a judicial procedure for declaring a person an outlaw, the Courts did not deny a declared outlaw access to them without exception. In, for example, *Hawkins* v *Hall* 1 Beav 73, 41 ER 109, an outlaw was allowed A to apply to the Court to set aside an attachment which had been irregularly issued against him, and was successful in his application. See, too, *Davis* v *Trevannion* 14 LJ, QB 138. If that principle were to be applied here Bickle, even if he were an outlaw, would be entitled to seek the protection of the Court from the action taken against him and his property. He would only be defending himself against what he B alleges is an illegal action.

It is unnecessary to decide in this appeal what the position would have been had a detention order been issued before Bickle left the country on 10 June. I have grave doubts as to whether the mere fact that an order had been issued would have been sufficient to character- C ise Bickle's departure as a flight from justice which would have precluded him from approaching the Courts. After all there appears to be no offence in the regulations of avoiding arrest under a s 17 order. Indeed it would seem that a detention order can be effective only when a person has been physically detained under it. And no warrant D for an arrest can be issued under s 37 (1) of the Criminal Procedure and Evidence Act chap 59 on the basis of a detention order, for under that section there must be an allegation of an offence. It would be even more difficult to contend that person is in the position of a fugitive from justice merely because, being outside the country when an E order is made against him, he declines to return.

On the facts of this case no process, either judicial or executive, has been issued and Bickle cannot be held to be in contempt either of any process or of the law. In those circumstances there is no basis upon which the Court should close its doors to him where he is seeking to F redress what he alleges is an unlawful action against him. The appeal must be dismissed with costs.

BARON JA and GEORGES JA concurred.

Appellant's Legal Representative: *State Attorney*. Respondent's G Legal Representatives: *Webb, Low & Barry*.

VAN ROOYEN v COMMERCIAL UNION ASSURANCE CO OF SA LTD

(ORANGE FREE STATE PROVINCIAL DIVISION) A

1982 *December* 23 M T STEYN J

Costs—Party and party costs—Claim for damages in terms of Act 56 of 1972—Pre-litigation costs—Witness' statements, counsel's opinion on the merits and attorney's opinion on quantum*—When such may* B *be allowed.*

Costs incurred before the issue of summons by an attorney's obtaining witness' statements relating to the "ephemeral element" of "MVA claims", ie the evidence of the occurrence itself, which has to be gathered during the brief period after the event when it is still fresh enough to be reliable C and therefore usable, will, in the great majority of cases where there is no prompt admission of liability by the insurer, be party and party costs clearly falling within the exception to the general rule expounded by INNES CJ in *Brits and Others* v *Engelbrecht and Others* 1907 TS 876 at 884 and within the class of costs reasonably incurred in relation to such claims and allowed on taxation as having been necessary and proper in terms of D Rule 70 (3), which itself clearly permits pre-litigation costs being included in party and party costs in proper cases.

While there are indications that provision is made in Item A(3) of the tariff for the taking of counsel's opinion on the prospects of success in contemplated litigation as between party and party, that tariff item must be read in conjunction with Rules 70 (3) and (5). Consequently, the tariff only provides for counsel's opinion in cases where it is necessary or proper to E obtain such an opinion as an "ordinary incident" of the litigation or where it is justified in extraordinary or exceptional cases. The general rule is that the need for such opinion is *not* an ordinary incident in litigation but in each case the facts should be examined to determine whether the attainment of justice requires that an exception be permitted or not.

Opinions as to *quantum* following an offer or tender of settlement in damages F cases must of necessity deal with imponderables to a markedly greater extent than opinions on the merits of the accident or other like cause of action. To that extent they deal with matters that are *per se* more difficult to decide upon than those of the more ascertainable questions of liability or guilt. As they are more often than not requested and given during the course of litigation there are as good or even better reasons for having G them included as party and party costs in appropriate cases than pre-litigation opinions on the merits. Again, the facts of the particular matter being considered will be decisive.

Review of taxation under Rule of Court 48.

M T STEYN J: This is a review of taxation under Rule of Court 48, H brought by the applicant who was plaintiff in an action pursuant to the provisions of Act 56 of 1972 for damages in the sum of R16 240. From the Taxing Master's statement of case it appears that plaintiff was injured on 6 May 1977 at Harrismith when run down by the insured vehicle, that a combined summons was issued on 18 April, appearance to defend being entered on 29 April 1980, and that the matter was eventually settled on an apportionment basis prior to close of pleadings on

13

26 February 1982 for an amount of R1 750 toget with an offer by defendant to pay plaintiff's taxed party and party costs.

It further appears from counsel's opinion, to which reference will again be made later, that at the time of the accident plaintiff was in the employ of Carnation Company, the owners of the insured vehicle, as a mechanic, that he was then busy on the company's premises standing at his workbench in the workshop with his back to the entrance thereof when he was run into from behind by a vehicle with defective brakes which was being driven into the workshop by a co-employee for the purpose of having it attended to by plaintiff. The procedure then in force was that a defective vehicle would be parked outside the workshop, the driver thereof reporting the defect to another co-employee, an "Induna", who would then place a note indicating the defect on the windshield of the vehicle. Thereafter it would be driven into the workshop by the designated employee as stated above.

Two attorneys acted for the plaintiff (hereinafter referred to as applicant), one at Bethlehem and one in Bloemfontein.

The items disallowed on taxation and now forming the subject-matter of this review relate to the bills of costs of both attorneys concerning consultations with client (the applicant), and taking his statements, counsel's opinion on the merits and the Bloemfontein attorney's opinion on *quantum* of damages. All were disallowed *in toto* as forming part of applicant's attorney and client charges.

Applicant's general and basic contentions, made orally by his Bloemfontein attorney, Mr Newdigate, in argument during the hearing in chambers in amplification and by way of emphasis of his written contentions, were:

(*a*) that although the amounts involved were small two very important principles relating to costs were involved, to wit:
  (1) the full indemnity for all costs reasonably incurred by the party in whose favour an award of party and party costs has been made, and
  (2) the greater realism in the taxation of such costs which has of late become evident;

(*b*) the tariff is a general one, applicable broadly to a wide variety of matters, but always with reference to the nature and circumstances of each particular case, it being dangerous to apply the tariff to a difficult "MVA case" in the same manner as to a simple "debt case";

(*c*) while rules of "taxation practice" are obviously valuable they must never fetter the discretion of the Taxing Master. Thus the general rule relating to witness' statements taken before close of pleadings is not applicable without more to "MVA cases", no matter what the position may be regarding other matters such as simple "debt cases".

Developing these arguments, Mr Newdigate contended that the "necessary or proper costs" referred to in Rule 70 (3) were in essence those one would expect an experienced and honest practitioner to incur.

Regard the greater realism in taxation, he contended that there was, and some pockets of legal thought still is, a dangerous tendency to rely on fictions such as the supposed lack of any necessity to take statements from witnesses prior to the pleading stage, such fiction presupposing some or other psychic power enabling an attorney to know what his evidence was without having taken or obtained such statements, and the related fiction that a lay litigant knew the law and its practice as though he had an LLB degree and had practised the law for such length of time as to be able to decide matters for and by himself, particularly in "MVA cases", as to such questions as negligence and *quantum* of damages, especially where apportionment enters the picture.

