MAJOLA v UNION AND SOUTH WEST AFRICA INSURANC
CO LTD

(SOUTH-EASTERN CAPE LOCAL DIVISION)

A

1977 *November* 14 ADDLESON J

Costs—Party and party—Claim for damages arising out of a motor accide —Instructions by plaintiff to see to correctness of police plan—Ite
B *should be allowed—Falls within item E 4* (a) *of tariff in Rule 70- Medical reports—Plaintintiff's attorney calling therefor to resolve co flicts of medical opinion—Costs thereof should be allowed—Counsel fees—Fee on trial—Counsel generally not to be suspected of marki excessive fees—Taxing Master's discretion to assess reasonable f not to be made illusory.*

C

In an action for damages arising out of a motor accident the accuracy of the poli plan is frequently one of the vital features in the evidence on the merits and t lack of proper preparation on this issue and verification of the *data* is one of t commonest causes of delay, expense and difficulty in such cases. Accordingly fee relating to instructions by the plaintiff to his attorney to see to the correctn
D of the police plan should be allowed at the maximum fee in a bill of costs: it is item which falls within item E4 (*a*) of the tariff in Rule of Court 70.

In claims for personal injuries it is important to resolve conflicts of medical opini at the earliest possible stage and not at pre-trial consultations. Accordingly, co incurred by plaintiff's attorneys in writing to various (potential) medical witness calling for reports by such witnesses upon other medical reports (submitted
E other potential witnesses) will normally constitute an allowable item in a pa and party bill of costs.

Counsel should not generally be suspected of marking an excessive fee; on the ot hand, it should not be laid down that counsel's services must always be asses at their own valuation: much must depend on the conditions at a particular I at a particular time. The Taxing Master's discretion to assess a reasonable should not be made illusory nor should the Court lightly interfere with his ass
F ment.

Review of taxation under Rule of Court 48.

ADDLESON J: This is a review of taxation of a bill of costs under
G provisions of Rule 48 (2) of the Rules of Court.

The applicant was the plaintiff in an action for damages against respondent arising out of a motor accident. The action was settled and respondent agreed to pay the applicant's costs. I shall for convenie refer to the applicant as the plaintiff and to the respondent as the defenda The plaintiff applies for the review of certain items in his bill of co
H which were either disallowed or reduced by the Taxing Master. On a to bill of R2 535,35 for fees, R927,75 was taxed off; and of disburseme of R5 348,02, R2 308 was taxed off.

There are 31 items in dispute, each of which has been fully dealt w in the plaintiff's contentions, the defendant's reply and in the stated c and the Taxing Master's report. After careful consideration of th submissions, it seems to me that the items fall into one or other of n groups and can be dealt with accordingly.

Group I:

Items 65, 187, 248, 249, 464, 496, 511, 518, 823 and 857:

These items comprise fees and disbursements for or arising out of consultations held with the plaintiff or with the plaintiff and counsel A and with certain witnesses regarding developments at various stages of the case. The amounts claimed were reduced or disallowed by the Taxing Master because he was of the view either that adequate allowance, as between party and party, was made in other items allowed in the bill, or because the item was not a properly incurred cost as between party and party or because there is no provision for such an item in the tariff of fees. B

The three relevant principles here which are referred to by the Taxing Master in his report are:

(*a*) The approach approved in *Openshaw* v *Russell* 1967 (4) SA 344 (E) namely that

"while it is true that a successful party should have a full indemnity in respect of C costs, it is equally important to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs."

(*b*) The successful party is not entitled to costs and the unsuccessful party should not be mulcted in costs occasioned by undue care or caution of the successful party's legal adviser; such additional costs are attorney and client costs which it is proper that the successful D party should himself pay for the anxious care which his adviser has devoted to his affairs. See, for example, the cases referred to in *Engel* v *Engel and Another* 1975 (1) SA 879 (SWA).

(*c*) The Taxing Master exercises a discretion which will not lightly be disturbed unless, for example, he has applied the wrong principle or has misdirected himself on the facts or law; that is so, even if the E Court might itself have given a decision different from that of the Taxing Master. *Paton* v *Santam Insurance Co Ltd* 1967 (1) SA 98 (E) at 100-101; *Engel's* case *supra; Horseshoe Caterers* (*Green Point*) (*Pty*) *Ltd* v *Burnkloof Caterers* (*Pty*) *Ltd* 1977 (3) SA 383 (C).

