should be allowed. Argument in support thereof would have been advanced by the late taxation consultant.' D

[159] Despite the non-compliance, the Taxing Master stated a case as follows:

> 'Item 67
>
> Mr Eiser argued this item and heard my ruling. I allowed a fee based upon the Bar Council parameters for a junior counsel on a simple E application. This included preparation and equals four hours at R750. I do not believe that the attendance at Court took more than 30 minutes, but did not see a note of time.'

[160] In terms of Rule 48(5)*(a)* the applicants submitted: F

> '11. Item 67
>
> 1. One hour's preparation at R750 means that only R2 250 was allowed for this item, which is below the Bar Council's parameters.

2. The application was far from simple and went to the credibility of the respondents' witness in this connection, the third respondent.

3. Mr Eiser was not present. The amount should be allowed as claimed.' G

[161] As already stated, counsel's fee for an appearance must be assessed on the basis of a globular amount that includes all preparation for the hearing that has not already been charged for. The same applies to the fee charged by an attorney performing the function of an advocate and appearing in Court. The contention that a preparation fee of R750 must be allowed and in addition an appearance H fee of R3 000 is simply wrong.

[162] The matter was postponed. The fact that the applicants' attorney may have spent no more than half an hour at Court, or even less, is irrelevant. He had prepared for the matter and set aside the time to argue it. He was entitled to his reasonable fee. The Taxing I Master obviously appreciated that this was the position, despite his irrelevant comment on the short time spent in Court. It has not been shown that the Taxing Master exercised his discretion on any wrong basis.

[163] The applicants have failed to show that their challenge to the Taxing Master's decision has any substantial basis. The challenge fails. J

STEGMANN J

Item 71 A

[164] In the bill of costs, this item reads:

'71. Drawing and settling of first draft of settlement agreement 4 hrs 3 400'

[165] The Taxing Master taxed off R1 700 and allowed the balance of R1 700. B

[166] The applicants' notice in terms of Rule 48(1), which did not comply properly with Rule 48(2) *(b)*, *(c)* or *(d)* in respect of this item, contained the following: C

'8. Item 71 The Taxing Master disallowed two of the four hours actually spent in preparing the first draft of the settlement agreement despite the fact that there are contemporary notes of the time actually spent. The late taxation consultant would have addressed argument in support of this amount being allowed as claimed.' D

[167] Despite the shortcomings, the Taxing Master stated a case on this item as follows:

'Item 71

The settlement proposal was seven pages long. I allowed tariff rate of R100 per page plus R1,000 for the time spent in formulating the E draft agreement. It is not clear on what basis it is believed that I disallowed two hours. Also refer to items 74 to 90 relating to settlement negotiations and the final draft of the agreement claimed in item 91 where a further two hours were allowed at R750 per hour.'

[168] In terms of Rule 48(5)*(a)* the applicants F submitted:

'12. Item 71

1. The settlement agreement was a most important document and the first draft was the most important version thereof.

2. Because of the critical importance of the matter to the applicant great care had to be taken, and the time spent which was G reasonable in all the circumstances was justified.

3. The basis of the amount allowed is based on misdirection as set out above.

4. The only amount that should have been deducted is R400.'

[169] The 'misdirection as set out above' (referred to in the applicants' 3 above) is presumably a repetition of their contention H that the Taxing Master erred in applying the intermediate basis of taxation of *Nel* instead of the basis of taxation described in *Cambridge Plan*. For the reasons already given, I cannot uphold this submission.