The Taxing Master chose to stand by his report, which is well-drawn and to the point.

Costs in a civil matter are in essence charges by or on behalf of those tasked with advancing or protecting the interests of the party they have been briefed to represent or assist, for the services rendered in the execution of their mandate and are, therefore, basically also a reflection of the manner in which they handled the matter.

Taxation of such costs is a regulating procedure based upon notions of fairness and practicality and designed to effect a just balance between the fruits of victory and the burden of defeat in the sphere of litigation expenses. The concept of such regulation emerged centuries ago, was already present in early Roman-Dutch practice and has been refined continually, from before the time of the Imperial "Vierschaar" to the present Uniform Rules of Court where it is now embodied in Rule 70 (3). But fairness and practicality have throughout been the dominant themes — the aim being to fully indemnify the successful party for all costs reasonably incurred by him in the litigation, whether it be related to a claim or to a defence to a claim, and thereby excluding from the indemnification unreasonable and special fees and charges, unusual expenses and all costs incurred or increased through overcaution, negligence or mistake. And "reasonable costs" have now been equated with such costs as are "necessary *or* proper for the attainment of justice or for defending the rights of any party".

We have derived the same notions of fairness and practicality from Anglo-Saxon jurisprudence and the results of this felicitous blending were well-described by R P B DAVIS J in *Barnett* v *Isemonger* 1942 CPD 325 in the following passage at 327:

> "The costs to be allowed need not be necessary — still less 'absolutely necessary': if they are, though not strictly speaking necessary, yet proper in the sense of being reasonably incurred, and not incurred or increased . . . 'through overcaution, negligence or mistake' or, in the words of MALINS VC, are not 'luxuries', or are not, in the words of *Gail*, 'delictate, noodelose en voluntaire of vrywillige', then they should be allowed. I repeat that 'the true position is that *the Taxing Master has still to steer his difficult course between the Scylla of liberality and the Charybdis of niggardliness*'."

(My italics)

The reference to MALINS VC comes from *Smith* v *Buller* 19 Eq 473 at 475, decided in 1875, and that to *Gail* is from Andreas Gail's work *De Keiserlijke Practijke ofte Observatien van de Keyserlyke Kamer; Ver-*

toonende alderhande Rechts-plegingen, soo als deselve hedendaags in de Keyserlijke Veyrschaar geoeffend en de onderhouden worden,
published in 1656, the quote being from a translation of book 1 obser-
A vatie 151.

To this may also be added the passage from Paulus Merula in his treatise on civil procedure — *Manier van Procederen, In de Provintien van Hollandt, Zeelandt en West-Vrieslandt, belangende Civile Zaken* — first penned by him in 1592. In book IV chap 1 s V, he remarked:

> "Ende men zal doen de voorschreven Taxatie, de oogen daarop hebbende,
> B als't behooren zal: Dat is, dat geen hinder, praejudice, agterdeel of schade en geschiede in dit stuk, noch den Triumphant, noch den Succumdant: dezen in onnodige Kosten toe te laten: dien in noodigen te verwerpen.
> *Noodige en Judiciele kosten moeten alleen getaxeerd worden: op onnoodige en die uyt het Process niet en spruyten en behoord men geen regard te nemen.*"

This quotation is from the 1750 edition and the italics are mine.

C The attorney is his client's master of costs, often deciding, either on his own or in conjunction with counsel, what steps to take, what evidence to obtain for and use in the litigation, evaluating the work and effort involved in the matter and what the charges therefor should be. If his client is the successful party he then has to see to it that the client be properly indemnified and has to draw his party and party bill of
D costs accordingly and have it properly taxed. As officer of the Court the attorney is enjoined to act responsibly and to draw his party and party bill of costs so as to include therein only what is permissible to recover from the party condemned in such costs.

What *is* permissible is, to my mind, those costs which an honest, ex-
E perienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation.

But even the most reasonable and capable of minds tend to subjectivity in evaluating own conduct and estimations. To curb such subjectivity the office of Taxing Master was called into being for the purpose
F of introducing an objective standard whereby to judge, from the outside as it were, the permissibility of the amounts sought to be recovered from the losing party. By virtue of his having in effect to make value judgments on the nature and amounts of the items in the bills of costs he has to tax, the Taxing Master must of necessity be vested with
G a discretion as to what he should allow or disallow. Being like the attorney an officer of the Court, the Taxing Master is enjoined to act responsibly in the performance of his duties and must consequently exercise his discretion judicially.

In essence the process of taxation is a joint undertaking by attorney
H and Taxing Master, aimed at justice being properly done in the matter of costs and each making his contribution for that purpose. It is clearly for this reason that the learned authors of Nathan, Barnett and Brink's *Uniform Rules of Court* 2nd ed remarked at 422 that attorneys, as officers of the Court, have a

> "duty to assist the Taxing Master, where possible, to steer his difficult course between the Scylla of liberality and the Charybdis of niggardliness".

But to evade the fangs of the monster on the one hand and the vortex of the whirlpool on the other, the Taxing Master should be properly apprec[iati]ve of the role of the attorney and be ever mindful of the exigencies of the particular litigation the attorney was set to handle.

A The process in fact requires of each that he place himself in the position of the other. By way of such mutual appreciation the proper balance needed for an equitable result can the more readily and speedily be attained. But the Court remains the ultimate arbiter and it is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with

> B "unless it is found that he has not exercised his discretion properly, as for example, when he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider, or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given".

C *per* SMIT AJP in *Preller* v *Jordaan and Another* 1957 (3) SA 201 (O) at 203C-E. See also, eg, *General Leasing Corporation Ltd* v *Louw* 1974 (4) SA 455 (C) at 461-462; *Uniform Rules of Court* (*supra* at 324); Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 503-504; Jacobs and Ehlers *Law of Attorneys' Costs and Taxation thereof* (1979) at 232-233.

D As methods of practice and procedure developed, a further principle came in course of time to be grafted upon the main *corpus* of principles. This is the "clearly wrong" principle, whereby the Court will on review interfere with a decision of the Taxing Master even though the matter cannot strictly be brought within the ambit of the
E main body of principles, where the Court is in as good a position as, or in a better position than, the Taxing Master to judge of what is proper and is satisfied that the Taxing Master was clearly wrong. See eg *Bensusan* v *Sterling and Mockford NO* 1930 WLD 303 at 307; *Wellworths Bazaars Ltd* v *Chandlers Ltd and Others* 1947 (4) SA 453 (T) at 457-458; *Ally and Others* v *Taxing Master and Others* 1954 (3) SA 728 (W)
F at 732-733; *Preller* v *Jordaan* (*supra* at 203E-G); *Century Trading Co (Pty) Ltd* v *The Taxing Master and Another* 1958 (1) SA 78 (W) at 84A-F; *Legal and General Assurance Society Ltd* v *Lieberum NO and Another* 1968 (1) SA 473 (A) at 477H-478H; *General Leasing Corporation Ltd* v *Louw* (*supra* at 461A-G); *Brivik Bros (Pty) Ltd* v *Balmoral*
G *Sales Corporation (Pty) Ltd* 1978 (4) SA 716 (W) at 718F-end; *Benson* v *Union National South British Insurance Co Ltd* 1979 (3) SA 710 (T) at 712C-G.

