/BB

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NUMBER: 37553/2005
JUDGMENT DELIVERED:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓

6/11/06
DATE

SIGNATURE

IN THE MATTER BETWEEN:

NUTRI-FLO CC REG NO: CK88/15032/23	FIRST APPLICANT
NUTRI-FERTILIZER CC REG NO: CK92/03588/23	SECOND APPLICANT
AND	
SASOL LIMITED	FIRST RESPONDENT
SASOL CHEMICAL INDUSTRIES (PTY) LTD	SECOND RESPONDENT
KYNOCH (PTY) LIMITED	THIRD RESPONDENT
NITROCHEM (PTY) LTD	FOURTH RESPONDENT
THE COMPETITION COMMISSION	FIFTH RESPONDENT

TAXATION REVIEW JUDGMENT

PRINSLOO, J

[1] This review application of a taxation conducted by the Taxing Master came before me in chambers in terms of the provisions of Rule 48 of the Uniform Rules of Court.

[2] It is convenient to quote the wording of the review notice in order to illustrate the basic underlying facts:

"BE PLEASED TO TAKE NOTICE THAT, the first and second applicants, being the parties dissatisfied with the ruling of the Taxing Master, Mr G van Vollenhoven on Monday 7 November 2005, hereby give notice that they require the Taxing Master to state a case for a decision of a Judge in respect of the costs he allowed the economic experts Lexecon Limited, London under items numbered 39, 86 and 92 of the Bill of Costs due to Messrs Webber Wentzel Bowens, the first and second respondents' attorneys as between party and party in terms of a Notice of Withdrawal of Action by the first and second applicants dated 5 November 2004, notwithstanding the fact that there was no order by the Competition Tribunal authorising the payment of such costs. Rule 58(2)(d) of the Rules for the Conduct of Proceedings in the Competition Tribunal provides that qualifying fees for expert witnesses may not be recovered as costs between party and party unless otherwise directed by the Tribunal during the proceedings.

The first and second applicants allege that their attorneys objected to each of the aforesaid items at the taxation."

[3] The three items in the Bill of Costs which are under attack in this review application are described as follows in the Bill:

Rene P Lion-Cachet
Legal Cost Consultant

Item 39

"Perusing Lexecon's statements of account for November and December, drawing cheque, attending to pay and paid same." R643 862,19

The Taxing Master reduced this amount, on taxation, by the amount of R353 362,19

Item 86

"Perusing Lexecon's statement of account, drawing cheque and attending to pay and paid same (£21 546,08)." R240 196,93

The Taxing Master, on taxation, reduced this figure by the sum of R92 996,93

Item 92

"Perusing Lexecon's statement of account, drawing cheque and attending to pay and

Rene P Lion-Cachet
Legal Cost Consultant

paid same ((£13 600)." R154 811,78

The Taxing Master, on taxation, reduced

this figure by R55 511,76

[4] As appears from the review notice *supra*, these proceedings were conducted before the Competition Tribunal.

[5] Rule 58, of the Rules of Procedure governing the activities of the Competition Tribunal, under the heading "Part 8 – Orders, Costs and Taxation" reads as follows:

"58 Costs and Taxation

(1) Upon making an order under Part 4, the Tribunal may make an order for costs.

(2) Where the Tribunal has made an award for costs in terms of section 57, the following rules apply:

(a) ...

(b) ...

(c) ...

(d) Qualifying fees of expert witnesses may not be recovered as costs between party and party unless otherwise directed by the Tribunal during the proceedings.

(e) ...

(f) The Taxing Master is empowered to tax any bill of costs for services actually rendered in connection with proceedings in the Tribunal.

(g) ...

(h) ...

(i) ...

(j) Any decision by a Taxing Master is subject to the review of the High Court on application."

[6] The taxation under debate flowed from an abortive interim application launched in the Competition Tribunal proceedings by the applicants and aimed at setting aside a referral by the Competition Commission to the Competition Tribunal for a certain determination in terms of the Competition Act, 89 of 1998.