[170] The next question is whether the applicants were entitled to recover the cost of this item on a time-related basis. Section I 82*(c)* of the tariff in Rule 70 requires drafting and drawing to be

brought up in a bill of costs on the basis of a rate per page, the tariff rate being R100 per page. That an attorney, even when performing the functions of an advocate, is to be remunerated for drafting and drawing on the tariff's J

STEGMANN J

rate per page basis is emphasised by note 2 to s 8. [111] No sufficient reason has A been advanced to support the applicants' suggestion that the Taxing Master should have allowed this item on a time-related basis at R750 for the full period claimed by applicants. As it was, the Taxing Master did depart from the per page basis of the tariff by allowing R1 000 for time spent, over and above the drafting fee allowed in terms of the tariff. B

[171] Finally, there is the question whether the Taxing Master should have allowed a rate per page exceeding the tariff rate of R100 per page. The Taxing Master's numerous departures from the requirements of the tariff show that he accepted that this party and party taxation, on a scale as if between attorney and client (the intermediate basis), did indeed relate to an 'extraordinary or exceptional' case, within the meaning of Rule 70(5)*(a)*, in C which strict adherence to the provisions of the tariff would be inequitable. Nevertheless, this did not mean that every item had to be allowed at a rate inflated above the tariff. One of the questions that the Taxing Master had to keep in mind was that which is central to the decision in *Nel*: to what extent did the conduct of the costs D debtor (being the conduct that resulted in the order for taxation as between attorney and client) cause the costs creditor reasonably to incur expenses that would not be recoverable on an ordinary party and party taxation?

[172] The Taxing Master has given his reasons for concluding that, in the context of all the other fees charged and allowed in E respect of the settlement, a fee of R1 000 for time spent on the first draft of the settlement, in addition to R 100 per page for the actual drafting, was fair to both parties. In my judgment it has not been shown that in this respect he exercised his discretion on any wrong or improper basis. The challenge to his decision must fail. F

Conclusion

[173] In the result, the applicants have failed in this review in all respects. The costs incurred by the second and third respondents, who opposed the review, will have included the perusal of about 30 pages and the drafting of three pages of their own. The unsuccessful applicants must pay those costs. I estimate them at R900. G

Orders:

1. The application to interfere with eight of the Taxing Master's decisions is refused, and the decisions of the Taxing Master are H confirmed.
2. The applicants are ordered to pay the costs of the second and third respondents in an amount of R900.

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1 At 1178F.

2 At 1177E - 1178E.

3 The subrule provides:
'70(3) With a view to affording a party who has been 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 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.'

4 This is the effect of the words in subrule 70(3) 'but save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master . . .' etc.

5 At 258I, the learned Judge emphasised that there was no suggestion of improper conduct on the part of the attorney concerned in the case.

6 The support is perhaps now more doubtful in the light of the above-quoted comments in *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA).

7 Precisely what mandate the costs consultant, Mr Francesconi, was given does not appear. Had he been engaged to draft the bill, the applicants' attorney, Mr Eiser, would have been obliged, by the provisions of s E3*(a)* of the tariff in Rule 70, to sign a certificate to the effect that he had read the bill and that everything it contained 'with reference to work, time and figures is consistent with what was necessarily done by him or her'. Formal provision was made at the end of the bill for such a certificate to be signed by Mr Eiser. However, he refrained from signing it. Presumably, therefore, in this particular instance the bill had not been drafted by the costs consultant but by the attorney himself. Moreover, although the costs consultant attended the taxation, the Taxing Master has recorded that his role was 'minimal' as the attorney had himself presented the applicants' case in support of the claims made in the bill. Even though the attorney, Mr Eiser, had withdrawn before the taxation was complete, the costs consultant, Mr Francesconi, who had stayed to the end, had not contributed anything to the debate.

8 Rule 48(2) specifies what must be set out in a notice in terms of Rule 48(1), by which a party dissatisfied with a ruling of the Taxing Master as to an item or part of an item that was objected to or disallowed *mero motu* by the Taxing Master, may require the Taxing Master to state a case for the decision of a Judge. It provides:

'48(2) The notice referred to in subrule (1) must -
(a) identify each item or part of an item in respect of which the decision of the Taxing Master is sought to be reviewed;
(b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the Taxing Master;
(c) contain the grounds of objection relied upon by the dissatisfied party at the taxation but not argument in support thereof; and
(d) contain any finding of fact which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof.

