NOT REPORTABLE

IN THE EASTERN CAPE HIGH COURT
(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 2462/2008

In the matter between

GENTECH ENGINEERING PLASTICS CC	**Applicant**

and

SHELDON MAURICE ZIMMER	**First Respondent**
KEITH BLAKE BELLING	**Second Respondent**
SIVALINGUM KEVIN REDDY	**Third Respondent**
UREFLEX CC	**Fourth Respondent**

CASE NO: 1422/2009

In the matter between

GENTECH ENGINEERING PLASTICS CC	**Applicant**

and

SIVALINGUM KEVIN REDDY	**First Respondent**
KEITH BLAKE BELLING	**Second Respondent**
SHELDON MAURICE ZIMMER	**Third Respondent**
UREFLEX CC	**Fourth Respondent**
GRAYMAUR CC	**Fifth Respondent**
VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD	**Sixth Respondent**

REVIEW OF TAXATION JUDGMENT

HARTLE J

1. The applicant seeks a review, in terms of rule 48(1) of the Uniform Rules of Court, of the taxing master's decision to reduce the hourly rate of counsel retained by it in two separate applications in circumstances where the order of court envisaged the recovery of costs on the scale as between attorney and client, including the costs of two counsel.

2. The respondents successfully objected upon taxation that the hourly rate charged by senior and junior counsel retained by the applicant was not reasonable having regard to the Eastern Cape Bar Council's guidelines for counsel's fees for their years of experience.

3. The contentious items are the disbursements at items 59, 137, 158, 165, 216, 366, 397, 421 and 439 of the applicant's bill of costs, being the accounts of Advocates *A P Joubert* and *G D Wickens*, the fees of whom the taxing master reduced from R3 000.00 to R2 000.00 and from R1 800.00 to R1 000.00 per hour respectively. (Their day fees

were also ostensibly reduced from R30 000.00 to R20 000.00 and from R18 000.00 to R10 000.00 respectively.)

4. The applications in respect of which the costs order was granted related to contempt of court proceedings (in two separate applications) subsequent to the breach by the first to fourth respondents of an interdict order granted against them in favour of the applicant.

5. The trial court held that the first to fourth respondents acted willfully and *mala fide* in breaching the interdict order and were guilty of "*a serious case*" of contempt of court. In his judgment, *Kroon* J noted and agreed with the submissions by the applicant's counsel that a punitive costs order was justified due regard being had to, firstly, the nature of the proceedings which sought to uphold the dignity of the court and, secondly, the first to fourth respondents' reprehensible conduct which was described in the judgment as "*calculated, devious and* (a) *persistent"* flouting of the authority of the court. *Kroon* J further agreed with counsels' submission at the hearing that the manner in which the first to fourth respondents had conducted the various proceedings was unacceptable.

6. The applicant contends (as it did at the taxation)[1] that since attorney and client costs were allowed, it was entitled "*to recover more than it would be entitled to recover on a party and party basis to ensure that it was not out of pocket; an attorney and client costs order being punitive in nature*".

7. Additionally it argued upon taxation that, having regard to the nature of the application and its complexity, the matter not only warranted the costs of two counsel but especially counsel with Advocates *Joubert* and *Wickens'* experience and years of practice; and that the hourly rates charged by them were commensurate with such experience and years of practice.[2]

8. The taxing master – somewhat incompletely, duly stated a case in terms of the provisions of rule 48(3) as follows:

[1] It appears from the taxing master's stated case that the applicant argued in reply that the costs payable by the respondents were ordered on an attorney and client basis, hence did not fall to be reduced as being excessive as contended for by the respondents. This is confirmed by its Notice in terms of rule 48(1) and (2) in which it went further contending that, by the reduction, it had been placed in an inequitable position which was not intended by the trial court in awarding the special costs order.

[2] This is to be gleaned from the applicant's notice in terms of rule 48(1) and (2). The taxing master does not deal with this aspect in the stated case at all.