[7] As I pointed out, this interim application was abortive, and withdrawn in the result. The determination by the Tribunal of the merits of the complaint, which was the subject of the opinions given by the first and second respondents' economic experts, remains "very much alive" according to the applicants.

[8] When the applicants decided to abandon the interim application, they served a formal notice of withdrawal of that application dated 5 November 2004. The notice of withdrawal reads as follows:

> "Kindly take notice that the above named Applicants hereby withdraw the application enrolled for hearing on 17 and 18 November 2004.
>
> Further take notice that the above named Applicants hereby tender to pay the First and Second Respondents' costs of this application to date of delivery of this notice on the scale as between party and party as taxed or agreed."

[9] It appears to be common cause that –

(1) There was no direction by the Tribunal regarding payment of qualifying fees for expert witnesses as intended by the provisions of Rule 58(2)(d), *supra.*

(2) There was no order or directive from any other source to this effect.

(3) There was no agreement regarding qualifying fees before, during or after the withdrawal of the application referred to.

(4) The respondents do not appear to have made any effort towards securing such a directive or agreement.

[10] When the taxation review was launched, the Taxing Master prepared and submitted a detailed stated case as required by the provisions of Rule 48(3).

[11] In his very comprehensive stated case, drafted in Afrikaans, the Taxing Master quoted liberally from the authoritative work *Law of Attorneys' Costs and Taxation Thereof* by Jacobs and Ehlers. He also made a number of submissions based on his own experience. I find it convenient to quote, not necessarily in a particular order, some of the remarks made by the Taxing

Master in his stated case which, in my view, may be relevant to the adjudication of this review:

"(1) Daar moet uit die staanspoor gelet word dat die posisie rakende kwalifiserende fooie in die Kompetisie Kommissie nie verskil van die Hooggeregshof nie. In albei forums is daar 'n hofbevel nodig voordat sulke fooie toegelaat sal word.

(2) Met ander woorde 'n kwalifiserende fooi gaan net aan 'n deskundige betaal word en nie ook aan 'n gewone getuie nie.

(3) As ons kyk na die spesifieke aksies vermeld in Jacobs is dit duidelik dat in feitlik alle gevalle waar 'n deskundige gevra word om 'n persoon, plek of voorwerp te ondersoek hy besig is om homself te kwalifiseer om in die hof te getuig wanneer hy sodanige ondersoek doen. Ook waar hy die dokumente betrokke in die aksie deurgaan is hy besig om homself te kwalifiseer.

(4) Ons kom nou by die punt waar ons kan bepaal of die werk wat deur die betrokke deskundiges in die saak gedoen is as kwalifiserende fooie kan deurgaan.

(5) Ingevolge die uiteensetting in Jacobs en Ehlers is die takseermeester van oordeel dat die werk 100% inval onder kwalifiserende fooie. Die deskundiges het immers hulle van die feite van die saak (waarvan hulle geen persoonlike kennis gehad het nie) vergewis en voorts dokumente ondersoek en ontleed om tot 'n gevolgtrekking te kom wat die hof sal help om sy beslissing te maak.

(6) Die volgende interessante vraag is: hoekom is hierdie fooi deur die takseermeester toegelaat as daar dan geen bevel vir kwalifiserende fooie is nie? ... Met ander woorde selfs al maak die regter nie 'n bevel vir die kwalifiserende fooie van 'n deskundige nie, word die fooie wat hulle hef vir die opstel van sy verslag wel op taksasie regoor Suid-Afrika toegelaat. ... Soos reeds gesien is sodanige voorbereiding, navorsing of ondersoeke bykans altyd kwalifisering ingevolge Jacobs en Ehlers se

uiteensetting. Nogtans word sodanige fooie toegelaat sonder 'n bevel vir kwalifisering.