9 After the dissatisfied party has delivered a notice in terms of Rule 48(1) and (2) requiring the Taxing Master to state a case, the Taxing Master must provide a 'stated case' in accordance with Rule 48(3). This is *not* his 'report'. After the parties have had an opportunity, in terms of Rule 48(5)*(a)*, to make submissions about the stated case, the Taxing Master is required, by Rule 48(5)*(b)*, to make a 'report'. In terms of Rule 48(5)*(c)*, the parties may make further submissions in the light of the 'report', after which all the papers are submitted to a judge. In the present case, the Taxing Master headed his stated case 'Taxing Master's Report', and headed his report 'Taxing Master's stated case in terms of Rule 48(5)*(c)*'. This did not make for clarity.

10 Published in GN R1557 dated 20 September 1996.

11 The term 'party and party' is sometimes used in a relatively narrow sense, as descriptive of a bill that must be drawn and taxed strictly in accordance with the tariff, in contradistinction to a bill drawn and to be taxed between 'attorney and client' on a scale that may, by express or tacit agreement between the attorney concerned and his client, depart from the tariff. The term is also used in another, perhaps broader, sense that extends to the taxation between 'party and party' (that is, for payment by one party to another) of a bill of costs on a scale 'as between attorney and client', in contradistinction to a taxation 'between attorney and client' (that is, for payment of the attorney by his client), on the scale applicable between 'attorney and client'. In my view, Rule 69(5) does not use 'party and party' in a sense that limits the applicability of the Rule to cases in which the bill is for payment by one party to another and is to be drawn and taxed on a party and party scale. The Rule also extends to cases in which the bill is for payment by one party to another ('party and party') and is to be taxed 'as between attorney and client'. This conclusion is based on a consideration of the final sentence of Rule 69(5) ('Where the tariff does not apply, he shall allow such fees (not necessarily in excess [of the tariff]) as he considers reasonable'), which must be read in the light of Rule 70 and, in particular, Rule 70(5)*(a)* and s A10 of the tariff in Rule 70.

The effect is, in my view, that, unless the magistrates' courts' tariffs is applicable in terms of Rule 69, the Taxing Master must determine a reasonable fee for counsel and, similarly, by virtue of s A10, a reasonable fee for an attorney performing the functions of counsel in terms of Act 62 of 1995. In general, there can be no basis for applying a different standard of reaonableness to the two. Nevertheless, particular cases may reveal grounds for making a distinction. An obvious example is that counsel's globular first-day fee includes all preparation, at least where he has not had earlier briefs for the settling of affidavits or pleadings, or consultation with witnesses, and so on. An attorney who has earned fees in advance of the hearing for perusing documents, consulting with witnesses, settling affidavits and in this way being paid for becoming thoroughly familiar with all aspects of the case, can obviously not expect to receive, in addition,a globular first-day fee equal to a fee that would be appropriate for counsel who must spend time in preparation and include the cost in the first-day fee.

Mr. Eiser submitted that it had been decided in *Mondi Paper Company v Dlamini* [1996] 4 B All SA 92 (N) that 'an attorney is entitled to what would have been allowed for counsel.' That is not how I read the decision. In an appeal from the industrial court, McCall J, upholding the appeal, was asked to order that the costs of the attorney who had appeared in the industrial court for the party who ultimately succeeded in the appeal, 'should be equivalent to the fee for appearance by counsel of similar experience.' In a judgment delivered on 14 June 1996 (before the publication of GN R1557 dated 20 Sepember 1996, containing the present tariff and, in particular, s A10) the learned Judge said:

'I do not think that one can tie the Registrar down to determining the fee with reference to the years of experience of the attorney concerned. . . . But I do think that it would be proper, to the extent that it may be necessary to do so, . . . to order that there should be recoverable at least the costs equivalent to the costs which would be recoverable in respect of the employment of junior counsel.'

The learned Judge ordered accordingly. The order was one made by the Court in the exercise of its discretionary powers relating to costs. I do not understand it to have established the general entitlement of attorneys for which Mr Eiser contended. In any event, the matter is now regulated by s A10 of the tariff.

Mr Eiser also referred to an unreported judgment of Van Dijkhorst J on 11 March 1997 in a case cited as *'Promine Agentskap & Konsultante Bpk v Du Plessis en 'n Ander*, TPD case No 20028/69'. It has not been made available to me. The case number that has been given is in any event obviously wrong. I do not know what the judgment contains.