During taxations and reviews thereof it should be borne in mind that, as the aforementioned process of engraftment so clearly demonstrates, practice and procedure are not static but, like the life of a
H community and the substantive law generated therefrom, continually changing and developing to meet the demands of the times and the needs of society, and that judicial pronouncements and other authorities of times long past should be approached with circumspection — the determining considerations undoubtedly being those pertaining to the modes of practice and procedure prevailing at the time of the particular taxation or review.

A good example of the danger lurking in antiquated authorities is to be found in *Hastings* v *The Taxing Master and Another* [19]82 (3) SA 789 (N) where MILNE JP commented thereon as follows at [7]93D-F:

"Using the manner of approach adopted by the Court of Appeal in *Scheff's* case *supra*" ([1948] 4 All ER 318 (CA)), "which was one of the cases cited by A Mr *Feetham*, I cannot have any doubt that the Taxing Master, in relying upon what was said by JONES J in *Scholtz* v *Van Niekerk and Another (supra)*" (1937 CPD 439) "adopting what was said by WILLES J nearly a 100 years ago in *Freeman and Others* v *Springham* 143 ER 421, at a time when there was no Rule such as ours, put such an obstacle in the way of exercising his discretion in the manner required by the Rule that he could not and did not exercise it properly."

B The passage referred to was uttered by WILLES J in the Court of Common Pleas during the Easter Term on 6 May 1863 as follows (143 ER at 423):

"I have always understood the rule to be that, if the plaintiff chooses to go on preparing for trial before issue joined and notice of trial given, he may do so, but he does it at risk of the costs not being allowed if it should turn out that C there is no issue. Where this is *bona fide* done, and necessary, the attorney will have a very good claim against his client, but not against his opponent. Experience has shown that justice is best done in the great majority of cases by not allowing the costs of preparing for trial until after notice of trial has actually been given."

Today, more than 119 years later, the words of WILLES J are merely D of historical import, indicating, as they do, the state of English civil procedure at a particular stage of its development.

In like manner lurks the danger of error in unguardedly applying decisions dealing with rules differing materially from those applicable in the matter being considered. Thus, in the days before the Uniform Rules, OGILVIE-THOMPSON J (as he then was), for example, felt con-E strained to warn that, in the Cape, Transvaal decisions on matters of taxation and reviews thereof had to be approached with the greatest caution due to the materially different Rules there pertaining. See *Buckley* v *Francke* 1950 (2) SA 709 (C) at 713.

Bearing the aforementioned considerations in mind, I now turn to the items in dispute.

F The items relating to the consultations and taking the statements of the applicant, are the following:

In the Bloemfontein bill (p 13):

"Item 1:	Consult with client re purpose of medical examination and merits of the case — 1½ hours.	R30,00
Item 2:	Draft client's statement and sketch plan — 10 folios (only R2,50 was allowed here for preparing the sketch plan).	5,00"

G

In the Bethlehem bill (p 6):

"Item 11:	Letter to Mr Filmalter enclosing copy of memorandum of client's replies to the statement of Mr A Z Labuschagne.	00,77
Item 12:	Making copy of memorandum attached.	00,60
Item 13:	Attend to letter from Mr Filmalter.	00,50
H Item 15:	Making copy of letter attached — 2 f.	00,40"

In his report the Taxing Master justified the disallowance of the charges relating to the consultation with and taking a statement from applicant (items 1 and 2 at 13 of the Bloemfontein bill) on the ground that they were costs prematurely incurred, adding that:

"I have always followed the principle that statements are only to be allowed on party and party scale once pleadings have been closed, the reason being that these witness statements are required to assist counsel in preparing for trial. That is why, when taxing party and party bills, an attorney is entitled, after close of pleadings, to take instructions and thereafter to instruct counsel to prepare advi[ce o]n evidence, after which the attorney can then proceed to obtain witness statements."

The Taxing Master also referred to Roos *Taxation of Bills of Costs* A *in the Superior Courts of South Africa* (1947) at 41.

There the following is said anent "premature costs" in trial actions:

"Where a plaintiff discontinues an action after the issue of summons and after appearance has been entered, but before the filing of a declaration, the defendant is only entitled to include as costs between party and party *such costs as have been absolutely necessary* up to that stage, and not costs prematurely or needlessly incurred." B

(My italics.) He also referred to the case of *Calder* v *Ebersohn* 1942 TPD 197, dealing with the position of a defendant, where MILLIN J is reported at 200 as having said the following (in reference to *De Kock and Vorster* v *Meyer and Pickard* 1903 TS 599):

"It is there indicated that the plaintiff may in such a case be charged the cost C incurred by the defendant in getting his attorney to note down the facts on which the defence is based; *but the drawing of statements is required only when the case is put before counsel*."

(The italicised passage is that quoted by the Taxing Master.)

Further down the same page MILLIN J added the following (also D quoted as aforesaid):

"I take the view that *the drawing of a statement of the case for the defence* can only be required for counsel and that no stage in this litigation had been reached at which counsel could be consulted at the cost of the opposite party."

(My italics.) (In this matter summons for cancellation of a lease was issued on 17 February 1942, appearance to defend entered on 25 February and on 3 March 1942 notice of withdrawal of summons was E given, to which was coupled an offer to pay "taxed costs".)

Roos' requirement that costs be "absolutely necessary" is clearly an overstatement of the position and is not in accord with the present "necessary or proper" standard of Rule 70 (3). *Roos'* statement is quite obviously derived from the now antiquated authority of Sir F Richard MALINS' *dictum* in *Smith* v *Buller (supra)*. And MILLIN J's statement in *Calder* v *Ebersohn (supra)* must likewise be seen in its proper context of 40 years ago when the general principle then pertaining in the Transvaal was also derived from the Vice-Chancellor's aforementioned *dictum*. That principle was summarised as follows by G KRAUSE J in *Sundy & Co* v *The Sun Insurance Office Ltd* 1931 WLD 29 at 32:

"The principle, therefore, seems to be 'a direct or necessary step' in the conduct of the action. 'Necessary' to enable the parties to conduct their litigation and no more, and 'necessarily' incurred for the purpose of enabling the Court to do justice to the parties by its decision. I think by taking these differ- H ent statements together that I have correctly summarised the general principle which is to be adopted by the Taxing Master in deciding which costs the successful party is entitled to claim from the losing party."

OGILVIE THOMPSON J's admonition is today as apposite to cases falling to be decided under Uniform Rule of Court 70 (3) as it then was to matters falling under the former Cape Rule 47 (6) from which our present rule is derived.

The second passage from *Calder* v *Ebersohn* relied upon by the

Taxing Master is clearly not in point because the "...tement of the case for the defence" mentioned by MILLIN J is something quite different from statements by the defendant and his witnesses, even if de-
A rived from them, and cannot be of much assistance in the present matter.

But there is another very important passage in *Calder's* case clearly demonstrating the different juridical milieu in which it was decided. That is the passage at 199 where MILLIN J expressed his doubts about
B the correctness of the *dictum* by WESSELS JP in *Wocke* v *Williams* 1922 TPD 78 at 80 and also distinguished it on the rules of procedure then in force in the Transvaal Supreme Court. (*Wocke*'s case dealt with the position in the magistrates' court.)