(7) Tweedens moet ons daarop let dat ten minste in die TPA daar deesdae 'n ander woord gebruik word wat blykbaar as sinoniem vir kwalifisering aangewend word en dit is Voorbereiding. Die woord 'voorbereiding' is wyd genoeg om alles wat Jacobs en Ehlers as kwalifisering beskryf in te sluit. In dié opsig kan voorbereiding gesien word as sinoniem vir kwalifisering. Daar word dan ook tans gereeld bevele gemaak in die hof waar daar slegs verwys word na die deskundige se voorbereiding en nie ook na kwalifisering nie.

(8) Die "voorbereiding" vir die opstel van die verslag sal dan nog steeds gesien moet word as kwalifisering. Daar is egter reeds aangedui dat in dié verband daar lank reeds nie meer vereis word dat daar 'n bevel is vir enige voorbereiding/kwalifisering gedoen vir die opstel van die verslag nie. Sulke fooie word outomaties in die koste bevel ingesluit en is verhaalbaar op party en party skaal sonder 'n spesifieke koste bevel saam met die fooi

vir die opstel van die verslag, alhoewel dit streng gesproke 'n kwalifiserende fooi is." (My emphasis.)

(9) "Die onderskeid tussen werk tot en met die verslag of verslae en dié daarna word bevestig as ons let op die volgende bevel wat deesdae gereeld gemaak word: 'Koste sluit in die koste van die verslae van die deskundiges waarvan kennis gegee is asook die voorbereiding/kwalifisering van die volgende deskundiges."

[12] The last mentioned quote "model order" or "example order" proposed by the Taxing Master, would still appear to include both "legs" of the enquiry proposed by the Taxing Master namely preparation for the trial and preparation for the drafting of the report. The distinction proposed by the Taxing Master, namely that only an order in respect of preparation for the trial is required whereas an item dealing with preparation for and drafting of the report will be allowed on taxation even if no court order was made to that effect, does not appear to be supported by the "model order" proposed by the Taxing Master himself.

Although the practice has not been entirely consistent, it has long been accepted that expert witnesses are (subject to there being an order of court or agreement) entitled, as between party and party, to 'qualifying fees' in addition to payment under any tariff of remuneration of witnesses. Orders in respect of qualifying fees should not be lightly made. The court should grant such orders only where it is quite satisfied that the payment of the qualifying fees was reasonably necessary; in cases of doubt the order should be refused. No court will grant such an order unless the party ordered to pay the costs has been given an opportunity of being heard. The term "qualifying expenses" is usually associated with the activities of expert witnesses. Qualifying fees for a plaintiff's medical witnesses and an actuary for which the plaintiff had obtained neither an order of court nor the consent of the defendant has been held to be properly disallowed."

For the sake of brevity I refrain from quoting the decided judgments referred to in the footnotes by the author compiling this particular article in Lawsa – op cit par 423.

[17] The same author also refers to the tariffs flowing from Uniform Rule 70 and more particularly section D item 5 which reads as follows:

"Testimony -

Fair and reasonable charges and expenses which in the opinion of the taxing officer were duly incurred in the procurement of the evidence and the attendance of witnesses whose witness fees had been allowed on taxation: provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties."

[18] In their own comprehensive submissions the applicants for review of the taxation pointed out that there is authority for the proposition that an agreement to pay taxed costs of the other party does not include qualifying expenses and fees for expert witnesses. See Van Wyk v Protea Assurance Company Limited 1974 (3) SA 499 SWA at 503F -504A where the learned judge says the following:

"It seems to me that it is open to a party to negotiate a settlement of a case to stipulate for the payment of the qualifying expenses and fees of expert witnesses if he is not prepared to agree to a settlement on any other terms. An example of an agreement that made detailed provision for the payment of such expenses and fees is to be found in the report

of the case of Köhne and Another v Union and National Insurance Company Limited 1968 (2) SA 499 N at page 500E-H. In my view the respondent's counsel is correct when he submits that the court cannot now vary the agreement which was made between the parties. It seems to me further, that it cannot be said that it was an implied term of the agreement to pay taxed party and party costs that such costs should include the qualifying expenses and fees of expert witnesses in respect of whom the court might, at a later date, declare, if it has the power to do, so that they would have been necessary expert witnesses at the trial and that their qualifying fees and expenses should be allowed on taxation."