12 'The tariff' is defined in Rule 69(3) as:

'The tariff of maximum fees for advocates between party and party referred to in Part IV of Table A of annexure 2 to

the Rules for the Magistrates' Courts.'

This definition creates a difficulty in the construction of the words 'the tariff under Rule 69 shall apply' where those words appear in item 10 of s A of the ariff in Rule 70. Does item 10 of s A mean that whenever an attorney with the right of audience in the High Court appears in the High Court, he is limited to the tariff of the magistrates' courts unless he obtains a special order (in terms of the relevant provisions of the magistrates' courts rules) for a higher fee? I am inclined to the view that this literal interpretation leads to absurdity. What item 10 of s A presumably means is that the fees of an attorney performing the functions of an advocate are to be assessed in accordance with Rule 69, including the tariff referred to in Rule 69 whenever that tariff is applicable in terms of Rule 69.

13 This review is concerned only with the taxation of the second bill.

14 Quoted above. R13 175 was claimed in respect of 15 hours 30 minutes spent perusing documents, preparing and drafting founding affidavit in restraint of trade interdict application. R8 775 was taxed off, and balance of R4 400 allowed.

15 Item 2, dated 04/10/01, was a consultation of 2 hours 40 minutes in which the applicants' attorney went through his client's documents with a representative of the applicants and took instructions for the application for an interdict to restrain the respondents from breaching a restraint of trade agreement: taxed and allowed at R2 000, the product of a rate of R750 per hour.
Item 5, dated 30/10/01, was an attendance of 4 hours by the applicants' attorney, together with a representative of the applicant, on the sheriff to copy the contents of the computer disks and document seized by the sheriff in terms of the order make in the *Anton Piller* appplication: taxed and allowed at R3 000; and item 5 was the cost of the copies made: R184.
Items 3, 4, 7, 8 and 9 related to seven telephone calls taxed and allowed at R80 each.

16 *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T).

17 Tariff, s B2*(c)*. The tariff rate for drawing up affidavits is R100 per page of at least 20 words.

18 Tariff, s C1*(c)*. The tariff rate is R20 per page.

19 That is, the basis of taxation defined in *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 497 for a bill of costs to be paid by one party to another and to be taxed as between attorney and client.

20 *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T).

21 A submission for which the applicants rely on *Cambridge Plan* at 599, para *(g)*(i).

22 For which the applicants rely on *Cambridge Plan* at 597 para *(e)*(ii) and 600, para *(g)*(ii).

23 For which the applicants rely on *Cambridge Plan*, at 596, para *(d)*.

24 This is a reference to the fact that the Taxing Master, when taxing a bill payable by one party to another 'as between attorney and client', or when taxing a bill payable to an attorney by his own client, is not necessarily bound by the tariff. Nevertheless, as will appear below, particularly when discussing *Loots v Loots* 1974 (1) SA 431 (E), it is important to keep in mind that when a bill is to be paid by one party to another, and a Taxing Master is to tax it 'as between attorney and client', he is not necessarily obliged to allow fees on a more generous scale than the tariff. Rule 70(5)*(a)* empowers the Taxing Master, in the exercise of his discretion, to depart from the tariff 'in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable'. When a Court orders one party to pay the costs of another 'taxed as between attorney and client', although there is generally a punitive element in the order, the essential reason is that the Court or the Judge expects that, when the bill comes to be drawn and taxed, the Taxing Master will find, in accordance with the Court's reasons for the special costs order, that the case is indeed an extraordinary or exceptional one in which strict adherence to the tariff would be inequitable. However, even in a case in which such an order has been made, once the bill has been drawn and presented for taxation, it may appear that the costs creditor was not in fact reasonably put to any expense that is not recoverable in accordance with the tariff. If so, the mere existence of the special costs order will not of itself entitle the costs creditor to recover amounts exceeding the tariff. This is all the more true when a bill, payable by one party to another, is to be taxed as between attorney and client merely because an agreement between the parties (often in inconspicuously fine print on a lengthy standard form) has made provision for it. The test remains whether the case is an extraordinary or exceptional one in which adherence to the tariff would be inequitable. Even if an agreement to pay attorney and client costs has been made an order of Court, as in *Loots*, nothing more than the tariff will be allowed if there is nothing extraordinary or exceptional about the case and if adherence to the tariff would not be inequitable.

