plaintiff, and that he has failed to restore conjugal rights. The plaintiff says that she is in employment in Cape Town, that after much difficulty she got that employment, and that she is earning the sum of £8 10s. per month. She supports herself and her minor child out of that wage. She says she obtained this billet after a great deal of trouble and that the billet is a permanent one, but that if she has to come to Johannesburg to give evidence in person she will lose her billet, which would mean that she would be without employment, and that she would have very great difficulty indeed in obtaining other work. Under the circumstances the Court, I think, should avail itself of the powers given by Rule 59 and hear her evidence in this case on the affidavit which has been presented. The whole of the proceedings have been brought to the notice of the defendant: in fact the petition for leave to place her evidence before the Court on affidavit, and the affidavit itself in which she gives her evidence on her claim for restitution have been served on the respondent. I have before me a copy of the petition and a copy of her affidavit, and there is an endorsement thereon by the defendant to the effect that he has received copy thereof on the 10th day of July, 1933, and that he raises no objection thereto. That being so I think the provisions of Rule 59 apply. The Court will therefore accept her evidence as if it were led in this Court and will make the usual order. The defendant is ordered to restore conjugal rights on or before the 31st August, failing which to show cause on the 18th September why divorce should not be granted, and why the agreement between the parties, dated 12th June, as to maintenance, custody and costs, should not be made an order of Court.

Plaintiff's Attorneys: *J. J. van den Bergh, Melamed & Nathan.*

O'REILLY v. LAKOFSKI.

1933. *August* 8, 9. DE WET, J.

Costs.—Review of taxation.—Wasted costs.—Test.—Benefit of doubt.—Postponement in limine.*—Immediate taxation of bill.—Abandonment of items.—Costs of application to review.—Defamation.—Attorney and client costs.—Consultations with witnesses shortly before trial.*

In deciding what are wasted costs due to a postponement, the test is whether the costs in question have become useless and unnecessary by reason of the postponement.

Koenigsberg v. *Transvaal Government* (1904, T.S. 576); *Konjillia* v. *Govender* (1929, N.L.R. 189), referred to.

If a litigant has been awarded wasted costs due to a postponement *in limine* applied for by his opponent, there is no reason why he should wait until the litigation is finally completed before taxing his bill.

Semble: If the postponement has been granted during the course of the trial, it is difficult to see how a full bill of wasted costs could be brought up before final judgment.

If there is any doubt as to whether a particular item should be included amongst wasted costs, the Taxing Master should give the benefit of the doubt to the party against whom the bill is being taxed.

On receiving notice of an application to review taxation of items totalling £35, respondent abandoned items totalling £9, and tendered "all such costs of the application up to date which may have been caused" by the abandoned items. Applicant proceeded with the review of the remaining items, and the Court, on confirming the taxation, ordered respondent to pay the costs of the application up to the date of the abandonment and tender, applicant to pay all subsequent costs.

Mathiba and Others v. *Moschke* (1919, T.P.D. 409); *Williams and Another* v. *Director of Education* (1922, T.P.D. 498); *Campher* v. *Estate Mundt* (1929, T.P.D. 915), discussed.

In an action for damages for defamation, it is not unreasonable for the plaintiff's attorney to interview his witnesses shortly before the trial, and to go through their statements with them to see how far their recollections still bear out the statements which they made some time previously. Charges for such interviews

Held, to have been rightly allowed in an attorney and client bill of costs.

Held, further, such costs had become wasted costs due to a postponement where the earliest trial date obtainable was six months later.

Application for review of taxation.