"Has the Taxing Master erred in reducing the Senior Counsel's rate?"[3]

9. His reasons for disallowing portions of counsels' fees was justified thus:

> "In the matter of *Nel v Waterberg Lanbouers Ko-operatiewe Vereeniging* 1946 AD 597 (sic) it was stated that where the attorney and clients costs are to be paid by the opposite party the taxation should be stricter than in a taxation as between attorney and client where costs are to be paid by the client to his attorney. Based on this authority the Taxing Master rejected the Applicant's submissions and reduced the Senior Counsel's account to R2 000.00, which is a fee generally allowed in this division for matters of this magnitude."

10. It is abundantly plain that the applicant's concerns in respect of the affected items in the bill relate to the fees of both counsel.[4] Although the taxing master's stated case is framed as if the dispute is limited to the complaint against the reduction of senior counsel's fee only (and seemingly without reference to the applicable scale and basis for the taxation), I expect that the justification above relates to the reduction of Advocate *Wicken's* fee as well, and I will regard it as such. To re-

[3] A more comprehensive description of what is in issue is whether, in the light of the special costs order, the taxing master correctly reduced the rate of both senior and junior counsel to bring it in line with generally allowable fees charged by counsel on a party and party basis.

[4] The disputed items are referenced by number in the applicant's rule 48(1) and (2) notice and the taxing master could not have been under any misapprehension as to the fact that the complaint related to the reduction of both counsels' fees.

submit the matter to the taxing master to correct this shortcoming will only result in a further delay[5] and prejudice to the parties who are *ad idem* regarding the items of dispute. Notwithstanding later clarification that the affected items indeed concern the fees of *both* counsel,[6] the taxing master has consciously chosen not to add anything to the stated case,[7] an unfortunate abdication of his responsibility to clearly define the issues between the parties and to set out the relevant facts to assist the court.[8]

11. The taxing master has a discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that he must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. A court is reluctant to interfere with his decisions upon matters in respect of which he is required to exercise a discretion entrusted to him. The

[5] There appears to have been a considerable delay in the allocation of the review to a judge.
[6] The respondents' attorneys noted especially in their notice in terms of rue 48(5)(c) that the taxing master's submissions had not dealt with the allowable fees with regard to junior counsel, yet aligned themselves with his "*decision and reasoning*".
[7] I refer in this regard to the taxing master's report contemplated by the provisions of section 48(5)(b).
[8] Rule 48(1) behoves the taxing master in clear and explicit terms to state a case for the decision of a Judge, which case shall set out each item or part of an item with the grounds of the objection advanced at the taxation and shall embody any relevant finding of facts by the taxing master. See *Fourie v The Taxing Master* 1983 (4) SA 210 (O) at 211G - H in which the purpose and necessity for this function is expounded upon.

general principles governing interference with the exercise of a taxing master's discretion have been stated as follows:

> "The Court will not interfere with the exercise of such discretion unless it appears that the Taxing Master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he has failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The Court will also interfere where it is of the opinion that the Taxing Master was clearly wrong but will only do so if it is in the same position as, or a better position than, the Taxing Master to determine the point in issue… The Court must be of the view that the Taxing Master was clearly wrong, ie its conviction on review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right to appeal."[9]

12. A review of taxation is, therefore, not strictly a "*review*" in the sense of the court interfering only with the exercise of an improper discretion; the powers of the court are wider than the known and recognized grounds to which a power of review is limited at common law.[10]

13. The Appellate Division judgment of *Nel v Waterberg Landbouers Ko-operatiewe Vereeniging*[11] is authority for the proposition relied on by

[9] *Visser v Gubb* 1981 (3) SA 753 (C) at 745H - 755C.
[10] *Legal and General Assurance Society Ltd v Lieberum NO* 1968 (1) SA 473 (A) at 478G.
[11] 1946 AD 597.

the taxing master that when a court has ordered a litigant to pay the other's costs as between attorney and client and the bill is taxed against the losing party, the taxing master should apply a "*stricter taxation*" than he would when taxing a bill as between an attorney and his client, referred to in the judgment as an "*intermediate basis of taxation*".[12] The intermediate scale refers to costs somewhere between the party and party scale, and that of (pure) attorney and own client costs.[13]