WESSELS JP said:

"Now I have no doubt whatsoever that if a person issues summons against
C another, the defendant is entitled at once, after summons has been served upon him, to proceed to collect his evidence against the day of trial. He has not got to wait until he is certain that the action will be proceeded with and then prepare his case. He is entitled to prepare his case immediately he is served with the summons; and part of the preparation of the case is the taking of the witnesses to his solicitor in order to get their statements taken down by the solicitor, so that he may know whether he ought or ought not to resist the
D action."

MILLIN J commented thereon in these terms:

"I am not sure, speaking with respect, that this is not too widely stated even for the purpose the learned Judge had in hand; but if what he says is correct with regard to the procedure on receipt of a magistrate's court summons, I am satisified that it is not applicable to the case of a Supreme Court summons. A
E magistrate's court summons contains the detailed statements of claim; a Supreme Court summons does no more than call on the defendant to enter appearance in an action. The general nature of the claim is indicated in the summons but the detailed statement of claim follows in the declaration, and no occasion normally arises to prepare for trial until, at the earliest, the pleadings are closed."

F That is no longer the position in the Supreme Court in the case of unliquidated demands for damages such as that now under consideration. In such cases Rules 17 (1) and (2) require a plaintiff to sue out a combined summons in accordance with form (10) of the First Schedule to the Rules, to which summons there shall be annexed "a statement of the material facts relied upon by the plaintiff for his claim" and which
G shall comply, *inter alia*, with the rules relating to pleadings generally (Rule 18), and to a declaration specifically (Rule 20). The old summons and declaration of *Calder* v *Ebersohn*'s time are now in fact combined in the present Rule which obviously necessitates greater expedition by both plaintiffs and defendants in the preparation of their cases
H for ultimate trial, and does so at an earlier stage of the litigation. In that sense *Wocke* v *Williams* has a much more modern ring about it than *Calder's* case which is in this respect now clearly antiquated.

The seeds of the modern approach are to be found in the old Cape Rule 509 (*b*) promulgated in 1923, which was in 1931 succeeded by old Rule 557 for which old Rule 606 was in turn substituted during 1936, and which was in its turn succeeded by new Cape Rule 47 (6) on 13 January 1938. These Rules were derived from the English Rule (Order LXV Rule 27 subrule 29) and the latter two Rules (old 606 and new

47 (6)) incorp...ted the interpretation thereof propounded by ATKIN LJ in *Société Anonyme Pêcheries Ostendaises* v *Merchants' Marine Insurance Company* [1928] 1 KB 750 (CA) at 762-763, namely the principle of "a full indemnity for all costs reasonably incurred". A

This history of juridical development was compendiously dealt with by Arenhold and Fisher at 69-70 of their 1938 work on the *New Cape Rules of Court* and by LEWIS J in *Verwoerd* v *Toubkin* 1948 (4) SA 245 (E), particularly at 247-252.

Then, on 12 December 1952, in *Government Gazette* No 4976, this development was introduced country-wide by promulgation in *Government Notice* 2835 of Union Rule of Court 24 and note 1 of the First B Schedule thereof, the latter being in practically indentical terms with the former Cape Rule 47 (6) which was repealed in the Second Schedule to the new Union Rule. (It is to be noted that at 792 of *Hastings'* case *supra*, the word "and" is mistakenly inserted in the place of "or" C between the words "necessary" and "proper" at line G5 in the setting out of the Union Rule and that at line H5 Cape Rule 47 (6) is erroneously referred to as Rule 47 (4)).

When the new Uniform Rules of Court came into force on 15 January 1965, Rule 70 (3) was substituted for Union Rule 24 and its First Schedule, but the new Uniform Rule was in terms practically identical D with that of note 1 to the Union Rule.

By way of this development greater realism was introduced step by step into the process of taxation of costs in South Africa and this more realistic approach has now been of country-wide force and effect for 31 years. The more modern and realistic *Wocke* v *Williams* approach E has likewise become established during this latter period, despite the set-back it suffered at the hands of MILLIN J in *Calder* v *Ebersohn (supra)* and has now become firmly established in Supreme Court practice. Thus, in *Hastings* v *The Taxing Master (supra)*, which was an "MVA case" wherein damages were claimed for bodily injuries sustained in a motor collision, and which was settled after close of F pleadings but before trial, MILNE JP dealt with the reasonableness of collecting evidence for the plaintiff, who was the applicant in the review of taxation before him. At 794A-C he said this:

"To put it at its lowest it was, in my view, eminently reasonable, in the circumstances, that the applicant should, at once, set about collecting the available evidence upon the question of negligence, and assessing its value, for the G purpose of establishing the cause of the accident, as well as upon the question of the *quantum* of damages. There was a real risk that the witnesses, approached for the first time long after the accident, might well be far less able to give reliable testimony than they would if their statements were taken as soon as reasonably practicable after the events."

In that case it was common cause that the insurer of the other vehi- H cle did not, at any time prior to the issue of summons, admit that the collision had been due to the negligence of the driver of the insured vehicle.

The *Hastings* approach was followed some five years later by MILLER J (as he then was) in a like matter, viz *Meer* v *Taxing Master and Another* 1967 (4) SA 652 (D) where the learned Judge, in dealing with the *Hastings* case, said the following at 654H-655B:

"I might add that delay in making full investigation of t circumstances of the accident might result in failure to locate or identify material witnesses. In my view, an attorney would be failing in his duty if, having been instructed by his client in a matter of this nature to act for him in regard to a proposed claim
A for damages, he did not at once advise his client of the advisability, if not the necessity, of investigating, with the least possible delay, all the relevant facts and circumstances relating to the accident and the evidence which might be available to support the claim."

At 655G-H MILLER J added that:

"The facts and circumstances of each case must be decisive of the question whether the costs were 'reasonably incurred' by the plaintiff in relation to his
B claim, for if such costs were in that sense 'reasonably incurred', plaintiff, if costs were ultimately to be awarded to him, would be entitled to 'a full indemnity' in terms of Rule 70 (3), and not (as MILNE JP pointed out in *Hastings* v *The Taxing Master (supra* at 793)), to a partial indemnity."

See also *Bennetto* v *Vryburg Municipality* 1980 (2) SA 84 (NC) at 99.

This new and more realistic approach, according greater weight to
C the actualities of litigation and practice than was done of yore, was a healthy and timeous development. The reasons therefor are cogent even if not always readily discernible. The private sector affairs of the modern, post World War II urbanised, techno-industrial community of which we are part have become much more complicated and pressing than those of earlier, more leisurely times and now require a
D far greater degree of expedition and innovation in their handling than was the case in the past. Litigation has inevitably been affected likewise, the exigencies of modern practice demanding a very high degree of prompt, alert and well-informed preparation and action at a much earlier stage than was the case four or five decades ago.

E The recent great and rapid advances in science and technology, especially in the medical, electronic and mechanical fields, have opened up new and very wide possibilities of proof and disproof in many areas of litigation, including "MVA matters", thereby greatly increasing the burden and scope of research and preparation which litigants and their legal representatives have to bear and handle.