Respondent sued applicant for damages for defamation, and on the day for which the trial was set down, applicant applied for and obtained a postponement, on condition that he paid wasted costs, including attorney and client costs (see *Lakofski* v. *O'Reilly*, *supra*, p. 126). The total of the bill of costs taxed in pursuance of this order was £96 19s. 3d., and applicant served on respondent notice of application to review items totalling £35 9s. 6d. Respondent thereupon abandoned items totalling £9 4s. 8d., and his attorney wrote to applicant as follows: "I am instructed further to state that my client hereby agrees to pay all such costs of your application up to date which may have been occasioned by the items abovementioned." Applicant, however, proceeded with his application to review the balance of the items. All the items in

question fell under the heading of consultations with witnesses on the eve of the date for which the trial had been set down, the consultations having been held either with respondent's counsel or his attorney; except one item which consisted of a consultation on the case generally, held between respondent, his counsel and attorney. All the witnesses, save one, had given statements anent the alleged defamation to the attorney some six months previously, and the consultations with them were held for the purpose of ascertaining whether they would adhere to these statements. The following was typical of the items challenged: "Attending on Mr. T. H. Sachs; discussing in detail the evidence he would adduce at the trial and arranging to advise him when he would be required to give evidence." Applicant asked for the items to be deleted, on the ground that they were not properly included amongst "wasted costs." It was common cause that the earliest date obtainable for the trial was in December, 1933, which was six months after the original trial date. The relevant portions of the Taxing Master's report read as follows: "3. All the items of the bill relate to work done on the 29th and 30th May, two days before the trial . . . . . and 1st June, the day of trial. I understand the intention of the Order of Court to be that the plaintiff should not be at all out of pocket in respect of fees due to his attorney as a consequence of the postponement . . . . 4. Where there was a doubt whether a particular cost was "wasted," in the sense that it would not still avail for the trial, I felt that the benefit of such doubt should be given to the plaintiff, more particularly in view of the fact that, by reason of a date in December next being the earliest date on which the case could be set down again, there would be an interval of six months between the original day of trial and the subsequent date . . . . It seems that in view of the long interval it will be necessary to hold again, *e.g.*, consultation on trial, and counsel's consultation with the witness Green, from whom, for reasons explained, no written statement was taken. In the possible event of the plaintiff (respondent) winning the action and taxing a bill against the defendant for the whole case . . . the costs already allowed in the present bill will naturally have to be taken into consideration."

T. J. Roos, K. C. (with him *R. W. R. Toms*) for applicant: Either these costs were unnecessarily incurred, or it is premature to tax them now. The Taxing Master's attitude, as expressed in paragraph 4 of his report, was wrong. He quoted the following

authorities *Muthiba and Others* v. *Moschke* (1919, T.P.D. 409, 414); *Carlis* v. *Hay* (1903, T.S. 317); *Koenigsberg* v. *Transvaal Government* (1904, T.S. 576); *Konjillia* v. *Govender* (1929, N.L.R. 189); *Campher* v. *Estate Mundt* (1929, T.P.D. 926).

M. Franks (with him, *W. Oshry*) for respondent: As to what are wasted costs, see *Koenigsberg's* and *Mathiba's* cases (*supra*). On attorney and client costs, see *van Wijk* v. *van Wijk* (1914, T.P.D. 35); *Hearle and McEwan* v. *Mitchell's Executor* (1922, T.P.D. 192). On the principles to be applied in review of taxation, see *Bensusan* v. *Sterling and Mockford, N.O.* (1930, W.L.D. 303). On costs, see *Williams and Another* v. *Director of Education* (1922, T.P.D. 498). The point now taken on behalf of applicant was not taken before the Taxing Master, as to which see *Golombick* v. *Atlas Assurance Co., Ltd.* (1916, W.L.D. 14); *Shrapnel* v. *Laing* (1888, 20 Q.B.D. 334, 337).

T. J. Roos, K.C., in reply: Respondent should have tendered the costs of the application. The argument of prematurity is not a new point raised in this Court for the first time. He also referred to *Freitas* v. *Reichman* (1921, C.P.D. 853); *Liquidator Benghiat, Ltd.* v. *Liquidators, Sterling Trading Co.* (1922, W.L.D. 177).