Applying these principles to the submissions made by the plaintiff on F each of the items in group I, I am satisfied that the Taxing Master clearly directed his attention to the various items and properly exercised his discretion in regard thereto. The plaintiff's contentions have not persuaded me that he was wrong in principle or in fact and, if some of the decisions are open to debate, this is not sufficient to entitle me to interfere with those decisions. It may be added that it is eminently a question for the exercise G of the Taxing Master's discretion to decide

"in the light of other items allowed for, . . . the question of the number of consultations which, in the circumstances, are to be treated as reasonably necessary."

See *Knipe* v *Venter* 1965 (4) SA 1 (C) at 2.

The review on the items in group I must therefore fail. H

Group II:

Items 247, 308 and 309:

These refer to fees for the taking of the plaintiff's instructions as to the correctness of the police plan (disallowed); and attending an inspection with certain engineers and the plaintiff to discuss the preparation of a scale plan and photographs of the scene of the accident. The fees were reduced from R20 to R10 and "travelling time and travelling expenses" were disallowed.

The Taxing Master's view is that there is no provision in the tariff for item 247 and that in his discretion he decided not to allow the claim under item E4 (*a*) of the tariff in Rule of Court 70, as reasonably necessary. The Taxing Master concedes that a consultation with a client on the
A correctness of the police plan may be reasonable and necessary; but he points out that such a submission is only now raised by the plaintiff, whereas the item in question is phrased differently – not for a consultation, but for "taking instructions on the correctness thereof" (ie the plan). In his discretion, he held that this particular consultation was not
B necessary.

In this regard I cannot agree with the Taxing Master's approach, which appears to me to be based on a wrong principle. I am sure that it is not only my experience that the accuracy of the police plan is frequently one of the vital features in the evidence on the merits in a motor accident case;
C and that lack of proper preparation on this issue and verification of the data is one of the commonest causes of delay, expense and difficulty of decision in such cases. Item E4 (*a*) of the tariff makes provision for

"any conference or consultation with client, witness or opposite party and any other conference or consultation, which the taxing officer may consider necessary . . ."

and the terms are wide enough to cover the item in question. Unless the
D costs are covered by some other item – which is not the case here – or unless it is patently unnecessary, it seems to me that the costs of such a "conference" should be allowed and, unless there are special reasons, at the maximum fee. (See the *Horseshoe Caterers* case *supra* at 387.) Since the Taxing Master disallowed the fee on the grounds that it was unnecessarily incurred, it is my view that his grounds for disallowing it
E were not correct and that the fee of R10 should be allowed

As to items 308 and 309, the plaintiff's contentions do not persuade me that the approach of the Taxing Master was wrong. He did allow a reduced fee, on what appear to me to be well-reasoned grounds, for item 308 and other items in the bill also refer to discussions with the engineers. He was
F not satisfied that the instruction of the engineers at the scene of the accident was, at that stage of the proceedings, properly a cost as between party and party and therefore disallowed the items for travelling time and expenses. I am not able to say that he exercised his discretion wrongly.

Group III:

G Items 551, 722, 723 and 723, 740, 741, 742, 743, 744, 752, 753 and 761:

These items all relate to correspondence from the plaintiff's attorneys to medical witnesses.

On item 551 I can find no fault with the Taxing Master's basis of decision and the plaintiff's submissions do not persuade me that he was wrong.

Items 722, 723 and 723; and 740-744 inclusive as well as items 752 and
H 753 have caused me some difficulty. They are, in essence, in respect of letters which the plaintiff's attorneys wrote to various (potential) medical witnesses, calling for reports by such witnesses upon other medical reports submitted by other such witnesses; and enclosing copies of the reports to be commented on by the other doctors. These items "were disallowed because of the conflict of opinion between the plaintiff's orthopaedic surgeons" and because they were "unnecessary charges as

contention that it was unnecessary as between party and party for the experts to comment on one another's opinions and that the plaintiff must decide which expert he will be calling; and that that expert must qualify himself on his own findings and not on those of his colleagues. Item 740 A
was not disallowed but was reduced.

The plaintiff's claim was for approximately R70 000. The costs now under consideration amounted to a total of R19,50, including disbursements. They were incurred nearly two years after the issue of summons and when preparation for trial was well advanced. It is well-known that over a period of time after the accident the condition of an injured plaintiff B
may change and that new factors, including the divergent views of his doctors, enter the picture. These matters may materially affect the assessment and recalculation of his damages as well as his prospects of success. Where there is a conflict of medical opinion it is important that that conflict be resolved at the earliest possible stage and not necessarily at pre- C
trial consultations, at which time unnecessary costs may be incurred and delay caused by a last minute attempt to reconcile conflicting opinions and to re-assess the damages. It is as much in the interests of the defendant as of the plaintiff that the medical views on his injuries be as precise and consistent as possible; apart from any other reason, such precision may D
limit the issues or facilitate a settlement.

