President of the Republic of South Africa and others v Gauteng Lions Rugby Union (CCT16/98) [2001] ZACC 5; 2002 (1) BCLR 1 (1 November 2001)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Appellant

THE MINISTER OF SPORT AND RECREATION Second Appellant

THE DIRECTOR-GENERAL: DEPARTMENT OF SPORT
AND RECREATION Third Appellant

versus

GAUTENG LIONS RUGBY UNION First Respondent

LOUIS LUYT Second Respondent

Decided on : 22 November 2001

JUDGMENT

KRIEGLER J:

[1] This is an application to review the taxation of a party and party bill of costs. It is governed by rule 21 of the Constitutional Court Rules (CC rules) read with rule 17 of the Rules of the Supreme Court of Appeal (SCA rules).[1] On review only two rulings by the taxing master are challenged: the amounts allowed as disbursements for counsel's fees and the calculation of a perusal fee for the attorney. Yet the case, the first of its kind in this Court, involves some issues of principle and presents an opportunity to give guidance to taxing masters and practitioners about this mundane yet important aspect of practice in this Court. This judgment will examine the Court's general approach to the

taxation of party and party bills of costs in the light of precedent, especially in the Supreme Court of Appeal. To that end the judgment will touch on the respective jurisdictions, rules and practices of these two courts, identifying what they have in common and where they differ. Finally the judgment will deal in some detail with some of the problems that arise in this particular case.

[2] The disputed bill of costs relates to an appeal and an associated recusal application that between them took up eight days of debate in this Court during May 1999. The appeal was brought by three appellants against whom a judgment and order had been made in the High Court. Details of those proceedings will be given later. Suffice it to say at this stage that they were of a quite unusual nature. In the court below and in this Court the appellants were represented by one and the same team of three advocates, instructed by the State Attorney's Pretoria office. As for the respondents, by the time the proceedings reached this Court only two of the original four remained, the Gauteng Lions Rugby Union (the Union) and its one-time president, Dr Louis Luyt (Dr Luyt). They, too, had the same joint legal team, consisting of an attorney and three advocates, that had acted for them in the High Court.

[3] Shortly before the appeal was due to be heard, notice was given that at the hearing application would be made on behalf of Dr Luyt — not the Union — for the recusal of all the judges of the Court. Once again details can best be left for later, this introduction requiring no more than mention that the opening three days of the hearing were spent on argument relating to the recusal application. At the commencement of the fourth day the Court announced that the application for recusal was refused, the reasons to follow later. The appeal itself was then argued on that day and the succeeding four. Midmorning of the seventh day leading counsel for the respondents announced that their mandate had been withdrawn and they were thereupon given leave to withdraw from the proceedings. This they did and Counsel for the appellants then delivered their replying submissions, among others arguing for a punitive award of costs on the appeal as well as the recusal application.

[4] Some four months later the Court delivered its judgment on the dismissal of the recusal application[2] but reserved the costs of those proceedings for consideration in the judgment on the merits of the appeal. This main judgment — about which more later — upheld the appeal with costs against the two respondents jointly and severally.[3] In respect of the recusal there was a separate award of costs in favour of the appellants. This latter order, however, was against Dr Luyt alone. Both awards were on the party and party basis and included the costs consequent upon the employment of three counsel.

[5] In July 2000 the appellants' attorney submitted to the taxing master[4] for taxation a bill of fees and disbursements drafted on the party and party basis. The total bill amounting to R1 139 145,30 was made up of attorneys' fees of R234 660,25 and disbursements of R904 485,14, being largely counsel's fees. The disbursements claimed in respect of counsel's fees were supported by vouchers in the form of fee lists submitted to the attorney by each of the three advocates. The fee lists and accompanying time sheets reflect that counsel debited on the basis of a fee per hour or per day for specified time spent on itemised work done by each of them in connection with the appeal. The rate charged by counsel was, for the senior, R750 per hour and R7 500 per day and for each junior two-thirds (i.e. R500 and R5 000). The time booked falls into two main periods, the first in December 1998 and January/February 1999 in respect of work described variously as "Preparation of written submissions", "Preparing heads of argument for Constitutional Court" or "Preparation for and finalisation of heads of argument for Constitutional Court appeal".

[6] There are also some debits during this first period relating to an application for postponement of the appeal. Both these sets of early debits are

probably ascribable to a change in the date set for the hearing of the appeal. The Court had originally (in early December 1998) set down the appeal for March 1999 and put the parties on terms as to the prior lodging of their written submissions. The date fixed for the hearing of the appeal did not suit the respondents' legal team and in January 1999 they made representations to the Court for a postponement of the appeal to later in the year. The dates were then shifted and the appeal was set down for 4 to 10 May 1999 with the caveat that counsel should be available to continue thereafter if necessary. The second period of preparatory work was April/May 1999 when the fee lists reflect counsel spending time in considering the respondents' answering argument and drafting the reply on behalf of the appellants, as also for preparation for and attendance at eight days of hearing.

[7] Of the items challenged at the taxation only two remain unresolved: counsel's fees and the perusal fee, both of which the taxing master reduced but still allowed at levels well above those contended for on behalf of the respondents. Their contention was that the sum total of what should be allowed for counsel's fees should be an amount calculated on the basis of a first day fee on appeal, which takes into account all the preparatory work up to that stage plus the appearance on that day, and refreshers of a half of the first-day fee for each of the succeeding days of the hearing. The respondents agreed that the fees of the juniors should be taxed at two-thirds of those of the senior. The first day fee that was proposed on this basis was R45 000 for the senior, R30 000 for each junior and refreshers of R22 500 and R15 000. For the eight days this adds up to a total of R472 500, made up as to R202 500 for the senior and R135 000 for each junior. The submission advanced on behalf of the respondents at the taxation regarding the perusal fee for the attorney was that it should be calculated at R17,00 per page for 940 pages and not, as reflected in the bill, at R27,00 per page for 1 390 pages, i.e. at R16 150 instead of R37 350.