DE WET, J. (after setting out the facts, continued): It seems to me that two questions arise: first of all whether those costs are reasonable, and secondly whether they have been rendered useless as the result of this postponement. The order is to pay the costs wasted as a result of the postponement, not the costs caused by the postponement, and in that regard the case differs from the case of *Koenigsberg* v. *Transvaal Government* (1904, T.S. 576) referred to from the Bar. In that case the order was that the one party had to pay the costs caused by the amendment. The learned Judge there stated that the expression "costs caused by the amendment" implied primarily those costs which are necessitated by, and which necessarily result from, the amendment having been made. Here it is not the costs caused by the postponement but the wasted costs. The learned Judge in that case goes on to say: "I do not wish to be understood to say that there are not costs antecedent to the amendment which the applicant in this matter would be entitled to, if he could satisfy the Court that such costs have become useless and unnecessary by reason of the amended plea." It seems to me that the principle of determining whether costs are wasted costs would be whether the costs have now become useless and unneces-

sary by reason of the postponement. In the case of *Konjillia* v. *Govender* (1929, N.L.R. 189) also quoted from the Bar, the Court held that wasted costs are either additional costs resulting from a postponement caused by an amendment, if those costs would not otherwise have been incurred, or costs previously incurred which have become useless by reason of the amendment. In this case it is difficult to see that there are any additional costs caused by the postponement, apart from the wasted costs which in this connection would be the costs which have been previously incurred and which have become useless by reason of the postponement.

Mr. *Roos's* first objection was that the whole taxation was really premature because it could only be determined whether these costs have been wasted when the action had eventually been heard, as then only could it be seen which of these costs had become useless. Now it seems to me that a party who taxes a bill shortly after the order is given, takes a risk that he may exclude certain costs which may eventually prove to have become useless by reason of the postponement, and that would be more especially so in a case which had been part heard; where it is difficult to see how a full bill could be brought up. But where the case has not been heard at all and was postponed *in limine*, it seems to me there is no reason why the party should not tax his bill if he is prepared to satisfy the Taxing Master that the costs brought up have become useless by reason of the postponement. Now the costs of the consultations with witnesses, at any rate as far as consultation with counsel is concerned, are usually allowed in a party and party bill, according to the practice of our Courts. Whether a consultation with witnesses by the attorney not for the purpose of taking a statement but simply for the purpose of finding out whether the witnesses still adhere to their statement some months afterwards, would be allowed between party and party is a question which I need not decide, because the learned Judge has in this case decided that the costs should be determined as between attorney and client. The principle applicable to bills of costs between attorney and client has been discussed in a large number of cases, and I need only refer to the case of *Hearle & McEwan* v. *Mitchell's Executor* (1922, T.P.D. 192). There the learned Judge on page 196 says: "Where an attorney *bona fide* believes a particular course of action expedient in the interests of his client and that action is not unusual in character and not negligent in, nor clearly unnecessary of execution, the costs thereby incurred should be allowed between the attorney

and the client, unless there are really substantial reasons for making him bear the costs personally."

Now we must consider the facts of this case. It is an action for defamation based on certain words which it is alleged were uttered by the defendant on a particular occasion in the magistrate's court. The pleadings deny that these words were uttered, therefore the exact words and the circumstances under which they were uttered become of very great importance at the trial, and I certainly think it could not be argued that it would be unreasonable, on the part of an attorney in safeguarding his client's interests, to interview the witnesses shortly before the trial and to go through their statements with them to see how far their recollections still bear out the statements which they gave originally, especially in a case like the present where the trial was to come on six months after the words are alleged to have been uttered. Therefore if this were an item in an attorney and client bill I do not think there would be any reason for disallowing it. The same applies with greater force to a consultation with witnesses which takes place with counsel, and a consultation on brief immediately before the hearing of the case. My experience at the Bar is that these consultations invariably take place in trial cases, and more especially in a trial case of the nature of the present that would be very desirable and necessary. Therefore, on the question whether these costs would be allowed as between attorney and client I entertain no doubt whatever.