In this regard I was also referred to a series of other cases namely:

- *Roos v Morkel and Somerset West Municipality* 1915 CPD 201 at 203;

- *Stevens v Provincial Insurance (Pty) Ltd* 1966 (3) SA 62 N at 65A;

Rene P Lion-Cachet
Legal Cost Consultant

- *De Villiers v Stadsraad van Pretoria* 1967 (4) SA 533 (T) at 535.

[19] The applicants also referred, in their submissions, to the provisions of rule 70, *supra*, to the effect that on taxation the qualifying expenses of the witness are not allowed without an order of court or the consent of all interested parties –

- *Stauffer Chemical Co v Safsan Markening and Distribution (Pty) Ltd* 1987 (2) SA 331 (A) at 355B-C;

- *South African Forestry (Pty) Ltd v York Timbers Limited* 2003 1 SA 331 SCA.

[20] The applicants, correctly in my view, challenged the "unfounded principle" set out by the Taxing Master in his stated case, *supra*, to the effect that an order in respect of qualifying fees is not required for work done in relation to the preparation or drafting of an expert report, but is required instead for the preparation by the expert specifically concerned with giving evidence in court. The applicants, correctly, point out that such a "principle" is unfounded because it is diametrically opposed to the authorities that relate to what constitutes qualifying fees.

[21] The applicants argue that there is ample authority for regarding the costs of the preparation of an expert report to be specifically included as qualifying fees. They referred to:

- *Administrator, Coke v Buffalo Park Township (Pty) Ltd* 1980 (2) SA 430 SE at 433H;
- *Mzamo and Another v Taxing Master and Another* 1978 (3) SA 228E at 233E-G.

[22] The applicants also point out that the reports in question prepared by the economic experts were adduced as evidence and confirmed by affidavits in the application for interim relief. Accordingly, so the argument goes, the preparation of the reports constituted the preparation of evidence for opposition to the application and ought to have been regarded as qualifying fees on the Taxing Master's own reasoning. In this regard the applicants also referred to *Van Wyk and Another v Protea Assurance Co Ltd, supra,* at 503B-C.

[23] The above is a summary of the main thrust of the submissions made by the applicants in support of their argument that the review ought to succeed.

[24] To this, they added a last submission or ground of objection which they alleged was raised during the taxation, namely that the qualifying fees of the economic experts incurred by the first and second respondents did not constitute wasted costs. They argued that the expert reports and opinions and the preparation in respect thereof remained relevant in relation to the main hearing on the merits which was pending at the time of taxation.

In my view, there is much to be said for this submission because the notice of withdrawal, *supra*, contained a tender in respect of the costs of the interim application only and not the main application. Although the tender does not specifically make reference to "wasted costs" I consider that this last argument offered by the applicants is not without merit, because the expert reports and opinions still remain relevant in relation to the main hearing which had not yet been disposed of at the time of the taxation.

[25] In their own very comprehensive submissions in opposition to the review application, the respondents, firstly, referred to Rule 70(3) which reads as follows:

"With a view to affording the 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 insure that all 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 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 or expenses to witnesses or other persons or by other unusual expenses." (The emphasis is that of the respondents.)

With this sub-rule in mind, the respondents argue that the Taxing Master has a wide discretion to decide on the costs that should be awarded in favour of the successful party.

While this may be so, I am not persuaded that the wording of Rule 70(3) can negate the strict requirement of the tariff, and more particularly section D

item 5, *supra*, that qualifying fees will not be allowed without an order of court or the consent of all interested parties.

[26] Another, and perhaps more attractive, argument offered by the respondents is that Rule 58, *supra*, of the rules governing the procedures of the competition Tribunal, does not apply to the present situation. The respondents point out that Rule 58(2)(d), which I quoted earlier, and which provides that qualifying fees for expert witnesses may not be recovered as costs between party and party unless otherwise directed by the Tribunal during the proceedings, only applies where the Tribunal has made an award for costs in terms of section 57 of the Competition Act 89 of 1998.