I cannot agree with the contention that a consideration by one or more doctors of the views of the other doctors (conflicting or otherwise) is *per se* unnecessary as between party and party or that it is not relevant to an ultimate decision as to which doctor to call or as to that doctor's preparations to qualify himself; but in any event I think that these charges E
would normally be allowable as between party and party for the reasons set out in the preceding paragraph. I say "normally", since every case must depend on its circumstances and there may well be cases where the number and content of the reports and the accompanying correspondence may reach unreasonable proportions and may have to be pruned F
on taxation. That however is not the position here, nor are any other grounds suggested for disallowing these items.

In my view the Taxing Master applied the wrong principle in disallowing these items in group III, and the review on such items must succeed, save in respect of the second item 723, where the report of Dr Scheepers G
was, according to the bill of costs, not received. The review on items 722, the first item 723, 740-744 inclusive, 752 and 753 therefore succeeds.

On item 761 the Taxing Master states that this item was disallowed by agreement and in this he is supported by the defendant. It is my view that the plaintiff was correct in so agreeing and that the item could not properly H
have been allowed as between party and party.

Group IV:

Items 594 and 615:

There were letters written by the plaintiff's attorneys to the Registrar to ensure that the Registrar gave effect to a "request" by the presiding Judge that the case be promoted on the roll at the postponed hearing. The plaintiff's submissions do not persuade me that the Taxing Master was wrong in regarding these items as resulting from over-caution and as being unnecessary and not allowable from the point of view of party and party costs.

Group V:

A Item 833:

There was apparently a misunderstanding here. The Taxing Master intended to reduce the fee from R3,50 to R2,50 but in error the whole item was shown as taxed off. Both parties appear to be satisfied that a fee of R1 should have been allowed.

Group VI:

B Items 908 and 910:

These two concern counsel's fees. In item 908 counsel's trial fee was reduced from R450 to R250 because he had already been allowed a fee of R925 on trial on 19 November 1976 and a further fee of R250 was considered reasonable at the resumed hearing when the matter was settled.
C Item 910 was disallowed in respect of counsel's fees "on consultations and on settlement" because no evidence could be produced with whom and on what the consultations were held.

The plaintiff contends that the case was complex and that senior counsel's fees were certified by the secretary of the local Bar as reasonable.

The Taxing Master's grounds for disallowing item 910 appear to me
D to be unanswerable and are indeed unanswered save for a statement that counsel was paid the fee in question.

As to counsel's fee on trial, I feel with respect, that generally the remarks of Vos J in the *Horseshoe Caterers'* case *supra* at 387 are apt and that counsel should not generally be suspected of marking an excessive
E fee; on the other hand, it should not be laid down that counsel's services must always be assessed at their own valuation; much must depend on the conditions at a particular Bar at a particular time. The Taxing Master's discretion to assess a reasonable fee should not be made illusory nor should the Court lightly interfere with his assessment. I am not in a better
F position than he was, in the present case, to decide what was a proper fee in the circumstances of the case and I do not feel able to interfere with his assessment. See *Duvos (Pty) Ltd* v *Newcastle Town Council and Others* 1965 (4) SA 553 (N) at 558.

The review of the decision on these items must therefore fail.

Group VII:

G Items 940 and 947:

These concern fees paid to Dr Scheepers (a medical expert) in the sum of R285 (item 940) which was disallowed; and R780 paid to Mr Jochelson, an actuary (item 947). The Taxing Master says that by agreement between the parties R425 was disallowed of Mr Jochelson's fees. This is supported
H by the defendant but denied by the plaintiff.

On item 940, Dr Scheepers' fees, there was a dispute as to whether the defendant had agreed to pay his qualifying expenses. Apparently also, at the taxation, documentary proof in support of this item could not be found. The matter is further complicated by the fact that the Taxing Master felt it necessary to approach the charges with caution to avoid the possibility of a duplication in fees. However he has very fairly suggested that the item be referred back to him for reconsideration after he has heard the submissions of both parties and that seems to me to be the most desirable course.

As to item 947 the plaintiff concedes that portion of Mr Jochelson's fee, relating to consultations with counsel, should not be allowed but A reiterates that no agreement was reached to reduce his fee and relies heavily on the complexity of the matter, the number of unknown or variable factors which had to be taken into the calculations and the length of the actuarial report.