The second question is whether the respondent in submitting this bill has satisfied the Taxing Master that owing to the postponement these costs have become useless. The report of the Taxing Master has been criticised by Mr. *Roos*, and I think, if I may say so, rightly, because it says: "Where there was a doubt whether a particular cost was 'wasted' in the sense that it would not still avail for the trial, I felt that the benefit of such doubt should be given to the plaintiff, more particularly in view of the fact that, by reason of a date in December next being the earliest date on which the case could be set down again, there would be an interval of six months between the original day of trial and the subsequent date." And then he goes on to say: "It seems that in view of the long interval it will be necessary to hold again, e.g., consultation on trial, and counsel's consultation with the witness Green, from whom, for reasons explained, no written statement was taken." I have to consider the matter in the light

of the facts, and if we turn to the facts we find that the case was postponed in June. It had to be postponed until the next term, for the simple reason that the then term ended on the 15th June and there was no opportunity of having the case tried before that date. We have also the fact, not disputed, that immediately after the postponement on the 3rd June the plaintiff made enquiries in the Registrar's office to put the case down for hearing and the earliest date available to him was 7th December.

[His Lordship dealt with a matter irrelevant to this report, and continued:]

This is a simple question of fact—whether these costs have become useless owing to the postponement. I can understand that the Taxing Master may have had a doubt in his mind, and if he did, then clearly he should have given the benefit of the doubt not to the plaintiff but to the defendant. The plaintiff had to satisfy him that these costs had become useless, and if he had a doubt about it then the plaintiff had not succeeded in satisfying him. I am not at all sure, however, that this is the effect really of the Taxing Master's expression of opinion here—that he had a doubt on these particular items, that they had not become useless. If the Taxing Master had said definitely "In view of the long interval I was satisfied that it would have been necessary to hold these consultations again," then the matter would be clearer: but I have to decide the matter sitting here on reviewing the facts, and as regards the consultation of counsel both with the principal witness and on the brief I have no doubt whatsoever that such a consultation six months before the case comes on is absolutely useless. No counsel would be satisfied to go into Court having had a consultation with his witnesses in a case of this nature six months before the action is heard. As regards the consultations with witnesses by the attorney, it seems to me very reasonable that he should be satisfied, in the interests of his client, that their recollection on the eve of the trial still bears out the original statements which they made, and not only to discuss that with them, but also to advise them when the case would begin and when they would be required to give evidence. I think we can assume that these gentlemen who have been called to give evidence would probably be men of business, and that would be known to the Taxing Master, and that it would be in the interests of the attorney's client not to inconvenience these witnesses by having them in attendance in Court perhaps for one or two days, but if possible try to

cut their attendance as short as possible. The attorney has to act in the interests of his client, and it is not necessary for me to decide what the position would be in a party and party bill because I have to regard this bill as between attorney and client. If in the interests of the client it was necessary that the attorney should consult these witnesses or the counsel, immediately before the trial, I do not see how I can possibly hold that it would not be in the interests of the client to have that consultation again shortly before the trial, nor how I can hold that the consultation which has taken place six months before the date of the trial is quite sufficient in the interests of the client. The attorney in this case contended that it would not be in the interests of his client to depend only on the consultations which he had with the witnesses when he took their statements, but that it was necessary and reasonable for him to have consultations shortly before the trial; in other words, if it were not for these consultations the plaintiff would have gone to trial without his counsel and attorney having seen these witnesses and having had consultations with them shortly before the action was heard, and under those circumstances it seemed to be futile to contend that consultations having been once held should be good for all time. Mr. *Roos* has admitted that the value of the consultations with counsel is to have a living impression of the facts so as to assist counsel in conducting the case before the Court. Well, I think Mr. *Roos* will have to admit that a busy counsel, dealing with many other matters in Court in the meantime, cannot after six months carry in his mind the impressions and the conclusions to which he came in consultation, and that it is necessary to have a further consultation shortly before the action is heard. That being so I am satisfied in this particular case that these consultations have become useless. Even if the Taxing Master had a doubt, I have no doubt about the matter, and in the circumstances I am not prepared to interfere with the discretion of the Taxing Master in having allowed these fees. The result is that as regards these fees the application will be refused and the taxation confirmed. As regards the other items which have been abandoned by the respondent, it is not necessary for me to go into the merits.