14. Ostensibly what was envisaged by this "*stricter*" oversight is to rule out costs which a winning party has suffered in prosecuting his case which are (*inter alia*) "*extraordinary*", or incurred "*unnecessarily*" or "*superfluously*" (and which cannot justly, and therefore lawfully, be recovered from the losing party in any circumstances).[14] Included in those charges to be disallowed on taxation against the losing party are "*charges in the nature of luxuries incurred with the approval of the client, who may happen to be a rich man"* and "*exceptionally high fees to counsel*"[15]

---

[12] *Nel (supra)* at 608.
[13] *Aircraft Completions Centre (Pty) Ltd v Rossouw & Others* 2004 (1) SA 123 (W) at par [54].
[14] *Nel supra* at 606.
[15] *Nel supra* at 608.

15. The reason for the differentiation between the party and party scale and that applicable when a taxing master is required to tax a bill of costs for payment to an attorney by his own client is essential "*to prevent injustice*" to the losing party as a result of the costs award against him, particularly since he was not a party to the costs agreement and to avoid a situation where he is fleeced by an exorbitant assessment.

16. But by the same token, the need to ensure the effectiveness of an order for costs taxed as between attorney and client cannot be overlooked. *Tindall* JA explains the rationale for a special costs order in *Nel (supra)* as follows:

> "The true explanation of awards of attorney and client costs … seems to be that, **by reason of special considerations arising 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 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.** 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, T.P.D. 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 the amount of an 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 authorized. See *Hearle & McEwan v. Mitchell's Executor supra."* [16] (Emphasis added)

17. In *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others (supra)* the court noted that - whether in respect of either party and party or attorney and client costs, the taxing master (when taxing against the losing party) is always required to adhere to the tariff. The fact that a bill of costs is between attorney and client does not mean that the fees allowed should be more liberal or that they should be on a higher scale. Departure from the tariff may well be warranted however where the taxing master in the exercise of his discretion concludes that the case is "*extraordinary or exceptional*" within the meaning of Rule 70 (5) (a) of the Uniform Rules of Court[17] and that it would, for that reason, be inequitable to adhere strictly to the tariff. This approach accords with that in *Nel (supra) vis-à-vis* identifying the presence of

[16] At 607 – 608.

[17] Rule 70(5)(a) provides that the taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions in the High Court tariff "*in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable*."

"*special considerations*" arising from the particular circumstances calling for a fuller indemnity.[18]

18. In this regard the court in *Aircraft Completions Centre* (*supra*) emphasized the need for the taxing master to look to the objective of an inter-party attorney and client costs order in order to give it practical realization: When the 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 one of two reasons. The first (but not the main reason for such a special order) is punitive. It is an expression of the court's censure of reprehensible conduct on the part of the costs order that caused the litigation or that made the proceedings unduly burdensome. Such censure is in itself punitive. It brings with it the punitive consequences that the costs debtor's liability for costs will be increased by the amount the taxing master finds to be justified in the light of the second and main reason for the special order.

[18] See in this regard *Loots v Loots* 1974 (1) SA 431 (E) where in a matter where the plaintiff in a divorce action agreed in a consent paper to pay the defendant's taxed party and party costs, the court held that, in taxing the bill the taxing master is bound to apply, or at least to be fairly guided by, the scale of fees provided in the tariff in Rule 70, and only to depart from it when in his discretion, extraordinary or exceptional cases present themselves where strict adherence would be inequitable.

19. The latter, the second and main reason (the "*true explanation*" referred to in *Nel*), is that the court making the order considers it likely that, when the costs order comes 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 that caused the costs creditor reasonably to incur extra costs that would not be recoverable on a strict party and party taxation; and that court considers it just in the circumstances of the case to ensure more effectually than it can do by means of a party and party costs award that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.

20. For this reason:

> "The taxing master is … required to look to the circumstances in which the court came to order one party to pay the 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."[19]

[19] At par [80].