[8] On 27 July 2000 the taxing master affixed her allocatur to a bill that reflects that on taxation she allowed a total of R1 054 986,85 inclusive of VAT and fees for drawing the bill and attending at the taxation. The main component of the overall bill was counsel's fees, which were allowed in an amount of R784 000 made up as to R336 000 for the senior and R224 000 for each of the juniors. These amounts the taxing master notionally allocated evenly to each of the eight days of hearing, i.e. for the senior a daily fee of R42 000 was allowed and for the juniors R28 000 each. She also allowed the appellants' attorney a perusal fee of R25 650 for perusing the judgment of the court of first instance, calculated at R27,00 per page for 950 pages. These two items, i.e. the disbursements in respect of counsel's fees and the particular attorney's perusal fee are still in dispute, involving a difference of R311 500 and R9 500 respectively.

[9] The respondents called on the taxing master in terms of SCA rule 17(3)[5] to state a case for the decision of the Court and the requisite steps under the succeeding sub-rules have been complied with.[6] It is not necessary to call for any further written submissions or oral argument — there are no disputed findings of fact, the respective submissions of the parties are clearly set out in the papers and the issues are defined.

[10] Before considering the specific issues raised by the application for review, some preliminary observations should be made about the nature of this Court's review jurisdiction in a case such as this as also about the test it should apply in deciding whether or not to interfere with the taxing master's exercise of her powers. The parties did not suggest any difference of principle between the nature of this Court's review jurisdiction under CC rule 21 and that of the SCA when it acts under its corresponding rule 17. Nor is any apparent. On the contrary, the very circumstance that this Court's powers and functions in

regard to review of its taxing master's performance of her duties are defined with reference to the rules of the SCA would on the face of it suggest uniformity. More substantively, however, there is nothing inherent in the distinction between the respective areas of competence of the two courts to indicate that there should be any difference between their respective powers and duties to control their functionaries in the performance of their official duties.

[11] Nor is there any difference in principle between the two courts in relation to the law of costs. Although this Court has long since made plain that, for reasons of policy dictated by and related to its constitutional jurisdiction, its approach to awards of costs differs in some respects from that in the other courts,[7] this would not ordinarily bear on the actual details of costs or their taxation. As regards such detail there may obviously be differences between this Court and the SCA by reason of differences in the respective rules or practices of the two courts. There is an example of such a difference in this case, which will be mentioned later. In general, however, there is no reason to deviate from the principles developed by the SCA with regard to the taxation of bills of costs by its taxing master.

> [12][In any event, in relation to matters closely related to the practice of law and the conduct or remuneration of its practitioners, this Court will generally rely on the experience and specialised knowledge of the SCA. This is so even where a case relating to professional legal conduct is alleged to involve constitutional questions. In the case of De Freitas and Another v Society of Advocates of Natal (Natal Law Society intervening)[8] Langa DP explained that it is not ordinarily appropriate for this Court to deal with constitutional issues in cases relating to regulation of the advocates' profession and the fitness of its members to practise without knowing the views of the SCA. While the bifurcated apex of the judicial hierarchy may have its disadvantages, as evidenced by an interlocutory skirmish about jurisdiction in this very litigation[9] and in cases like S v Boesak,1[0] its benefits should not be overlooked. Here, for instance, it is instructive for this Court to have regard to decisions of the SCA regarding the relevant principles, as it was for the parties and the taxing master who were sensible in taking a bearing as to counsel's fees from what the taxing master of the SCA has awarded in comparably heavy cases in that Court.

[13] It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of Innes CJ in the JCI case.1[1] This means —

> " . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling".1[2]

This dictum has not only been reaffirmed fairly recently by the SCA in JD van Niekerk en Genote Ing v Administrateur, Transvaal1[3] but has been approved and followed by the Namibian Supreme Court in Hameva and Another v Minister of Home Affairs, Namibia.1[4] There is therefore no apparent reason why this Court should adopt a different approach to a review of taxation under CC rule 21 or apply a different test for interference with decisions of its taxing master. In what follows, therefore, the enquiry will be directed towards establishing

whether in respect of any disputed items this Court's view differs to the stated extent from that of the taxing master.

[14] To this there is a qualification, however. Not all decisions by the taxing master are equally insulated from judicial interference. In some instances, for example, where the dispute relates to the quantum of fees allowed by the taxing master, the courts are slow to interfere with the taxing master's assessment. But there are other cases —

> " . . . where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion."1[5]

The prime example of such cases is where the court has better knowledge of the particular question than the taxing master, for instance where a point as to admissibility of a segment of evidence is determined by the court and subsequently bears materially on costs items in dispute. The instant is another example of this type of case. As will be shown shortly, it was in several respects an unusual case and the taxing master's knowledge and appreciation of some of its features cannot reasonably be expected to match those of the members of the Court who participated in the proceedings.

[15] In all taxations it is important to keep in mind the one overarching general principle applicable to all awards of party and party costs, a principle which applies to this Court as it does to the SCA. This principle was put in the following terms by Innes CJ in Texas Co. (S.A.) Ltd. v Cape Town Municipality:

> "Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation . . .".1[6]

This principle is echoed and fleshed out in Note I to SCA rule 18G(5), which reads as follows:

> "Note I - With a view to affording the party who has been awarded an order for costs full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been made, the taxing master shall on every taxation allow such costs, charges and expenses as appear to him or her 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 them, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence or mistake, or by payment of a special fee to counsel or by other unusual expenses." (Italics added.)