F The experienced, diligent and efficient attorney is well aware of this and acts accordingly. A Taxing Master should do likewise because he will not be able to exercise his discretion properly if he is not conversant with the ever-changing requirements and demands of modern litigation and practice.

G The general background to the present review has already been sketched. The background immediately relevant to the aforementioned items on pages 13 and 6 respectively of the Bloemfontein and Bethlehem bills is the following. Without any admission of liability by defendant, the parties explored the possibility of reaching an agreement as to the merits, ie as to the question of negligence or cau-
H sation. As part of this process they agreed to exchange witness' statements and defendant submitted one by a certain Labuschagne which was materially at variance with applicant's version of the incident. Labuschagne's statement quite clearly called for a reply and applicant's answers thereto were taken down by his Bethlehem attorney and submitted in its turn to defendant who, however, continued to repudiate liability. Thereafter, on 28 May 1980, defendant requested further particulars to plaintiff's claim and a full witness statement was then taken f n applicant by his Bloemfontein attorney who, for understandable reasons, was directly concerned with the conduct of litigation on his behalf.

Negotiations for a settlement of the whole matter, including the A
question of *quantum* of damages, continued, however, and a full and final settlement was eventually reached as set out above, without any reply to defendant's request for particulars or any other pleading having been filed.

That the aforementioned statements by the applicant as witness (ie his replies to Labuschagne and his full statement consequent upon the B
request for particulars) and the matters directly related thereto as set out in the said items were directly related to his claim admits of no doubt. But on the question whether they are capable of being regarded as forming the subject-matter of a claim for costs on a party and party basis and of possibly, therefore, being included in an award C
of costs on that basis, it is necessary to consider the *dictum* by INNES CJ in the matter of *Brits and Others* v *Engelbrecht and Others* 1907 TS 876 at 884, which goes as follows:

"It is a sound rule that, as an action only begins with the summons, so party and party costs should, as a general rule, only commence then."

That the "general rule" was not, in the learned Chief Justice's esti- D
mation, an exclusive one is clear from his remark conjoined to the above *dictum*, that in the matter he then had in hand there were no circumstances taking it out of the operation of the general rule. See also *Verwoerd* v *Toubkin (supra* at 253).

The exceptions to that "general rule" have inevitably multiplied as
time went on. Thus, at the time of the Chief Justice's *dictum* (27 Sep- E
tember 1907) motor vehicles were still a novelty and the problems and complications to be generated by motor traffic socially, economically and in the field of litigation, but dimly discernible, if at all. Today, as Mr Newdigate rightly contended, the parties to "MVA cases" such as the present still do not come to grips with the essential facts soon F
enough despite the underlying idea of compulsory motor vehicle insurance being to establish liability and effect proper compensation as soon as possible, and also despite the fact that 99 per cent of such cases are settled before trial.

Such a high rate of pre-trial settlement and the attainment of the
basic goal of that legislation necessarily require the gathering of a cer- G
tain class of vital evidence very soon after the cause of action arose and more often than not before the issue of summons. This expedition is required because of the "ephemeral element" of the claim, the evidence as to the occurrence itself (including the mechanical condition of the vehicle or vehicles involved) which would inevitably "evapo- H
rate" with the passage of time. A very good illustration of this kind of evidence, and the expedition required to obtain and preserve it, was given by Lord ATKIN in the *Merchants' Marine* case *supra* at 763. This is what he said:

"The Taxing Master has discretion in every case to decide whether the costs incurred before the action were necessary or proper for the attainment of justice; . . .

A very good example of this was put in argument; it was a case of an accident happening owing to a railway bridge breaking down when the railway-bridge has to be replaced forthwith and the state of the bridge is said to be the cause of the action. In such a case it is essential that there should be an immediate inspection by skilled witnesses of the state of that bridge."

A By substituting "motor vehicle" for "railway bridge", Lord ATKIN's example becomes even clearer for present purposes.

Evidence of the occurrence itself — as to what happened and how — is in the same category and has to be gathered during the brief period after the event when it is still fresh enough to be reliable and therefore usable.

B But in matters of this nature there is the other, conflicting, element where the evidential material necessary for proof of the damages component of the claim requires time to mature. It relates to the injuries sustained and to the *quantum* of damages caused thereby. Before such *quantum* can be reliably calculated the full extent of the injuries must become ascertainable. And they must also have become stabilised
C before their full and final effect can be determined. It is obviously for this reason that a plaintiff is allowed two years within which to institute proceedings (s 24 (1)) and that provision is made for the extension of that period (s 24 (2)).

Where the "ephemeral element" requires expedition and the "maturing element" that time be taken, it is clear that in very many "MVA
D cases" evidence as to the accident will have to be gathered before issue of summons.

As to who should gather such evidence, the following is said by *Jacobs and Ehlers* in their aforementioned work on attorneys' costs at 198:

E "In *Thumler* v *Weis* (1934 EDL 224 at 228) GUTSCHE J held that 'obviously the costs of collecting evidence does not *per se* fall into the party and party bill'.

In our submission, the answer to this enquiry will depend upon all the facts of the case concerned. We are, therefore, of the respectful view that whilst generally speaking the client must collect the evidence, there may be occasions when it is manifestly unreasonable to expect him to do so.

F In our respectful submission, the judgment in *Stevens* v *Provincial Insurance Co Ltd* (1966 (3) SA 62 (N)) is for this reason incorrect. In that case the plaintiff, because of brain injury, was incapable of collecting the necessary evidence. The learned judge held that somebody, such as a member of his family, and not his attorney, should have done so on his behalf.

In our view, to entrust this task to a member of the family, who has no obligation to perform it, is not reasonable. *Furthermore the attorney, by the exer-*
G *cise of his training and skill, would be in a far better position to know what evidence is relevant and what is not.*"

(My italics.) I am in general agreement with this passage but am nevertheless doubful whether it is still correct, in view of the considerations mentioned earlier on in this judgment, to say that "gene-
H rally speaking the client must collect the evidence". He may very well be able to indicate who are the probable witnesses, but it is a matter of general experience in practice that it is a waste of time and money to have the ordinary lay client actually take the statements of such witnesses. Such statements are mostly incomplete and either rambling and loaded with irrelevancies or far too terse in their exposition of the facts to be of any real use. The case of *Stevens* v *Provincial Insurance Co Ltd*, mentioned by the learned authors, may also be distinguish-

able from the present matter by virtue of the fact that CANEY J found that the costs in question seemed to have been incurred

"largely in the process of advising whether the plaintiff had a good cause of action, essentially a matter to be charged as between attorney and client". A

That is certainly not the case in the instant matter.

To my mind it was quite proper (and even necessary) for the attorneys concerned to have elicited and recorded applicant's replies to Labuschagne's allegations and to have thereafter taken down his full witness statement, and to have charged for having done so. B

Reverting to the question as to whether these charges can properly be considered as party and party costs, it is to be noted that, at 199 of their aforementioned work, *Jacobs and Ehlers* said the following:

"Generally, the costs of taking statements from witnesses before the institution of action will be disallowed between party and party."