On the question of costs, it is unfortunate that in this case, where two attorneys of the Court are concerned, and where we have already had this litigation in connection with costs, I should perhaps have to give opening for further litigation. On the 27th

July the respondent's attorney addressed a letter to the applicant in which he stated that certain items were abandoned, and he goes on to say: "I am instructed further to state that my client hereby agrees to pay all such costs of your application up to date which may have been occasioned by the items above-mentioned." Now as I pointed out during argument that is a very ambiguous statement. It leaves a doubt as to what are the costs of the application up to date which may have been occasioned by the items above-mentioned. In dealing with the question of costs Courts have perhaps not laid down a very hard and fast rule. In the case of *Mathiba and Others* v. *Moschke* (1919, T.P.D. 409), CURLEWIS, J., on page 414 while upholding the judgment of the court below, says: "As regards the question of costs, I prefer the principle that a partially successful applicant should be granted the costs, except such costs as are incurred in connection with such matters on which he has failed and which can readily be separated from the general costs of the application." In that case in the first instance, the learned Judge had made no order as to costs: there was a taxed bill of £160, and in the end the applicant was successful in diminishing that bill by £7, he was unsuccessful with various other items, and the learned Judge made no order as to costs. In the case of *Williams and Another* v. *Director of Education* (1922, T.P.D. 498), MASON, J., also made no order as to costs, the applicant had been successful in having restored items to an amount of £7 17s. 8d., but unsuccessful as regards various other items. In *Campher* v. *Estate Mundt* (1929, T.P.D. 915) the applicant was successful in an amount of £9 4s. out of a total bill of £390, and the Court held that the applicant was entitled to the general costs of the application but had to pay the costs caused in respect of the items on which he was unsuccessful. It seems to me on review of these cases that if this application had been brought and the applicant had been successful on these items of £9 out of £96, and unsuccessful on the other items of £26, and if I had made no order as to costs, and it went to appeal, the Court would probably have refused to interfere with my discretion, i.e., judging from the cases of *Mathiba and Others* v. *Moschke* and *Williams and Another* v. *Director of Education* (*supra*). Now if the tender by the respondent had been to pay the costs of the application saving such costs as may be occasioned by the other items, it would have been on all fours with the decision in the case of *Campher* v. *Estate Mundt*. It seems to me

that if the plaintiff accepted the tender as it stands and had not gone further with his application, the Taxing Master even on this tender could not have done otherwise but allow the general costs of the application. He may have taxed off a very small amount on the other items. I have looked at the supporting affidavit and if you were to say particularly which line and which paragraph and which words only affect the items still remaining it would be a very trifling amount, and in substance it seems to me that if it had gone to the Taxing Master he would have been entitled to tax the general costs of the application. In any case, acting on the principle of *de minimis non curat lex* I am not going to give an opening for further litigation on the question of taxation, and I think a reasonable order would be to make the respondent pay the costs of the application up to the date of tender, i.e., the 27th July, 1933, and the applicant to pay all costs subsequent to that date. It is true there may be a few shillings which are included in the costs of the application which should not be allowed to the applicant, but it would be such a trifling amount that on general principles I think the respondent should pay the costs up to that date. The application is dismissed and the taxation confirmed save as to the items abandoned by the respondent, the respondent to pay the costs of application up to the 27th July, 1933; the applicant to pay all costs subsequent to that date.

Applicant's Attorney: *M. Handelsman*; Respondent's Attorneys: *Bredell & Badham*.

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35. T.P.94
1932. T.P.85-83
32. N.P.300-302

EX PARTE DE JAGER.

1933. *August* 14. DE WET, J.

Insolvency.—Voluntary surrender.—Benefit to creditors.—Small estate.—Undue pressure by creditors.—Free residue.—Sole asset owned under hire purchase agreement.—Act 32 *of* 1916, *sections* 3, 5.

Before the Court will accept the surrender of an estate, the debtor must show, firstly, that there is an estate to surrender; and secondly, that there will be some appreciable benefit to creditors.

But, *semble*, if an honest debtor is being unduly pressed by his creditors, the Court will accept the surrender of his estate, however small the estate may be.