This Note underscores that a moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds. The taxing master is also enjoined by SCA rule 18G(5) Note II to adopt a flexible and sensible approach to the task of striking the balance while taking into account the particular features of the case. This it does in the following terms:

> "Note II - The taxing master shall be entitled in his or her discretion at any time to depart from any of the provisions of this tariff in extraordinary or exceptional circumstances where the strict execution thereof would be unjust, and in this regard shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant." (Italics added.)

[16] The ultimate question raised by the respondents' application for review of taxation is therefore whether the taxing master struck this equitable balance correctly in the light of all the circumstances of this particular case. Before turning to a consideration of that question, however, mention must be made of a major hidden complication. That is that there is a fundamental error in the bill of costs which was not picked up when the bill was debated, taxed and subsequently submitted for review. The mistake originated in the bill prepared on behalf of the appellants. It is drawn as a single bill reflecting all the fees and disbursements claimed notwithstanding that the Court quite specifically made two distinct orders as to costs, one relating to the recusal application and the other to the appeal itself. Dr Luyt alone was to bear the costs of the recusal while he and the Union were jointly and severally liable for the costs of appeal. The costs of these two proceedings cannot simply be rolled into one as the bill purported to do. Not only is that not what the Court ordered but it unjustly saddles the Union with a debt for which it is not liable.

[17] There is no indication that in drafting the bill any attempt was made to distinguish the recusal costs from those related to the appeal. The notice of taxation and the bill itself describe the parties as they were in the High Court, i.e. still listing the original four respondents, and do not specify the award or awards of costs pursuant to which they purport to be issued. But it is apparent from but a superficial perusal of the bill that it incorporates costs that relate to both the appeal and the recusal. Thus, for instance, items 182 to 188, 195 to 199 and 201 to 228 (involving attorney's fees totalling approximately R4 000) are unmistakably related to the recusal; and a time sheet submitted by one of the two junior advocates in support of his fee list for April 1999 shows that on 29 and 30 April 1999 some 17 hours were spent (debited at R500 per hour) on perusing the recusal application and preparing to meet it. His fee list for May 1999 speaks of preparation and court appearances "on recusal and on appeal" without allocating debits to one or the other. It is obvious, however, that the fees for three of the eight days debited by the attorney and counsel for their attendance at court are directly ascribable to the recusal application, which took up the opening three days.

[18] It may have been of little concern to the appellants which of the two respondents paid their costs — and therefore which should be identified in the bill as liable — but it certainly made a difference to the respondents, particularly the Union, without whose informed mandate the attorney was not entitled to consent to the consolidation of what should have been two sets of costs. On the respondents' approach to counsel's fees, at least three refreshers for each advocate and the attorney's fees mentioned in the previous paragraph are recusal costs. That would mean that counsel's fees of R157 500 (3 x R22 500 plus 2 x 3 x R15 000) and the attorney's recusal charges have wrongly been debited to the Union, albeit jointly and severally with Dr. Luyt. The parties having overlooked the mistake, the taxing master did likewise when taxing the bill. In the result one composite bill was taxed.

[19] Be that as it may, the items challenged at the taxation and the bases of the challenges are unrelated to the failure to separate the two sets of costs. They apply to the fees and disbursements of both the appeal and the recusal regardless of their separation, as do the points raised by the respondents in their subsequent application for review of the taxation. Their notice of review specifies only two findings by the taxing master that ought in their submission to be corrected: the fees allowed for counsel and for the perusal. The written submissions subsequently filed on behalf of the respondents specify how it is suggested these fees should have been arrived at by the taxing master.

[20] The issue relating to the calculation of the perusal fee involves a relatively trivial amount and is really quite simple. It should therefore be

resolved first to clear the decks for the more substantial and demanding problem of the assessment of counsel's fees. It is common cause that a fee is recoverable for the perusal by the appellants' attorney of the judgment of the court of first instance and that it is to be calculated at a rate per page for 950 pages. The only issue is whether the respondents are correct in contending that the fee per page should be R17,00 or whether it should be R27,00 as the bill claimed and the taxing master allowed. The respondents rely on SCA rule 18C(3)(a), which allows a fee for —

> "[a]ttendance on and perusal of any application or affidavit or any other document not elsewhere provided for . . ."

while the appellants contended and the taxing master agreed that the appropriate rubric was Rule 18C(1)(a), which relates to —

> "[p]erusing judgment of court a quo when taking instructions for the continuation of an appeal or cross-appeal, where leave to appeal is not required . . .".

[21] On the face of it, the contention advanced by the respondents is wrong. It is common cause that the fee relates to perusal of the judgment of the court a quo; it is also common cause that the work was done when the attorney was "taking instructions for the continuation" — i.e. with a view to pursuing — the appeal against the judgment; and lastly it is common cause that leave to appeal was not required. This was so held in a judgment of this Court on an interlocutory issue related to jurisdiction to hear the appeal in this matter.1[7] In terms of section 167 of the Constitution this Court had exclusive jurisdiction to deal with the principal issues raised by the appeal; and the orders made in respect thereof by the court of first instance were inchoate unless and until confirmed by this Court. On a plain reading of rule 18C(1)(a) therefore, it was the appropriate heading under which to assess this fee. Even if that were not so, it certainly is more appropriate than rule 18C(3)(a), a general fall-back provision aimed at the perusal of more mundane documents.

[22] The judgment in the High Court certainly did not fall into that category. Apart from the fact that judgments are inherently of a more important nature, this particular judgment was an exceptionally long and turbid document that played an important part in the procedural preliminaries to the eventual consideration of the appeal. The appellants lodged with the High Court an application for leave to appeal to the SCA soon after the adverse order had been made against them in that court and while they were awaiting the learned judge's reasons. Later, once the reasons had been given (in an 1159 page judgment) they lodged a notice of appeal in this Court and an accompanying application for condonation for its late filing. This application was opposed and resulted in a debate in this Court about its jurisdiction to hear the appeal, which necessitated close analysis of the judgment. In the circumstances the taxing master was entitled to have regard to the general guideline in Note I to rule 18G(5) that she should afford the appellants full indemnity for all costs reasonably incurred and allow such costs as appear to her to have been properly incurred in the defence of the rights of the appellants.