The case they refer to as authority for their view is that of *Open-* C *shaw* v *Russell* 1967 (4) SA 344 (E) where KOTZÉ J, as he then was, in following *Verwoerd* v *Toubkin* 1948 (4) SA 245(E) at 253, was of the opinion that the general rule enunciated by INNES CJ in *Brits* v *Engelbrecht (supra)* was entirely consistent with the directive contained in the former Cape Rule of Court 47 (6) which was substantially identical D to the present Uniform Rule of Court 70 (3).

What was said by KOTZÉ J in *Openshaw's* case is, however, clearly distinguishable from the present matter because there the defendant, in a claim for damages for seduction and maintenance, had in fact admitted liability before the issue of summons. E

The learned authors however qualified their last-mentioned statement by saying at 199-200, in reliance upon *Hastings*' case *supra*:

"However, this is not always the case. It might well be reasonable in the circumstances of a particular case that witnesses be approached at the earliest possible stage, particularly where there is a real risk that if they are approached for the first time long after the event, their testimony may be less reliable." F

This fits in with what has been said earlier on and to my mind the costs incurred before issue of summons in obtaining evidence relating to the "ephemeral element" of "MVA claims" will, in the great majority of cases where there is no prompt admission of liability by the insurer, be party and party costs, clearly falling within the exception to G the "general rule" expounded by INNES CJ in *Brits* v *Engelbrecht*, and within the class of costs reasonably incurred in relation to such claim and to be allowed on taxation as having been "necessary or proper" in terms of Rule 70 (3).

This is so also because the policy of the statute (Act 56 of 1972) as H well as fairness and practicality require that such evidence be gathered as soon as possible so that the parties can effectively come to grips with the facts of the matter and that, where circumstances permit, compensation can be effected with the least possible delay and expense and even without the necessity of having to issue summons. And the present Rule 70 (3), otherwise than in the Transvaal prior to 1952, also clearly permits pre-litigation costs being included in party and party costs in proper cases. See *Jacobs and Ehlers* *(supra* at 153-154).

To recapitulate, it was therefore in the instant case eminently
A reasonable and proper to exchange witness' statements as aforesaid and for the attorneys concerned to obtain from applicant both his replies to Labuschagne and his full statement. It was also under the circumstances already described necessary for him to have employed two attorneys. See *Jacobs and Ehlers* (*supra* at 82-83). And in connection
B therewith equally necessary and proper to have copies made of the documents reflected in the disputed items (see *Jacobs and Ehlers* (*supra* at 143-144)), and to enter into and attend to the correspondence referred to therein.

To my mind all the aforementioned charges are party and party costs for which applicant must be fully indemnified in terms of Rule 70
C (3), and the Taxing Master was consequently clearly wrong in disallowing the items concerned. Having erred by applying a hard and fast rule and in relying upon antiquated authority, he also failed to exercise his direction properly and undoubtedly applied a wrong principle. The review of these items succeeds and the matter must be remitted to
D the Taxing Master for his decision as to the *quantum* of fees, charges, etc allowable.

The next set of items disallowed and now in dispute are those relating to counsel's opinion and listed as follows in the aforementioned bills:

E <u>In the Bloemfontein bill (p 13)</u>

"Item 7:	Taking instructions to brief counsel for opinion.	R10,00	
Item 8:	Giving instructions to counsel.	10,00	
Item 9:	Arranging counsel's brief.	1,33	
Item 10:	Attending on counsel with brief.	1,17	
Item 16:	Attending on counsel to uplift opinion.	0,50	
Item 17:	Perusing counsel's opinion — 14 folios.	7,00	
F Item 18:	Making one copy thereof.	2,80"	
(At p 14):			
"Item 1:	Attend to pay and paid counsel.	R0,50	100,00
Item 2:	Letter with cheque.	0,77	0,05"

<u>In the Bethlehem bill:</u>

G "Item 9:	Telephone call to correspendents instructing them to obtain counsel's opinion.	R1,33	1,50
Item 11:	Attending on correspondent's letter advising that they are proceeding to instruct counsel.	0,50"	
(At p 11):			
"Item 1:	Peruse counsel's opinion — 14 folios	7,00"	

H Reporting on this issue the Taxing Master, *inter alia*, contends as follows:

"Plaintiff's attorney, on p 6 (para 11) of his contentions, concedes that the opinion of counsel concerned 'the question of the plaintiff's being able to prove negligence on the part of one or other of the servants of the insured' Jacobs and Ehlers *Law of Attorneys' Costs and Taxation thereof* at 42, under the heading 'What costs are not party and party costs', give the following example at para (*a*):

'The costs of putting a party in a position to litigate; for instance, the costs of obtaining counsel's opinion as to the prospects of a party's success.'

The learned a[u]thors then cite the case of *Estate Van Aswegen* v *Steytler* 1931 CPD 470. At 4[73] the Court had the following to say as regards the old Rule of Court 557 (the wording of Rule 70 (3) of the present Supreme Court Rules is similar):

'It seems to me that "costs, charges and expenses" must be costs, charges and expenses in the litigation itself, and that this term cannot include costs incurred in putting a party in a position to litigate.' A

At 47 under the heading '37. Examples of attorney and client costs — recoverable from one's own client,' the learned authors in para (8) cite another example:

'Costs of obtaining counsel's opinion as to a party's prospects of success in a contemplated action.' B

They then refer to Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* at 476 where the following is said:

'So, for instance, costs of obtaining counsel's opinion as to a party's prospects of success in a contemplated action will not be allowed as between party and party.'

In conclusion I refer the honourable reviewing Judge to a recent decision of C this Court where the Court upheld the ruling of the Taxing Master that opinions form part of attorney and client charges.

The case in question is *Van der Westhuizen* v *Gibbon and Another* (A213/81) and has to date not yet been reported.* At 6 the Court held that

'the Taxing Master concluded on the facts placed before him that the consultation was held with a view to obtaining counsel's opinion on the course to D be followed by the applicant. I have no reason to think that the Taxing Master erred in doing so.' "

A copy of the opinion now under consideration is annexed to applicant's contentions in relation to the Taxing Master's stated case, and it is *ex facie* the opinion itself related to the prospects of proving negligence on the part of the owner of the insured vehicle or of one or E other of its servants in any litigation that may ensue.

It was nevertheless contended on behalf of applicant that the case of *Estate Van Aswegen (supra)* was distinguishable as being related to the question of raising the necessary funds wherewith to finance the contemplated litigation which was to have been a defence to a claim F against the estate. At 473 GARDINER JP is reported as having said:

"It seems to me, therefore, that an application for leave of the Court to enable a minor to sue or defend may be regarded as an ordinary incident in the litigation in which a minor is involved, and that the costs thereof may fairly be taxed against the opposite party . . . But an application for leave to raise money for litigation is on quite a different footing. It is not an ordinary inci- G dent in a case, and it is not one which the opposite party must necessarily contemplate. It is, moreover, a procedure which is in no way dependent on the merits of the main section."

On the facts, the *Estate Van Aswegen* case is clearly distinguishable, but the reference by GARDINER JP to the concept of "an ordinary incident in the litigation" is nevertheless of direct application in the pre- H sent matter and will be adverted to again presently.

It was further contended on applicant's behalf that item A (3) of the tariff refers to the fee for an attorney for taking instructions "for case on opinion" and that this refers to counsel's opinion, which, in a party and party tariff, indicates that provision is therein made for the taking

* See 1983 (1) SA 95 (O) at 96G-H — Eds.

of such an opinion "as between party and party".