25 The heading to the report describes it as a 'stated case'. This is misleading. The stated case, drawn in terms of Rule 48(3), was delivered by the Taxing Master on 31 July 2002. The procedure does not provide for a second 'stated case'.

26 In this review, the applicants have not contended that the Taxing Master erred in holding that he was not bound by the rate of R850 per hour agreed between the applicants and their attorney. As was held in *Cambridge Plan*, in my respectful view correctly, the Taxing Master could not ignore the existence of that agreement entirely, but he was not bound by it. He had to bear it in mind (at least to the extent that it was not for luxurious expenses that it would be unjust to impose on the costs debtor) as one of the factors that were relevant to the determination, in the exercise of his discretion, of a reasonable rate to be paid by the respondents for items chargeable on a time-related basis. That is precisely what the Taxing Master did, rightly in my view. Even if the applicants did contend, at the taxation, that the Taxing Master should apply the rate of R850 per hour, they have not persisted in that contention in this review. They have not challenged his decision that items chargeable on a time-related basis should be allowed at a rate of R750 per hour. It is therefore unnecessary for me to deal any further with the second question raised by the Taxing Master.

27 In this regard, I have already indicated above that, in respect of items for which the tariff in Rule 70 provides for the assessment of an attorney's fees on a time-related basis, the practice of assessing a reasonable fee on a time-related basis should generally be followed even where Rule 70(5)*(a)* justifies a departure from the particular rate determined by the tariff. On the other hand, when an attorney appears in the High Court, or performs any of the other functions of an advocate in terms of Act 62 of 1995, item 10 in s A of the tariff in Rule 70 provides: 'The tariff under Rule 69 shall apply.' For the reasons already discussed, a time-related basis is not then appropriate. A reasonable fee for the attorney must be determined in the manner used for the determination of advocates' fees, in accordance with Rule 69. Unless the magistrates' courts tariff that is contemplated by Rule 69 (of the Uniform Rules

of the High Court) is applicable, it is for the Taxing Master to determine whether any particular attorney's standing, ability and experience, and the circumstances of the case, reasonably justify burdening the costs debtor with fees to the attorney calculated at a rate comparable with a rate suitable for senior counsel in similar circumstances. There is no reason in principle why an attorney should not become an experienced litigation specialist, much in demand for Court work, as many senior advocates are. In practice, many attorneys still choose to concentrate on their work as attorneys, and to leave the work of the advocates, and in particular senior counsel, to the members of the Bar. For the time being, the number of attorneys who could credibly claim to command, for court work in the High Court, fees comparable to those of senior counsel is probably rather small.

28 Tindall JA said:

'The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See *Hearle & McEwan v Mitchell's Executor* (1922 TPD 192.) Therefore in a particular case the Court will try to ensure, as far as it can that the successful party is recouped. I say "as far as it can" because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and client bill which a attorney and client bill which has been taxed against the losing party. For instance, in the taxation of the attorney's bill against his client, the latter could not object to a special fee, however high, to counsel which he had specially authorised. . . . But before the amount of an attorney and client bill can be recovered against the opposite party it must be taxed against the latter. . . . And on this taxation charges in the nature of luxuries incurred with the approval of the client, who may happen to be a rich man, and may have authorised his attorney to pay exceptionally high fees to counsel, would not be allowed against the losing party. Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid by the client to his attorney. This distinction was recognised in the English Rule applied in *Giles v Randall* (1915 KB 290), where an action was settled on terms that judgment should be entered for the plaintiff against the defendant for a sum of money "with costs as between solicitor and client to be taxed if necessary". But in applying the Rule, the Judges of the Court of Appeal indicated their view that the Rule applicable went too far in the extent to which it required the Taxing Master to disallow items of an attorney and client bill of costs where such costs were payable not by the client himself to his attorney but by the other party. We have no Rule of Court on the subject but it seems to me that here also, when the bill is taxed against the losing party, it is essential to apply a stricter taxation to prevent injustice to the latter as the result of the award of attorney and client costs against him. Thus the award of attorney and client costs against him. Thus the award of attorney and client costs against the losing party really demands what may be termed and intermediate basis of taxation.'