The fact that the defendant's actuary charged a far smaller fee is relevant but, of course, not conclusive, if Mr Jochelson had initially done B much of the calculations to which the defendant's actuary had to refer. Be that as it may, the Taxing Master is adamant that R425 was disallowed from Mr Jochelson's fee by agreement between the parties and he points out it was not the plaintiff's attorney, but his articled clerk, who attended the taxation. I do not think that I can go beyond the Taxing Master's C statement of the facts, nor can I resolve the dispute other than by accepting his version, supported as it is by the defendant.

Group VIII:

Items 962 and 963:

These items relate to a third party notice served by the defendant on the D plaintiff in another action in which the plaintiff was joined as a third party. It was agreed that the costs arising from that notice would be included in this bill in this case.

On item 962 the Taxing Master allowed a fee of R9,50 for perusing 10 folios and disallowed the balance of the fee of R5 in respect of a further 19 folios. Similarly he allowed R3,80 out of a fee of R5,80 for "copy for E counsel". In both cases he held that the remaining 19 folios constituted annexures already allowed for perusal and copying, in other items of the bill.

In my view the plaintiff's contentions fail to meet the Taxing Master's reasons for disallowing the amounts in question and I am not at all F persuaded that his decision was wrong.

Group IX:

Item 978:

The Taxing Master disallowed this item: it was a "General inclusive 'fee . . . R21". He held that

'all consultations held were charged for and nothing further could be proved of anything not having been charged for". G

The plaintiff contends that both the defendant and the Taxing Master objected to this item "on the basis that no such fee exists in the tariff". This the Taxing Master denied and he is again supported by the defendant. Both point out that provision for such a fee clearly exists by virtue of H item F3 in the tariff. The plaintiff failed to answer the challenge of the Taxing Master and the defendant, at the taxation, to detail which items had not been "specifically charged for" under item F3; the points now raised by him in his submissions were not raised before the Taxing Master but the latter now states that all the matters now raised by the plaintiff were covered by items in the bill. I feel myself quite unable to hold in the circumstances that the Taxing Master erred in disallowing this item. See *Paton* v *Santam Insurance Co Ltd* 1967 (1) SA 98 (E) at 99.

In the result:

A. The review succeeds on the following items:

247; 722; 723 (first item); 740; 741; 742; 743; 744; 752; 753; 833 and 940. The taxation of these items is set aside and the matter is A remitted to him to retax items 833 and 940; to allow item 247; and to tax the other items set out above, on the basis that a proper fee for each such item should be allowed.

B. The review of the remaining items fails.

C. As to the costs of review, the papers before me are lengthy and the B plaintiff has only succeeded partially, on approximately one-third of the items in dispute. In the circumstances I consider that a proper award of costs is that the defendant is to pay the plaintiff the sum of R20 as costs of review.

C Applicant's Attorneys: *Jacobs & Feldman.* Respondent's Attorneys: *Pagden, Christian, Hanley & Parkin.*

D

LLOYD v AA MUTUAL INSURANCE ASSOCIATION LTD

(SOUTH-EASTERN CAPE LOCAL DIVISION)

1977 *October* 24 STEWART J

E

Costs—Taxation of—Party and party—Damages claim arising out of motor accident—Agreement that costs to be taxed on magistrate's court scale—Fees claimed by medical practitioners—Such fees were disbursements——Magistrate's court scale not limiting disbursements—Not shown that F *such amounts unreasonable or that Taxing Master had exercised discretion improperly—Taxing Master's decision upheld.*

In settling a claim for damages for injuries received by plaintiff's son in a motor accident the defendant had paid an amount into Court and had offered to pay "costs (to include the costs of medico-legal reports) taxed on the magistrate's court scale". G The plaintiff had accepted the offer. The Taxing Master had allowed amounts by the medical practitioner who had examined the patient. The defendant objected to the allowance of these amounts and in a case stated under Rule of Court 48 it contended (1) that the charges were excessive; (2) that the boy had been examined before it was necessary and had thus incurred medical costs prematurely and (3) that when costs were payable on a magistrate's court scale the fees payable to medical practitioners were less than when costs were payable on the Supreme Court scale.

H *Held*, as to (3), that the scale of fees in the magistrate's court did not limit disbursements: the fees allowed were disbursements.

Held, further, that the fact that the Legislature had seen fit to limit the fees which legal practitioners might charge in certain circumstances did not mean that the fees of members of other professions would, without more, be similarly limited.

Held, as to (1), as the Taxing Master had considered these fees reasonable, that the Court could not interfere.

Held, as to (2), that the Taxing Master was vested with a discretion and, as it had not been shown that such had been exercised improperly, that his decision should be upheld.