I am satisfied that this is the correct construction of the particular tariff item but add that this item must be read in conjunction with A Rules 70 (3) and (5) and that the tariff consequently only provides for counsel's opinion in cases where it is necessary or proper to obtain such an opinion as an "ordinary incident" in the litigation or where it is justified in extraordinary or exceptional cases. Thus in *Pienaar* v *National Employees Mutual General Insurance Association* 1967 (3) SA 243 (E) KOTZÉ J (as he then was) said at 243-244:

B "Generally speaking advice required subsequent to a payment into Court is regarded as an attorney and client charge. (*Phiri* v *Northern Assurance Co Ltd* 1962 (4) SA 284 (C) at 286-287C.) But circumstances may conceivably, by reason of complexity of a particular case or by reason of unusual circumstances, be such as to render such an item one as between party and party."

C But opinions as to *quantum* required after tender, offer of compromise or payment into Court, differ from opinions on the prospects of success in contemplated litigation and will be dealt with later.

It is undoubtedly true that in very many instances counsel is consulted by prospective litigants as to their prospects of success, and in D this sense such opinions can be said to be fairly usual occurrences in litigation which should, therefore, be within the contemplation of the opponents. But so to a fairly common degree is also the fact that many parties choose for their own convenience to litigate on a luxurious scale. And it is clear that such unnecessary costs or special fees are not E recoverable on a party and party basis from an unsuccessful opponent.

Whilst opinions on the merits are very often precursors to litigation, they are certainly not invariably so and are clearly not necessary steps therein.

F As aforementioned, Mr Newdigate submitted in his oral argument that it is unrealistic and unfair to treat the ordinary lay litigant as though he had an LLB degree and as though his knowledge of legal matters had been honed on the whetstone of practice. Developing this argument, he contended that a lay litigant should, therefore, be entitled to turn to counsel for advice as to whether to litigate, either as G claimant or defendant.

It would certainly be manifestly unjust to treat lay litigants as though they were legally trained, and our Rules of Court and methods of practice and procedure demonstrate most clearly that he is not, in fact, so treated but accorded the right to legal representation and to be H fully indemnified for his necessary or proper costs reasonably incurred in the litigation if he is the successful party. It may, therefore, seem strange and not in accord with this general approach not to allow him as a matter of course to obtain counsel's opinion on the merits at the pre-litigation stage on a party and party basis. Such is, however, undoubtedly the general rule as to such opinions as stated by SMUTS J in *Van der Westhuizen's* case *supra* and by the other authorities quoted by the Taxing Master. There are, however, exceptions to this general rule which may be brought either under Rule 70 (3) or 70 (5), but such exceptions would then be justified by some feature peculiar to the matter being dealt with, such as exceptional complexity, novelty, etc.

The reason for this general rule is, in my estimation, the fact that A such an opinion is not an "ordinary incident of the litigation" within the meaning of that concept as formulated by GARDINER JP in the *Estate Van Aswegen* case *supra* where he had to do with a Rule of Court substantially similar to that now in force. By "incident" the learned Judge President meant, as I see it, an "element" of the litigation which, like the pleadings and evidence, is part of the material B constituting the process itself. Despite the increasing complexity of litigation and the more realistic approach to taxation mentioned above, it is clear that, although there may be an increase in the matters wherein pre-litigation opinions on the prospects of success are permissible on a party and party basis, the general rule excluding such opinions from that basis still stands. And the reason therefor is clearly C that they are not "ordinary elements" of the litigation but matters domestic to the client and his legal advisers — a kind of private appreciation for the convenience of the litigant concerned. Because it is clear that in many cases such opinions are unnecessary, even on such an internal basis, the continued existence of this general rule is under- D standable.

But the reasons for the exceptions thereto are equally clear, and where fairness and practicality so dictate, such opinions will be allowed on a party and party basis. The facts of each case are decisive in this respect and will determine whether the attainment of justice requires that such an exception be permitted. Cf *Meer* v *Taxing Master* E (*supra* at 655G-H and 656B).

It is obvious that the Taxing Master proceeded on the principle that charges and fees relating to pre-litigation opinions "on the merits", ie as to the litigant's prospects of success in the contemplated litigation, cannot be regarded as party and party costs and are always to be F treated as part of that litigant's attorney and client expenses. This decision precluded the Taxing Master from considering the facts of the case and, therefore, from considering whether they constituted an exception to the general rule last mentioned above.

In doing so the Taxing Master acted upon a wrong principle, and G failed to exercise his discretion on the merits of the matter.

The review of these items consequently succeeds as they are all related to the opinion in question, and the matter must be remitted to the Taxing Master for proper consideration and exercise of discretion on the facts of the case.

The last item to be reviewed pertains to the Bloemfontein H attorney's opinion on *quantum* of damages consequent upon the defendant's offer of settlement on an apportionment basis.

The item in question is entered as follows in the Bloemfontein bill (at p 15):

"Item 10:	Opinion to correspondents on *quantum* — 12 folios.	R24,00	R0,05."

This item was disallowed *in toto* by the Taxing Master, who reported thereon, *inter alia*, as follows:

"This item was disallowed on the grounds that it did not form part of plaintiff's party and party charges. I refer (to) the honourable Supreme Court Rules, as well as to the case of *Liquidator Benghiat Ltd* v *Liquidators of Sterling Trading Co* 1922 WLD 177 at 181.

I further submit that any opinions, be they given by counsel or an attorney, form part of attorney and client charges, and can never be allowed as between party and party.

I refer the honourable reviewing Judge to Rule 70 under the heading 'Tariff of fees of attorneys', s F2, which reads:

'For giving a verbal or written opinion (as between attorney and client) R5,00 to R50,00.'

I submit that the wording of this item in the tariff speaks for itself and the inclusion of such an item in a party and party bill can never be allowed. Were I to allow it I would be failing in my duty as Taxing Master.

Plaintiff's attorney, at p 8 of his contentions, also refers to item F2 of the tariff and has the following to say:

'The reason for the inclusion of a reference to an attendance between attorney and client in a tariff which is a party and party tariff is not clear.'

I should like to assist him by stating that there is no separate tariff provided for attorney and client charges. A Taxing Master only has the one tariff as a guide which is used for both party and party and attorney and client taxations. For that reason, it would seem, items such as A3: 'For case on opinion . . .' and F2 have been included."

It was, *inter alia*, contended on applicant's behalf that

"the assessment of *quantum* of damages, and particularly general damages, is not a mathematical process. It falls in a specialised field and presents difficulty even to attorneys, and for that matter to counsel, who do not have experience in this field. To a layman it is a practical impossibility. There is therefore no way in which a plaintiff in such a case can exercise his judgment as to whether to accept or reject an offer of settlement without obtaining a legal opinion as to *quantum* of damages, be it that of counsel or of an attorney."

As to the construction of item F2 of the tariff, applicant's contention was that:

"the reason for the inclusion of a reference to an attendance between attorney and client in a tariff which is a party and party tariff, is not clear. It is submitted, however, that this item should not be construed as being to the effect that every opinion by an attorney is necessarily an attorney and client item.