In the present case, so the argument goes, the taxation under attack flowed from the tender by the applicants to pay the respondent's costs pursuant to the withdrawal by the applicants of the abortive interim application. The costs in question do, consequently, not flow from an award of costs made by the Tribunal in terms of section 57 of the Competition Act, so that Rule 58(2)(d) of the Rules for the conduct of proceedings of the Competition Tribunal does not apply and may be disregarded.

Even if this argument is correct, which, in my view, it probably is on the technical grounds advanced, it still does not, in my opinion, serve to avoid the clear requirement, on the weight of the authorities considered, including section B item 5 of the tariff, that qualifying fees will only be allowed on the strength of an order of court or an agreement between the parties.

To this extent even if Rule 58(2)(d) is not directly applicable, I am not persuaded that it should be ignored altogether for purposes of deciding this dispute: the spirit of the sub-rule is clearly in line with all the other authorities to which I have referred.

[27] Another argument advanced by the respondents is that fees charged for work done by an expert may, in certain circumstances, also be recoverable as normal party and party expenditure where such work was done primarily for the purpose of drawing pleadings in the matter.

In support of this argument, the respondents, firstly, relied on the case of *Julies v Cape Town Municipality* 1976 (3) SA 138 CPD. In that case the plaintiff consulted an orthopaedic specialist and radiologist in order to enable her to reply to a request for further particulars as to her condition. The consultation costs charged by these experts for this particular purposes were held not to be

"qualifying expenses" and allowed on taxation because they were incurred, so it was held, primarily for the purpose of drawing the pleadings even though it might also serve, though incidentally, as a qualifying examination.

In my view, the facts in *Julies* are clearly distinguishable from the present situation: as pointed out by the applicants, the preparation of the reports of the economic experts constituted preparation of evidence to be used in relation to the main hearing and, in that sense, would go well beyond the narrow requirement of preparing pleadings, such as the answer to the request for particulars in *Julies*.

[28] The respondents further developed this argument by referring to the case of Road Accident Fund v Registrar, Transvaal Provincial Division and Another 2003 (5) SA 268 T. In that case the following order was made, by way of a declarator, at 272D-F:

> "1. It is declared that in order to avoid liability for the costs of medical or other experts or additional or special investigations done or caused by such experts the Road Accident Fund, when offering to settle a claim as contemplated in section 17(2) of the

Road Accident Fund Act 56 of 1996, is not obliged to exclude expressly from the offer the costs of such experts and if the Road Accident Fund fails to exclude expressly such costs from its offer the Taxing Masters of this Court and the Magistrates' Courts are still obliged to determine whether or not such costs must be allowed pursuant to the provisions of Rule 70(3) of the Uniform Rules of Court and Rule 33(16) of the Magistrates' Court Rules."

I fail to see how this judgment can be considered to support the argument of the respondents that the qualifying fees were correctly allowed by the Taxing Master notwithstanding the absence of a court order or an agreement to that effect by the parties. In my view I am fortified in this conclusion by the clear provisions of section D item 5 of the tariff, *supra*.

[29] In all the circumstances I am of the view that the application for review ought to succeed and the Taxing Master's award of the qualifying fees ought to be set aside.

[30] In terms of Rule 48(7) I am required to make an appropriate cost order, which may include an order directing the unsuccessful party to pay a sum fixed by myself in respect of costs.

[31] I make the following order:

(1) The application for review is upheld.

(2) The award of the Taxing Master in respect of disbursements under items, 39, 86 and 92 of the Bill of Costs is set aside.

(3) The Taxing Master is directed to reduce and rectify the *allocatur* of the Bill of Costs to comply with the order in 2 above.

(4) The respondents, jointly and severally, are ordered to pay the costs of the applicants in the amount of R5000-00.

W R C PRINSLOO
JUDGE OF THE HIGH COURT