[23] Moreover and in any event, as will appear presently, this was pre-eminently a case that presented, in the words of Note II to rule 18G(5) —

> " . . . extraordinary or exceptional circumstances where the strict execution [of the tariff] would be unjust . . ."

and obliging the taxing master to —

> " . . . take into account the time necessarily taken, the complexity of the

matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant."

In doing so the taxing master would have been entitled to take into account the circumstance that the items under Rule 18C were tailored for the leave to appeal procedure of the SCA and do not fit the corresponding procedure of this Court quite as snugly. Here rule 18 of the CC rules prescribes a procedure that differs quite substantially from that in the SCA.

[24] On the first issue submitted for review the finding is therefore that the taxing master was correct in deciding that R27,00 per page is the appropriate tariff at which to calculate the attorney's fee for perusing the High Court judgment. The fees allowable under this item were correctly taxed in the amount of R25 650. This is quite clearly an item relating to the appeal and would be taxable as against both respondents.

[25] As regards counsel's fees, five propositions are advanced in support of the basic complaint on behalf of the respondents that the amounts allowed are excessive:

(1) "As the Rules of the Supreme Court of Appeal regarding taxation and attorneys' fees are to be applied by this Court it is submitted that the practice which has been developed by that Court ought to be applied."
(2) "The guiding principle [in that Court] when taxing counsels' fee is to determine what the reasonable fee is for the value of the work done."
(3) "The time actually spent in preparation of an appeal is not a decisive criterion for determining the reasonableness, between party and party, of a fee for that work. Time spent cannot displace an objective assessment of the features of the case."
(4) "The practice in the taxation of costs in appeals before the Supreme Court of Appeal is that a composite (i.e. all inclusive) fee is established and that such fee comprises the drafting of heads of argument, preparation and the arguing of the appeal."
(5) "It is presently the practice of the Taxing Master of the Supreme Court of Appeal to allow for senior counsel a composite fee of between R30 000 - R45 000 (depending on the complexity of the matter) for the first day with a refresher for each day thereafter of half of the amount allowed for the first day. Junior counsel are allowed two thirds of senior counsel's fees."

The respondents also contend that the taxing master did not apply her mind to the relevant issues, she having —

" . . . simply divided the total amount of senior counsel's accounts by the number of court days for the appeal (i.e. 8) and then allocated the result (i.e. R42 000,00) to each particular court day. After establishing senior counsel's fees in this manner the Taxing Master allowed each junior counsel two thirds as their respective daily fees."

[26] The taxing master did not specifically respond to this submission in the stated case she submitted for the review. She had however set out in her report filed earlier how she set about taxing counsel's fees. Her approach, she reported, had been to apply —

" . . . the principles as laid down in J D van Niekerk en Genote Ing v Administrateur, Transvaal 1994 (1) SA 595 (A) . . . with regard to the fixing of a global fee for counsels, encompassing fees for preparation, drafting of heads of argument and the arguing of the matter."

She further explained that in seeking to arrive at amounts that were neither excessive for the respondents nor insufficient for the appellants she took the

following five factors into account:
The complexity of the matter: “Complex and important constitutional questions”.
The volume of the case: “The court record was eight volumes. The record consists of 6684 pages. Judgment of the court a quo consists of 1159 pages.”
The prevailing level of counsel’s fees: “All counsels’ fees including VAT. Thus, R784 000,00 minus R109 760,00”.
Inflation: Here the taxing master did not elaborate but she apparently took the erosion in the value of money in the intervening period into account in comparing the level of fees with those allowed in Van Niekerk’s case.
Counsel must be fairly compensated for preparation and presentation of argument: Here the taxing master, relying on the fee lists rendered by counsel, did the calculation on the basis that senior counsel and the two juniors were in court for 8 days and that they spent 361, 330 and 349 hours respectively in preparation.

[27] The appellants support the taxing master’s reliance on Van Niekerk’s case,1[8] agree with the criteria she accordingly identified and endorse her evaluation of these. All in all they submit that she performed her functions and exercised her discretion correctly. They draw attention to the feature that the counsel’s fees put into the equation by the taxing master were charged according to debiting guidelines agreed between the Bar and the attorneys’ profession. In terms of the agreement between the respective professional associations, advocates book the time actually spent in the preparation of a case and charge an hourly or daily rate for such time.

[28] The attitude of the courts, however, is that this rate-per-time basis is to be no more than a pointer in assessing what is a reasonable fee to allow on taxation for particular services rendered by counsel. Indeed, in Van Niekerk’s case Corbett CJ roundly condemned this basis as putting a premium on slow and inefficient work and conducing to the charging of fees that are wholly out of proportion to the value of the services rendered. The learned Chief Justice reaffirmed the following statement in an earlier judgment of that Court, Scott and Another v Poupard and Another:

> “Although not wholly irrelevant to the question of complexity and bulk, the time actually spent in preparation of an appeal cannot be a decisive criterion for determining the reasonableness, between party and party, of a fee for that work, and thus displace an objective assessment of the features of the case.”1[9]

The effect of blithely adhering to the rate-per-time basis is graphically illustrated in Van Niekerk’s case where counsel’s fees on appeal that were sought to be recovered on a party and party basis were described in the judgment as “kommerwekkend”, “beswaarlik aanvaarbaar”, “uiters vergesog” and “buitensporig”.2[0]

[29] The respondents do not contend that the same mistake of principle was made in this case. Notwithstanding a generalised complaint that the taxing master had not applied her mind and had made incorrect use of senior counsel’s rate-per-time debits, they acknowledge that she did not accept the rate-per-time basis as the sole criterion, that she followed the lines indicated in the Appellate Division cases cited above and that in so doing she correctly identified the relevant criteria, being the five she enumerated.2[1] Indeed, they do not really challenge the taxing master’s broad approach to the evaluation of the relative weight of such criteria.