29 *Nel* (above at 608, line 28).

30 A copy was attached to the original judgment.

31 *Nel* (above at 607, line 25).

32 'Extraordinary or exceptional' are the words used in Rule 70(5)*(a)* to describe cases in which the Taxing Master is relieved of the duty to adhere to the tariff if adherence to the tariff would be inequitable. An order that one party should pay the costs of another taxed as between attorney and client is not generally described as 'extraordinary or exceptional', but it is regularly referred to as a 'special' costs order. In this context, 'special' generally means, in my view, that (apart from cases of prior agreement for attorney and client costs) the Judge making the 'special' costs order has found, at least by implication, that the case as presented 'extraordinary or exceptional' features, within the meaning of Rule 70(5)*(a)*; and that the Taxing Master should examine the bill of costs to see whether the particular 'extraordinary or exceptional' aspects of the case have resulted in the costs creditor's reasonably incurring extra costs that would not ordinarily be recoverable on a taxation as between party and party. If, in the judgment of the Taxing Master, such extra costs have been incurred reasonably, it is his duty to give effect to the requirement of equity that the costs creditor should be given the fuller indemnity envisaged by the intermediate basis of taxation as described in *Nel*, and which he is authorised to afford in terms of Rule 70(5)*(a)*.

33 *Nel* (above at 608, lines 21 - 6).

34 *Nel* (above at 608, line 26).

35 No more than party and party costs plus necessary letters to and attendance on the client.

36 *Nel* (above at 608, line 28).

37 At 608, line 12.

38 *Nel* (above at 606, lines 9 - 18).

39 See *Giles v Randall* [1915] 1 KB 290 (CA); *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 608.

40 The erroneous passage was that in which *Roos* commented that the third basis or 'principle' of attorney and client taxation 'gives little more than a taxation as between party and party'. This had nothing to do with the decision made by Burne AJ.

41 As indicated below, this comment must not be misunderstood.

42 This was an allusion to the provisions of Rule 70(5)*(a)*.

43 *Loots* (above at 434C - E).

44 *Loots* (above at 433H).

45 *Loots* (above at 434G).

46 *Nel* (above at 607 lines 9 - 15).

47 *Nel* (above at 607, line 21).

48 *Nel* (above at 607, lines 25 - 39).

49 There may also be others.

50 *Nel* (above at 607, lines 9 - 15).

51 *Nel* (above at 607, lines 21 - 39).

52 *Loots* (above at 434F and Rule 70(5)*(a)*).

53 Rule 70(5)*(a)* provides -

'70(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.'

Our legal system does not provide any rules or principles of 'equity' by means of which the Taxing Master, having decided that a particular case is 'extraordinary or exceptional', is to determine when strict adherence to the tariff would be 'inequitable' and when it would not. The provision can only mean that the Taxing Master is to determine in his own discretion what is 'equitable' or 'inequitable', and that in this endeavour he is to be guided by the principles established in *Nel* and other relevant case law, and by his own sense of what is to be regarded as equitable (fair and reasonable) in all the relevant circumstances.

54 Loots (above at 434A - B).

55 Swart J has supported this call for reform: see *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) at 597F - H.

56 For the reasons already given, I consider this to be a mistaken premise: it does not reflect the law as stated in *Nel*.

57 According to *Roos*, this scale also applies to a case 'where the costs are payable out of a fund belonging entirely to the client'. Presumably this is another instance of the liability of the client to his own attorney. It is not apparent to me that there is any difference, in our law, between a client's liability to pay his own attorney, and his liability to pay his attorney out of a fund belonging entirely to him, the client. No doubt it is possible that English law made some distinction between the two.