21. Thus where the attorney and client order follows not by agreement, but by conduct giving rise to the litigation, or conduct itself in relation to the litigation which is reprehensible and deserving of the censure of the court, the order is not merely punitive but:

> "(i)t implies that, to the extent that the inappropriate conduct of one of the parties may, on taxation of costs, be found by the taxing master to have resulted in the other 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 "*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."[20]

22. The latter approach is no different from that adopted by this court in *Loots v Loots (supra)*. It is suggested however that it is self evident that, whether a taxation on an attorney and client basis arises by agreement between the parties or is ordered by the court, the taxing master may when considering the particular circumstances of the case find them to be "*extraordinary or exceptional*" 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 that sub-rule from strict adherence to the tariff in either case.

[20] At pages 157 – 158, par [80] & [81].

23. In determining what circumstances ought to be singled out as warranting a departure from a strict tariff, the court noted that:

> "it is generally a strong indicator to the Taxing 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 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".[21]

24. The taxing master in this instance evidently did not even consider that anything other than a strict basis was to be applied on taxation leading him to conclude (without any further question and seemingly without even having regard to the usual factors in determining what is a reasonable fee for an advocate in respect of each attendance) that common generally allowed rates (well at least for senior counsel) were applicable across the board for him, and exactly one half of that for the junior advocate retained by the applicant.[22]

---

[21] At page 16, par [92].

[22] Ostensibly the taxing master's treatment of the affected items flowing from a taxation on a strict party and party basis led him to deal with the quantum of the junior advocate's fee on the basis provided for in Rule 69 (2), this notwithstanding that not every attendance of the junior advocate was a tandem attendance with the senior advocate.

25. The impression gained from such approach is that he had no option other than to stick to a fee which is generally allowable "*in this division for matters of this magnitude*" (what this standard is was nowhere explained), I assume leaning conservatively toward what is recognized on a party and party basis (by whom and with reference to what it is not entirely clearly clear) as being the accepted hourly (and daily) rate for local counsel.[23] If this is what the taxing master understood by a "*stricter taxation*", he clearly erred. Evidently the special costs award and the stern comments of the trial judge warranted a taxation on the intermediate basis which, whilst it does indeed call for a stricter taxation *vis-à-vis* the non client at the receiving end of an attorney and client award, yet sanctions a departure from the tariff where applicable amounting to a more generous hand on taxation than would be permissible in respect of the assessment of a standard party and party bill of costs. *Stegmann* J eloquently explains this difference in approach in *Aircraft Completions Centre (supra)*:

[23] It bears mentioning that both senior and junior counsel retained by the applicant were from Johannesburg.

> "… the 'intermediate' basis of taxation established by *Nel*…was *not* the same as the unduly restrictive basis that the English rule of court had established within 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.*
> The intermediate basis of taxation identified in *Nel* does not have its origin in English law. It is a feature of South 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 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**. 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."[24]
> (Emphasis added)

26. Seemingly *in casu* the taxing master erroneously reflected that a stricter taxation demanded a conservative assessment without regard to the special considerations applicable which the trial court had in mind when imposing the costs award, the clear objective of which, to my mind, was to ensure that the applicant was indemnified more completely than could be achieved by an order for party and party costs, in respect of the costs to which the litigation had put it.

[24] At par [62]

27. The limitation or safeguard to be applied on taxation then is not the application of a rote restrictive tariff (which seemingly in the perception of the taxing master limits the recovery to nothing more than a strict party and party permissible fee for counsel),[25] but the considerably less stringent criterion that costs of the kind for which the costs creditor has incurred liability *reasonably* should be allowed as against the costs debtor to prevent injustice to him, while at the same time allowing the applicant to receive a fuller indemnity than a party and party taxation would provide for all reasonable additional costs to which the respondents' conduct that received the trial court's reproach may have put it. In this regard the taxing master considered the aspect of the reasonableness of counsels' fees from an entirely wrong premise, if he considered that they were reasonable at all except for the generalized manner in which he appears to have decided the issue.