[30] The respondents’ principal complaint in seeking to review the amounts allowed on taxation for counsel’s fees, is that the taxing master gave too much weight to the total amount debited by senior counsel on the rate-per-time basis. Although the respondents raise other objections as well, this is the basic cause of complaint. It affects not only the senior’s fees but also those of the

juniors, which were taxed at two-thirds of the senior's. As noted above,2[2] they contend that first-day fees for senior counsel in the Supreme Court of Appeal are currently being allowed in party-and-party taxations at between R30 000 and R45 000, which latter figure they suggest would be appropriate in this case for the appellants' senior counsel. As regards the fees for each of the two juniors, they do not challenge the taxing master's decision to allow two-thirds of the senior's fee and contend that R30 000 ought to be allowed.

[31] The second ground advanced by the respondents is important in terms of principle and possibly even more important in terms of money than the first, with which it interacts. This second contention is that in principle taxation as between party and party of advocates' fees on appeal to the SCA does not permit separate fees for the preparatory work such as mastering the facts, conducting legal research or even for drafting the heads of argument. They say that the settled practice of the SCA is to allow a relatively heavy composite first day fee into which is rolled together the fees for all the work done in preparation plus the remuneration for the appearance to argue the matter; and for the succeeding days there are daily refreshers at a much lower rate. In the alternative they contend that this is certainly the way in which counsel's fees on appeal to the SCA are normally taxed as between party and party. Therefore, it is said, the taxing master erred in allowing an uniform fee of R42 000 per day for the senior and R28 000 for the juniors for each of the eight days of the hearing. It will be remembered that according to the respondents the allowance for the senior should have been R45 000 for the first day plus seven refreshers of R22 500 each, a total of R202 500; and for each junior two-thirds, namely R30 000 plus seven refreshers of R15 000, totalling R135 000. The respondents therefore submit that the overall total for counsel's fees should be R472 500.

[32] The respondents are correct as to the practice of the SCA in regard to separate debits for preparatory work and for the appearance on appeal. Many reported cases make that clear, the most illustrative probably being the judgment of Corbett CJ in the Van Niekerk case.2[3] As roundly as he condemned the rate-per-time basis of assessing counsel's fees, as strongly did he express himself against taxing counsel's fees for the preparatory work separately from the appearance fee. The judgments in Scott v Poupard2[4] and Ocean Commodities2[5] are no less firm in their rejection of such cumulative debiting. Of course, what underlies this consistent and vehement rejection is that such piecemeal charging often serves to camouflage excessive fees. Though this is only too plain from the uncharacteristically acerbic observations of Corbett CJ in Van Niekerk, it is also an undertone of the other two judgments cited. This is because the ultimate object of the exercise of taxation — and hence of a review of taxation — is to determine a reasonable fee to be recovered as between party and party for the work done by counsel; or as it is put in Note I to SCA rule 18G(5), to —

> " . . . allow such costs, charges and expenses as appear . . . to have been necessary or proper for the attainment of justice or for defending the rights of any party . . ."

[33] It is therefore as well to recognise that the two points advanced by the respondents, though notionally distinct, are very much interrelated. The real complaint that the respondents have against the taxation is not that the taxing master failed to apply her mind. Nor is it really that she ascribed too much weight to the time spent in preparation and made over-generous allowance for it or that she should have allowed less on refresher than for the first day. These are but handy pegs, as is evident from the proposals by the respondents in their written contentions in response to the stated case. At bottom the complaint is that the taxing master allowed the successful appellants to recover from the respondents an unreasonably heavy contribution towards the fees payable by the appellants to their advocates.

[34] In assessing how much to allow, the taxing master was faced with a welter of information, much of it confusing. It was an exceptional case, as is borne out by some aspects of the bill of costs now under review. As regards the current question of counsel's fees for preparation the picture is particularly confusing. Starting in December 1998, at a time when the appellants' written submissions were scheduled to be delivered by 3 February 1999 for a hearing the following month, counsel for the appellants started clocking hours for preparing such submissions.2[6] Then, after the dates had been shifted, each of the appellants' advocates intermittently booked hours and occasionally days — some times several days on end — now working together and then independently of one another, each booking his own hours. In addition, at the end, counsel each debited a fee for each day of the eight-day hearing of the application for recusal and then the appeal.
[35] Faced with this complex picture, the taxing master decided to start by trying to arrive at a reasonable composite fee for the senior for all the work he put into the appeal and the recusal application. In her report she outlines the criteria she took into account2[7] in coming to the conclusion that the total amount he had debited was substantially reasonable (deducting VAT). The respondents do not dispute that these are the factors which in principle she ought to have considered and the parties are agreed as to their cogency. The enquiry should then turn to an evaluation of their weight.

[36] The fees allowed are unusually high; even those proposed by the unsuccessful litigants' attorney are well above the norm. But then it was an unusual and in many respects unprecedented case. In essence it involved allegations that the President of the Republic of South Africa, acting in concert with a minister of state and the administrative head of the latter's department, had — initially on paper and thereafter in oral evidence — committed perjury in order to cover up that the President had abdicated in favour of the minister the functions of the President with regard to the appointment of a commission of enquiry into a matter of public interest. Besides, its sheer bulk was daunting. The judgment of the High Court was so extensive that the publishers of SA Law Reports decided that although it had to be reported, it could not be reported in full. It ran to no less than 1159 typewritten pages and is quite exceptionally prolix. The record of the proceedings in the High Court which was prepared for the appeal was well over 6 600 pages, consisting of an unusual number and confusing set of affidavits: founding, answering, replying, supplementary, explanatory and so forth; and then several volumes of transcription of oral evidence. The written argument lodged by counsel in the appeal, excluding photocopies of authorities cited, eventually exceeded 1 000 pages.