It is submitted that the true effect of this item is that where an opinion by an attorney is indeed to be correctly regarded as an attorney and client item, not admissible as between party and party, the fees for such opinion shall be as prescribed."

Duly promulgated Rules of Court have the force of law and must be obeyed. But the obedience must be in context, and where a discretion is conferred by the Rules as to the mode of their implementation, and where a particular standard or tariff is provided as a guide and not as an absolute or unqualified measure or injunction, such obedience is in itself also flexible and related to the facts or circumstances in respect whereof the discretion is to be exercised or the "guide" applied.

Quite apart from the provisions of Rule 70 (3) it is clear that a measure of flexibility in the application of the tariff is provided for in Rules 70 (1) and (5) which, taken together, read *inter alia* as follows:

"It shall be competent for any taxing master to tax all bills of costs for

services actually rendered by an attorney in his capacity as such, whether in connection with litigation or not. In the latter event the taxing master shall nevertheless be guided as far as possible by the scales of fees fixed by the appended tariff (hereinafter referred to as the tariff) . . . (subrule (1)).

. . . The taxing master shall be entitled in his discretion at any time, to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable" (subrule (5)).

The discretion conferred by subrule (5) clearly relates not only to *quantum* of fees allowable but also to instances where fees or charges are sought to be included in a particular bill of costs. But these two subrules and the tariff itself are to be read in conjunction with subrule (3), which is the cardinal or dominant measure in the taxation process.

Item F2 is perplexing and of obscure parentage, but cannot be ignored and must be applied in consonance with its tenor. If it is to be construed as an absolutely exclusionary injunction it will militate against the provisions of Rules 70 (3) and (5) and render the Taxing Master powerless to remedy or avoid even the most glaring inequity. Such a result would frustrate the whole purpose of Rule 70 which is to ensure that fairness and practicality prevail in the interests of justice, and in effect result in a measure of strict, archaic formalism remaining embedded in the body of our legal process. That would be unendurable.

But the bracketted words "as between attorney and client" cannot simply be ignored as *pro non scripto* or treated as having been inserted *per incuriam*. The only way in which to give them an effective meaning consistent with the purpose and provisions of Rule 70 is to construe them in the manner contended for by applicant, namely as relating only to instances where the charges are indeed only between attorney and client.

I have already mentioned that even pre-litigation opinions on the merits may in appropriate cases be taxed on a party and party basis. Opinions as to *quantum* following an offer or tender of settlement in damages cases must of necessity deal with imponderables to a markedly greater extent than opinions on the merits of the accident or other like cause of action. To that extent they deal with matters which are *per se* more difficult to decide upon than those of the more objectively ascertainable questions of liability or guilt. And they are more often than not requested and given during the course of litigation. There are, in my opinion, consequently as good or even better reasons for having them included as party and party costs in appropriate cases than pre-litigation opinions "on the merits". Here, once again, the facts of the particular matter being considered will be decisive. And there is to my mind no reason for allowing an opinion by counsel but not one by an attorney.

I am, therefore, satisfied that the Taxing Master acted upon a wrong principle in considering himself debarred from deciding whether or not the facts of the case justified the inclusion of the item in question in a party and party bill. He must now be asked to do so.

As the *quantum* of fees or charges is something to be ·ided by the Taxing Master in the exercise of his discretion, the decision thereon in respect of all the items concerned in this review must, where he considers it permissible for them to be included in the respective bills in
A relation to the aforementioned opinions, be left to him.

To sum up:

(1) The review succeeds in respect of all the items concerned, in both the Bloemfontein and Bethlehem bills of costs.

(2) The matter is remitted to the Taxing Master who is directed:

B (*a*) to reconsider his rulings in regard to the items relating to the opinions on the merits and as to *quantum* of damages, to determine the *quantum* of fees, charges etc, in relation to the items dealing with the statements of witnesses, and, if necessary, also in relation to those dealing with the one, or
C the other or both of the aforementioned opinions, and

(*b*) to so reconsider and determine in the light of the principles and findings set out in this judgment.

(3) In view of the fact that the defendant did not oppose the review and that no request for costs was made, no order as to costs of this review is made in terms of Rule 48 (3).

D

Plaintiff's Attorneys: *Webber & Newdigate.* Defendant's Attorneys: *Symington & De Kok.*

APPENDIX

A

DIGEST OF CASES ON APPEAL

Company—*Formation and constitution—Character and classes of companies—Subsidiary companies—"Subsidiary" as defined in s 1 (3) of Act 61 of 1973—"Some power to appoint" (directors) as intended therein may arise from source outside of articles of association—By virtue of first "deeming" provision, being exhaustive, such power includes potential power to appoint—Not limited to power immediately exercisable.* B

Company—*Formation and constitution—Character and classes of companies—Subsidiary companies—Relationship between holding and subsidiary companies—Holding company "desubsidiarising" subsidiary company with object of making use of its own funds to purchase its (the holding company's) own shares—Such object unlawful—Scheme to achieve such object* in fraudem legis, *even if holding company had acted openly and in the belief that what it had done was correct.* C

Company—*Investigation of affairs of company—Act 61 of 1973 s 258—Application to Court for order for such investigation—Question whether there is a well-founded suspicion that some grave impropriety exists—Thus necessary to evaluate allegations and/or denials by company whose affairs are sought to be investigated in order to decide on probabilities.* D

The respondent had brought an application in a Local Division for an order that the second and third appellants (Newstock and Billhawk respectively) E were subsidiaries of the first appellant (Unisec) and that the affairs of the six appellants be investigated in terms of s 258 of Act 61 of 1973. Its application was granted by the Court *a quo*. In and during 1977 Unisec took a decision that its wholly owned subsidiary, Donlewis Investments (Pty) Ltd, should purchase Unisec's shares. Pursuant to that decision the name of the company was altered to Newstock and its articles of association were amended in order to "desubsidiarise" it and its own subsidiary, F Billhawk. As a result of the amendment to Newstock's articles (1) its capital was divided into an equal number of "A" and "B" shares; (2) the company was to have an even number of directors, no fewer than four and no more than eight; (3) half the directors were to be appointed by the "A" shareholders and half by the "B" shareholders; (4) appropriation accounts were created in such a fashion that, for practical purposes, only G the "A" shareholders could derive any economic advantage from the company's income and capital assets. On the face of it, therefore, neither the "A" nor the "B" shareholders were in control of the company. The sixth appellant (Unit Securities), a subsidiary of Unisec, became the holder of the "A" shares and the "B" shares were sold and transferred to Goshawk, a company which, apparently, had no connection with Unisec, for a sum of R181,50, being their nominal value. Unisec's annual report H for 1977 reflected Newstock as being a company in which Unisec held more than 20% of the equity, without revealing to its shareholders that it was its erstwhile wholly owned subsidiary, Donlewis Investments. The "B" shares were then sold to L&D, a company controlled by one T, a director and executive of Unisec, for R184,35 in February 1978. Prior to the shares being transferred, a "side letter" was addressed by Goshawk to L&D, recording that the shares had been sold, subject to Goshawk's right to repurchase them for R200 on or before 3 January 1980. L&D accepted the condition. T resigned from and cut all ties with Unisec in May 1979.