58 *Nel* (above) has established that it would be unjust for the Taxing Master ever to allow that attorney's client, C, to recover such costs from another party, P, to litigation with that client, C, notwithstanding the fact that the court may have ordered P to pay C's costs, to be taxed 'as between attorney and client'. The position is the same where the costs debtor has agreed to pay the costs taxed as between attorney and client. The principle that a taxation where one party is to pay the costs of another must stop short of injustice to the costs debtor does not cease to apply merely because the Court has ordered, or the parties have agreed, that the taxation should be 'as between attorney and *own* client'. Orders and agreements are not made in those terms for the purpose of facilitating the infliction of injustices on the costs debtor. They are made in order to 'compensate' for the (erroneous) perception that an order for costs taxed 'as between attorney and client' is an order that 'gives little more than a party and party taxation'. They are made for the purpose of ensuring that the costs creditor gains the benefit of the 'fuller indemnity' envisaged by the 'intermediate' basis of taxation established in terms of *Nel*. The reigning confusion can only be eliminated by recognising the error made in *Roos*, and discarding it.

59 *Gross v Svirsky* 1923 TPD 422 at 425; *Loots v Loots* 1974 (1) SA 431 (E) at 434A - B.

60 According to *Roos*, this scale is 'stricter' than (1) and less strict than (3). But in what way it is less generous to the costs creditor than (1) and more generous than (3) has not been set out in specific terms. As the authority relied upon in *Roos* in English, further reference to the English law of costs, as it was over half-a-century ago, is presumably necessary to ascertain the particulars. In the mean time, the English law of costs has changed fundamentally.

61 *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

62 This was the same question as had faced Magid AJ in *Enslin v Gallo* (above) in 1984.

63 *Cambridge Plan* (above at 576H).

64 *Nel* (above at 607, lines 34 - 35).

65 *Nel* (above at 608, line 28).

66 *Cambridge Plan* (above at 580D - E).

67 *Cambridge Plan* (above at 579J - 580E).

68 *Cambridge Plan* (above at 580F - 581G).

69 *Cambridge Plan* (above at 584B - 585G).

70 *Cambridge Plan* (above at 582F - I). The Taxing Master appears to have believed that Eksteen J, in his judgment in *Loots*, had approved the incorrect statement made by *Roos*. As I have endeavoured to show, in dealing with *Loots* above, it is far from clear that Eksteen J did approve it. On the contrary, the learned Judge applied the principles of *Nel*, with which the incorrect proposition in *Roos* cannot be reconciled. It would appear that the Taxing Master in *Cambridge Plan* was misled by *Roos*, and that her error in that regard was not pointed out to Swart J when he reviewed the matter and repeated, at 582H - I, the incorrect statement that an inter-party taxation as between attorney and client 'in effect gives little more than a taxation as between party and party'.

71 It is wrong to read *Loots* as if it had approved the erroneous general proposition that an interparty taxation as between attorney and client yields little more than a taxation between party and party. That proposition is only true where (as happened in *Loots*) the conduct of the costs debtor had not resulted in the costs creditor's incurring substantially more costs than he would in any event have incurred. But in cases in which the costs debtor has been ordered to pay attorney and client costs, and in which the taxing master finds that his conduct has led the costs creditor to incur substantially greater costs than would be recoverable on a taxation as between party and party, so that the case is an 'extraordinary or exceptional' one within the meaning of Rule 70(5)*(a)*, *Nel* entitles the costs creditor to a full indemnity for his costs, limited only on the principles of justice towards the costs debtor set out in *Nel*. The costs to which the costs creditor is entitled are *not* limited on the basis of the incorrect generalisation that such a taxation 'gives little more than a taxation between party and party'.

72 *Cambridge Plan* (above at 586G - H).

73 *Cambridge Plan* (above at 589D - E).

74 *Cambridge Plan* (above at 595G - H, 596G, 597C - D, 597D - H).

75 *Cambridge Plan* (above at 595G - H).