[37] The proceedings in the High Court had started as an opposed urgent application on notice of motion. There were seven distinct causes of action advanced in support of a claim to review and set aside the decision by the President to appoint a commission of enquiry to investigate the affairs of the first respondent. After several days of hearing the matter was referred to oral evidence, essentially on the ground that the veracity of the denials on oath by the President and the other appellants of allegations made by the respondents had to be tested in cross-examination.

[38] The legal, political and constitutional implications of this unprecedented order2[8] were weighty and were underscored when the judge ordered the President to appear before him to be cross-examined. The responsibility cast on counsel for the President by these orders must have been burdensome. In any event, the hearing of oral evidence then occupied 18 days. Ten witnesses were called and four interlocutory applications punctuated the proceedings. The President, the Minister of Sport and Recreation and the Director-General of the latter's department duly appeared, testified and were cross-examined as to their

credibility. The President himself spent many hours under cross-examination, it being hinted but never openly said that he was lying. The upshot was an adverse credibility finding by the judge against each of the appellants and an order substantially in the terms sought by the respondents.

[39] The case and its outcome elicited considerable public debate and no little anger. Intemperate public criticism of the judge generated further heat, so much so that the Judge-President of the court concerned had to intervene publicly. When the case then went on appeal the animosity was exacerbated. One of the principal lines of challenge to the findings and conclusions of the court of first instance that was foreshadowed in the papers filed by the legal representatives of the appellants, was that the judge of first instance had been biassed.

[40] Then, shortly before the appeal was due to be heard, Dr Luyt initiated an application for the recusal of all of the judges of this Court, targeting some for special submissions as to their unfitness to hear the case but leaving it to the respective consciences of the others whether to continue or not. On 4, 5 and 6 May 1999 argument relating to the recusal application was heard and on Friday 7 May the application was refused, the reasons being reserved. The judgment subsequently handed down in relation to the recusal, 83 pages long, explains the imputations against the integrity of the members of the Court and the constitutional implications inherent in the application.2[9] Though the appellants were not formally parties to the recusal proceedings, their counsel were inevitably involved as officers of the court and the hearing of the appeal on which they had been briefed was both complicated and delayed.

[41] Argument on the merits of the appeal commenced on 7 May with counsel for the appellants presenting argument, continuing on Monday 10 May and half of the next day. After the mid-morning adjournment on 12 May counsel for the respondents, having traversed less than half of their argument, announced the withdrawal of their mandate and asked to be excused from further participation. The case then continued on 12 and 13 May without the benefit of further argument on behalf of the respondents and counsel for the appellants having to adapt their strategy and argument accordingly. On 10 September 1999 the Court delivered a judgment of 198 pages (containing 260 paragraphs).3[0] This judgment is not only very long but emphasises “the multiplicity and complexity of the factual and legal conclusions it contains, the sweep and gravity of counsel’s submissions in this Court and the inherent importance of the case . . .”.

[42] Apart from the quite unusual bulk of the record and the major complication presented by the belated and sweeping application for recusal, the case presented a wide range of constitutional conundrums with serious implications, not only in the particular case but as precedent for later cases. Clearly the matter placed a heavy burden on counsel in relation to the multitude of legal problems and factual issues. More importantly, the underlying politico-legal issues and their constitutional ramifications demanded much research and mature reflection by counsel. Besides the merits of the appeal itself and the shadow cast over the reputation of the Head of State by the findings of the judge in the High Court, the case bore directly on the professional integrity and judicial career of that judge and of the judges of this Court. The constitutional issues involved in and the political implications of the order directing the Head of State, to give evidence in a court of law were particularly grave and complex. Likewise the judicial delving into the inner workings of the office of the head of the executive branch of the government presented difficult and important questions for counsel to address in their argument to this Court.

[43] To a degree the same could be said for the recusal application. Although not intellectually or professionally as demanding as the appeal itself, the task

of counsel for the appellants was demanding even when it came to this part of the case. The dual duty of counsel, to the client and to the court, is trite and ordinarily presents little difficulty. In a situation such as occurred here, where the challenge was directed at the bench itself and implied a measure of judicial impropriety, counsel on both sides had an awkward role to fulfil, promoting the interests of their clients but at the same time performing their duties towards the Court. In the case of counsel representing the President the problem was compounded in that the very basis of the generalised application for recusal was that the judges were reasonably to be perceived as seeking to favour their client. All these things being considered, there can be little doubt that the taxing master was obliged to attach exceptional weight to the first, second and fifth criteria she listed: (i) The complexity and importance of the case; (ii) the volume of the case; and (iii) fair compensation for the preparation and presentation of the case.

[44] As for the last-mentioned factor, it should be noted that there is a difference between the practice in the SCA regarding heads of argument and the associated appearance of counsel at the hearing and the practice in this Court. In the SCA the emphasis is on the oral presentation of argument by counsel in open court with the heads of argument serving largely as a preliminary guide to the court. Thus rule 10 of the SCA rules refers to “main heads of argument” which are to be “succinct and without unnecessary elaboration” and must not contain “lengthy quotations from the record or authorities”. In this Court, however, the emphasis is on the written submissions, which are not regarded as succinct heads of argument forming the basis of argument to be presented, but the argument itself together with all supporting material. It is impossible for this Court, sitting en banc with eleven members, to engage counsel in debate as does the SCA. Here much more detailed argument and more extensive quotations are expected in advance. In consequence this Court can decide — and on occasion has decided — cases without hearing oral argument. Moreover and more to the point, the importance of the written submissions in relation to the oral argument is significantly greater than in the SCA.

[45] In an appropriate case, therefore, it may be reasonable to make some special allowance for counsel’s fees for preparing written argument for this Court. This is expressly contemplated by sub-rule (2) of CC rule 21, which provides as follows:

> “(2) In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item.”