28. The taxing master is obliged to remain aware:

> "that it is the intention of the court that has ordered a 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

[25] *Stegmann* J criticises the notion that this conservative assessment applies where taxation on an intermediate basis is indicated.

and other types of unreasonable expense that it would be an injustice to impose upon the costs debtor."[26]

29. Beyond the basic assumption that a stricter rate for senior counsel's fee was warranted, the taxing master did not suggest that such charges were incurred unnecessarily or that his attendances were superfluous or beyond what was reasonable to advance the prosecution of the applications. The respondents' submissions too, in respect of the rates adhered to by counsel, were that they were not reasonable, but only in relation to the guidelines proposed by the Eastern Cape Bar Council pertaining to their hourly (and daily) rates. Evidently no thought was given by the taxing master (or the respondents for that matter) to the question whether the applicant - by virtue of the special costs award, was not entitled rather to as full an indemnity as possible in the peculiar circumstances of the matter and in relation to the specific invoices in contention. Against that yardstick reasonableness was not assessed. The taxing master ought to have addressed his mind to the question of the extent to which the extraordinary or exceptional nature of the case (undoubtedly evidenced by the trial judge's stern remarks and rounded criticism of the respondents in their attitude towards the

[26] At the end of par [62].

matter, the dignity of the court and the reprehensible manner in which they had conducted themselves in the conduct of the proceedings) caused the applicant reasonably to incur costs of counsel in excess of the run-of-the-mill generally allowed fee per hour (and day) permitted in party and party taxations. He ought to allow such fees charged by counsel or to tax them off only to the extent that they inflict injustice upon the respondents.

30. I have already expressed the observation above that the presence of the special considerations arising in this matter, with particular reference to the trial judge's comments and the nature of the special costs award, ought to have operated in my view in favour of the applicant in the sense that the intermediate basis as required by *Nel* should have been generous to the extent required by it so as to give the applicant the fullest indemnity envisaged, which to the extent that it is justified by the circumstances of the case may exceed the ordinary and generally allowable party and party sanctioned rates for counsel, an indemnity which the taxing master appears to have thought was rendered inappropriate following his narrow interpretation of the manner in which he was required to tax the bill of costs.

31. The taxing master ought to have examined each affected invoice in the bill to determine whether equity requires that the fees charged therein should have been allowed on a basis more generous to the applicant than that of the tariff or generally accepted basal rate for senior or junior counsel as the case may be. By the reduction of counsel's fees on a general basis, the applicant was in my judgment placed in an inequitable position which was not intended by the trial court in awarding the special costs order

32. In the result it follows in my view that the taxing master has failed to exercise his discretion in a proper manner, justifying an order that his reduction of both senior and junior counsels' fees in the circumstances be set aside and the bill of costs remitted to him to consider the applicant's entitlement afresh.

33. The review accordingly succeeds with costs, which I fix in the sum of R1 500.00, plus vat.

34. I issue the following order:

1. the taxing master's rulings in respect of items 59, 137, 158, 165, 216, 366, 397, 421 and 439 referred to in the applicant's bill of costs are each set aside;
2. the bill is remitted to the taxing master to reconsider the affected items afresh with due regard to the provisions of Rule 70(5)(a) in the light of, *inter alia,* the nature of the special costs award; the special considerations arising from the circumstances which gave rise to the applications or from the conduct of the respondents; the sentiments expressed by the trial judge in his judgment; this judgment and such information and arguments as the parties may wish to present on that occasion; and
3. the respondents are to pay the applicant's costs of the review, fixed in the sum of R1 500.00, plus vat.

_____

B C HARTLE

JUDGE OF THE HIGH COURT

Date of Judgment: 11 April 2013

For the applicant: Rushmere Noach Incorporated, 5 Ascot Office Park, Conyngham Road, Greenacres, Port Elizabeth (ref. Ms L Koorsse/mt/MAT17890).

For the respondents: Friedman Scheckter Attorneys, 75 Second Avenue, Newton Park, Port Elizabeth (ref. Mr G Friedman/ps/L06259).