76 *Cambridge Plan* (above at 595G - H).

77 *Cambridge Plan* (above at 595I - 596J).

78 *Cambridge Plan* (above at 596B).

79 *Cambridge Plan* (above at 596C).

80 *Cambridge Plan* (above at 596D - F).

81 *Nel* (above at 608, line 28).

82 *Cambridge Plan* (above at 597B).

83 *Cambridge Plan* (above at 597C - D).

84 *Cambridge Plan* (above at 597D - E).

85 *Cambridge Plan* (above at 597J - 598C).

86 *Cambridge Plan* (above at 598C - 599E).

87 *Cambridge Plan* (above at 599F - 602J).

88 *Cambridge Plan* (above at 599H - I).

89 *Nel* (above at 608).

90 Porter and Wortham *Guide to Costs* 13th ed at 915.

91 Of the three, this basis of taxation is the most generous to the costs creditor (the attorney), subject to the client's not being over-reached by his attorney.

92 The taxation is less generous to the costs creditor than (i) above. Compare *Brooks v Taxing Master and Another* 1960 (3) SA 225 (N) at 230B - E, dealt with more fully above.

93 Although this basis of taxation is the strictest of the three, and the least generous to the costs creditor, the objective is nevertheless as set out in *Nel*. It is to provide the costs creditor with a full indemnity for all the costs he has had to incur, including not only those that would have been recoverable on a taxation as between party and party, but also the additional costs that would not be recoverable on such a taxation and that he has reasonably incurred in consequence of the conduct of the costs debtor that has met with the disapproval of the court. This basis of taxation is subject to the limitation that there should be no injustice to the costs debtor of the kind envisaged in *Nel*. This is the basis of taxation referred to in *Nel* as 'intermediate'. It is indeed intermediate between (i) above (taxation of a bill to be paid to an attorney by his own client) and a party and party taxation. The court makes a special order for one party to pay another's costs taxed as between attorney and client in the expectation that, when the Taxing Master looks into the details of the bill of costs, he will find that the costs creditor reasonably incurred costs additional to those recoverable on a party and party taxation; and that the reprehensible conduct of the costs debtor made the case 'extraordinary or exceptional' within the meaning of Rule 70(5)*(a)*. The intention of the Court making the order is, in accordance with *Nel*, that the costs creditor should recover *all* of his costs reasonably incurred, short of inflicting injustice on the costs debtor.

94 *Cambridge Plan* (above at 599J - 600G).

95 *Nel* (above at 607, line 24).

96 *Cambridge Plan* (above at 600G - 602J).

97 *Nel* (above at 607, line 29).

98 For example *City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd and Another* 1973 (1) SA 93 (N).

99 For example *Brooks v Taxing Master and Another* 1960 (3) SA 225 (N).

100 For example *Loots v Loots* 1974 (1) SA 431 (E).

101 *Cambridge Plan* at 596E.

102 At 596D - E.

103 At 596C.

104 At 596G.

105 At 596G - H.

106 At 596I - J.

107 Rule 70(5)*(a)*.

108 It may be noted that such an agreement does not take the costs creditor very far. Unless the Taxing Master is satisfied that the case is an 'extraordinary or exceptional' one, 'where strict adherence to [the] provisions [of the tariff] would be inequitable' (for the purposes of Rule 70(5)*(a)*), he will be obliged to tax the bill in accordance with the tariff. The mere agreement of the costs debtor even if reinforced by a court order, is not necessarily enough to establish that the case is one contemplated by Rule 70(5)*(a)*: compare *Loots v Loots* 1974 (1) SA 431 (E).

109 In terms of the 'Note' at the end of s C, the numbers of pages must be specified.

110 In this context, the expression 'party and party' is not, in my view, confined to taxations on the party and party scale. It includes the taxation of a bill to be paid by one party to another party after taxation on a scale as between attorney and client.

111 Note 2: 'Whenever an attorney performs any of the work listed in this section, the fees set out herein in respect of such work shall apply and not any fees which would be applicable in terms of the tariff under Rule 69 if an advocate had performed the work in question.'

A