In such cases, however, the taxing master will still have to be guided by the general precept that the fees allowed for counsel must constitute reasonable remuneration for work necessarily and properly done for the attainment of justice. Therefore, although the taxing master may in an appropriate case properly allow some or all of counsel’s fees charged for preparation of and drafting written argument for this Court, it would not be proper then also to allow a full “first-day fee” for the hearing, i.e. the kind of composite fee ordinarily allowed in the SCA and which has built into it remuneration for preparatory work. That would condone cumulative debiting and result in excessive fees being allowed.

[46] The taxing master would moreover have to keep a watchful eye on the reasonableness of not only — or even so much — the rate being charged by counsel, but on the time spent. The comments by Corbett CJ referred to above apply with equal force in this Court. Allowing a rate per unit of time places a premium on slow work to the detriment of the party who has to bear the cost thereof. Moreover, it does conduce to the production of unnecessarily lengthy or detailed written submissions. This would not only be unfair to whoever has to bear the cost but places an additional burden on all who have to study the

resultant verbosity.

[47] In addition it should be remembered that although a rate per unit of time worked can be a useful measure of what would be fair remuneration for work necessarily done and although the need for written submissions in this Court may permit this method more readily than in the SCA, the overall balance between the interests of the parties should be maintained. The rate may be reasonable enough and the time spent may be reasonable enough but in the ultimate assessment of the amount or amounts to be allowed on a party and party basis a reasonable balance must still be struck. Here the inherent anomaly of assessing party and party costs should be borne in mind. One is not primarily determining what are proper fees for counsel to charge their client for the work they did. That is mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When taxing a party and party bill of costs the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid or has to pay on her or his own side. Or, to put it differently, how much of the client's disbursement in respect of her or his own counsel's fees would it be fair to make recoverable from the other side?

[48] An application of these guidelines to the facts of this particular case may prove instructive. In the first place it should be decided whether this is a case that falls within the special category of cases contemplated by CC rule 21(2), i.e. where it is appropriate on taxation as between party and party to allow separately for written argument. Here the most significant factor is that the date for the hearing and the accompanying dates for the lodging of written argument were changed during January 1999, approximately a month after they had originally been fixed. By the time the postponement was sought — and the more so by the time it was granted — counsel for the appellants would have had to do the bulk of their preparatory work. It was not only reasonable but imperative for them to knuckle down to the task when they did in December 1998 and January 1999. Then, when the case was postponed, it was reasonable for them to renew their preparation of the argument on appeal during April 1999. In the circumstances it is unnecessary to decide whether, were it not for the hiatus brought about by the belated postponement of the hearing, this would have been a case where some allowance for fees on preparation ought to have been made. Clearly the unusual nature and scope of the case coupled with the interruption occasioned by the rescheduling of the dates for hearing of oral argument brought it within the special category of cases contemplated by CC rule 21(2).

[49] The next question to be resolved is whether the rate at which the fees were charged is reasonable. Senior counsel booked his time at R750 per hour and R7 500 per day and the juniors at R500 and R5 000. On the face of it those are not excessive charges for the complexity, importance and sensitivity of the work involved in this case. It really did call for exceptional skill and scholarship, a great deal of intensive intellectual effort and no little wisdom. Having regard not only to what is currently being charged by advocates in private practice but by consultants in general, the charges are reasonable for the leader of a specialist team engaged in work of this kind. Similarly, the rate of fees charged by the two juniors is reasonable.

[50] The more difficult question that then arises is whether the time spent on the preparatory and drafting work by counsel as reflected in their fee lists was reasonable. The taxing master calculated that senior counsel's hours booked add up to 361 and those of the juniors to 330 and 349 respectively but expressed no view as to the reasonableness of these hours and the respondents did not challenge them. That is of little moment, for their estimates of the total number of hours that would have been reasonable to spend on the preparation of this case would perforce have to be shots in the dark. That is why the ultimate test is not whether the rate charged and/or the time spent is reasonable but

whether the resultant amount is fair to award on a party and party basis. Looking at the rate, the time and the resultant product purely to assess their reasonableness, it would be difficult to fault the taxing master.

[51] But this is not an attorney and client bill where the reasonableness of the fee is the predominant criterion. The question is whether it would be fair to both sides to allow recoupment of virtually the whole of very substantial attorney and client charges in respect of counsel's fees. The taxing master did not consider this aspect and the Court is therefore obliged to exercise its own judgment on this issue. Having regard to the circumstances of the case as detailed above, it would be fair to both sides to allow on a party and party basis roughly two-thirds to three-quarters of these fees.

[52] It is important to note two further points. First, there is little if any evidence of duplication of work. Senior counsel, who clocked many hours in the period before Christmas 1998 and early in January 1999, did not debit again until a week before the hearing while the juniors spent less time at the beginning and correspondingly more time in April 1999. The second is that although the basis on which counsel debited and on which their fees were taxed did not conform to the practice endorsed by the SCA, namely a composite first-day fee and lesser refreshers, there was no cumulative debiting. Each of the three advocates booked the first day of the hearing and each of the seven following days at the same daily rate at which they booked their preparation and drafting time, i.e. at R7 500 and R5 000 respectively. The main mischief identified in cases like Van Niekerk is not present here.

[53] That does not mean that the taxing master was correct in dividing the total fees thus calculated on the basis of equal daily fees for each of the eight days of the hearing. On the contrary, such an allocation seems quite unnecessary and cannot be endorsed. A proper assessment of the quantum of counsel's fees to be allowed has been made, in which the duration of the hearing has been taken into account, and no more need be done. In any event, as pointed out above, the appeal did not run for eight days but for five only.

[54] In the result the taxing master's allocatur cannot be allowed to stand. The matter will have to go back to her for reconsideration of bills that distinguish properly between the costs that are for the account of both respondents and those that are to be borne by Dr Luyt alone. Once such allocation has been done, the taxing master can proceed to taxation along the lines indicated in this judgment. The attorney's fee for perusing the judgment must be allowed in the amount of R26 650 as an item in the bill on appeal and the total at which counsel's fees for both the recusal application and the appeal should be allowed as between party and party is R240 000 for the senior and R160 000 for each of the juniors.

[55] Were it not for the circumstance that the joint and several liability of the Union and Dr Luyt does not extend to both sets of costs, no more would have to be done. It is however necessary to allocate counsel's fees separately to the recusal application and the appeal in order to determine the respective shares of those fees for which they are respectively liable. That task may prove wellnigh impossible so long after the events and the taxing master may have to do the best she can with the available data. In that event she would be acting prudently and fairly were she to assume that, unless the attorneys submit evidence and/or argument persuading her otherwise, roughly one-fifth of the amount allowed for counsel's fees is for Dr Luyt's account. This fraction is arrived at on the basis that the appeal took up more than half of the time at the hearing and required much more time in research and preparation than the recusal. In the circumstances it would be fair to both Dr Luyt and the Union if four-fifths of the overall allowance on the party and party bill for counsel's fees were notionally allocated to the appeal and one-fifth to the recusal.

[56] In the result the application to review the taxation succeeds to the extent indicated in this judgment. The respondents have succeeded in substantially reducing the total amount of costs to be paid. To that extent the appellants' opposition failed. The fact that the specific grounds relied on for setting aside the allocatur were not upheld does not alter the substance of the material success achieved. The dominant (if not exclusive) purpose of reviewing the bill was to decrease the amount of the respondents' liability. Had the contentions advanced but not accepted resulted in the costs of the taxation being substantially more than they would have been had the correct argument been advanced, some special order may have been necessary. But that is not the case here and the applicant is entitled to such costs as are normally awarded to a party succeeding in a review of taxation. Such costs are however limited to the costs incurred in (i) drafting the notice of review; (ii) perusing the stated case and the appellants' written contentions in response thereto; and (iii) drafting the respondents' written contentions in relation thereto.

Order
[57] The following order issues:

1. The taxing master's allocatur in this matter is set aside and the bill is referred back to her to be taxed afresh in the light of this judgment.
2. The appellants are to pay the respondents' costs of the review of taxation, such costs to be limited to the costs incurred in (i) drafting the notice of review; (ii) perusing the stated case and the appellants' written contentions in response thereto; and (iii) drafting the respondents' written contentions in relation thereto.

Langa DP, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Kriegler J.

[1] CC rule 21 provides as follows:
"(1) Rules 9 and 10 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary."
SCA rules 9 and 10 have however (with effect from 28 December 1998 in terms of Government Notice R1523 of 27 November 1998) been substituted by new rules. Rules 17 and 18 are the corresponding provisions that now deal with the taxation of bills of costs. They are referred to more fully below.
[2] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) para 103.
[3] The judgment containing the two awards is reported as President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC). The awards read as follows:
" 3. The costs of the application for recusal are to be paid by the fourth respondent, such costs to include the costs of three counsel.
4. The costs of the appeal are to be paid by the second and fourth respondents jointly and severally and are to include the costs of three counsel."
[4] The registrar of the Court is entrusted with the responsibility to tax bills of costs and when performing this function is styled the taxing master.
[5] The sub-rule reads as follows:
"(3) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed mero motu by the taxing master, may within 20 days of the allocatur require the taxing master to state a case for the decision of the court, which case shall set out each

item or part of an item, together with the grounds of objection advanced at the taxation, and shall embody any relevant findings of facts by the taxing master."

[6] The relevant sub-rules of rule 17 provide as follows:

"(4) The taxing master shall supply a copy of the stated case to each of the parties, who may within 15 days of receipt of the copy submit contentions in writing thereon, including grounds of objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed mero motu by the taxing master.

(5) Thereafter the taxing master shall frame his or her report and shall supply a copy thereof to each of the parties and shall forthwith lay the case, together with the contentions of the parties thereon and his or her report, before the Court.

(6) After the taxing master has so laid his or her report before the Court, he or she shall, subject to the directions of the Chief Justice, notify the parties or their respective attorneys of the date of hearing."

[7] See e.g. Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No2) 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC).

[8] 1998 (11) BCLR 1345 (CC) para 23.

[9] See para 22.

1[0] 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[1]1 Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111.

1[2] Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others 1984 (3) SA 15 (A) at 18F — G.

See also the discussion by Botha J in Noel Lancaster Sands (Pty.) Ltd. v Theron and Others 1975 (2) SA 280 (T) at 282D — 283D for a discussion of the nature and limits of the judicial function in this context.

1[3] 1994 (1) SA 595 (A).

1[4] 1997 (2) SA 756 (NmSC).

1[5] Per Millin J in Wellworths Bazaars Ltd. v Chandlers Ltd. and Others 1947 (4) SA 453 (T) at 457 in fin.

1[6] 1926 AD 467 at 488.

1[7] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

1[8] Above n 13 at 601I — 601J.

1[9] 1972 (1) SA 686 (A) at 690C — D.

2[0] "Disturbing", "hardly acceptable", "farfetched in the extreme" and "excessive".

2[1] In para 26 above.

[2]2 Above para 7.

2[3] Above n 13.

2[4] Above n 19.

2[5] Above n 12.

2[6] At the request of the respondents the hearing was subsequently rescheduled for hearing in May 1999 and the dates for lodging submissions were changed.

2[7] See para 26.

2[8] There is no precedent in South Africa for such an order and the extensive researches conducted in the course of the appeal produced no comparable instance of a head of state being obliged to appear for cross-examination in a court of law.

2[9] Above n 2.

3[0] Above n 3.