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

CASE NO: 21061/2004

Date: 03/08/2007
UNREPORTABLE

IN THE COURT OF THE COMMISSIONER OF PATENTS FOR THE REPUBLIC OF SOUTH AFRICA

CASE NO: 97/10535

In the matter between

VARI-DEALS 101 [PTY] L TD *tla* V ARI DEAL	**First Applicant**
JILL BELINDA DRAK	**Second Applicant**
ZIMSTONE [PTY] LTD t/a ZIMSONE	**Third Applicant**
KEITH ARNOLD MUNRO	**Fourth Applicant**
UWE FRIT	**Fifth Applicant**
SPECIALITY SEWING SERVICES CC	**Sixth Applicant**
GUTENBERG ORANGE ADVERTISING	**Seventh Applicant**

AND

SUNSMART PRODUCTS [PTY] LIMITED	**First Respondent**
Mr VON VOLLENHOVEN NO	**Second Respondent**

BOSIELO J /ENT

INTRODUCTION

1.1 The applicants and first respondent are locked in a fierce legal battle relating to the use of a flag or banner. The first respondent claims to have patent and design rights over such a flag or banner. In an attempt to protect what it perceives to be an unlawful use of its patent by the applicants, it instituted proceedings in this court for an interdict against the applicants. This dispute was referred to oral evidence by this court during 2005.

1.2 It is common cause that the applicants had briefed one Adv Bester, who allegedly is a specialist in intellectual property law. The matter was enrolled for hearing on or about 4 November 2005. It then transpired that Adv Bester was not available for the days on which the matter was enrolled. As the applicants regarded Adv Bester as the only counsel suitable for their case, they required a postponement. This was vehemently opposed by the first respondent. Suffice to

state that there was a formal application for a postponement which was heard in the urgent court before Patel J. Sadly for the applicants the application was dismissed by Patel J with costs on an attorney and own client scale.

1.3 Subsequent to the dismissal referred to in para 1.2 (supra), the first respondent prepared a Bill of Costs for taxation by the Taxing Master. It is not in dispute that the notice of taxation together with the attached bills of costs was served on the applicant's correspondents in Pretoria, viz Messrs Hack, Stupel & Ross on 22 June 2006. It is furthermore not in disputed that shortly thereafter Messrs Hack, Stupel & Ross sent the said notice of taxation together with the bills to the applicants' attorneys per telefax. It is common cause that neither the applicants nor their attorneys attended the taxation of the bill of costs by the Taxing Master on 15 June 2006 when the bills of costs were taxed in the amount of R194302-44.

1.4 On or about 19 June 2006, the applicants' attorney received a letter from the first respondents' attorneys demanding payment of the taxed amount. According to the applicants'

attorney this was the first time he became aware of the existence of the bills of costs. The applicants' attorney, although admitting that the bills of costs and the notice of set-down were duly sent to his offices by Messrs Hack, Stupel & Ross, he is unable to explain why same was never bought to his attention. In the circumstances, he accepted that the fault lay at the door of his own office. Suffice to state that after some exchanges of correspondence between the respective firms of attorneys representing the parties, the applicants' attorneys was advised by a letter dated 31 August 2006 from the first respondents' attorneys that the first respondent declined to consent to a re-taxation of the bills of costs. In the interm in and out of fear of execution against their properties, the applicants paid the taxed amount into the account of the first respondents' attorneys, without the knowledge of their attorneys.

1.5 As applicants' attorney was concerned about the state of affairs and the respondents' intransigence, he reported the matter to his professional insurers, who in turn instructed a specialist cost consultant to prepare an opinion regarding the bills. Suffice to state that the specialist cost consultant, Ms

Belinda Patricia Spiers (Spiers) furnished her report on 7 August 2006. It is clear from Spiers' report, attached to the papers as "Annexure J" that she was of the opinion that the amounts taxed by the Taxing Master were grossly excessive and in fact amounted to over-reaching. I find it necessary to state that the Taxing Master filed reasons for the taxation which are annexed to the papers as "Annexure CRJ". It is clear from the Taxing Master's Report that amongst other, he allowed higher tariffs on the basis that this matter was complex due to the fact that it was a patent matter and further that only specialist attorneys can do such matters (see p 101). Furthermore, the Taxing Master held the view that the mere fact that the bills of costs were in respect of an application for a postponement only, that did not detract from the fact the main application was a complicated patent matter. As a result of this, the Master held, amongst others, that this was “a complex postponement and that ±500 pages of the main application became relevant to this application" (see p 101). It is not in dispute that flowing from the above perception, the Taxing Master permitted taxation at 3.5 more that than the rate as prescribed by Rule 70.

1.6 It is important to note that at p 103, the Taxing Master concedes that *"the rulings made on the main bill had to be applied to the correspondents bill. It does seem that this was not done correctly. See for instance item* 55 *on the main bill which was reduced to 1 ½ hours and item* 58 *on the correspondents bill which was not reduced."* Furthermore, at the end of the report, the Taxing Master concedes further that value added tax (VAT) should have been taxed off. Relying amongst others, on the above- state concessions, the applicants assert that there are reasonable prospects that should there be a re-taxation of the bills of costs, the bills might be appreciably reduced.

1.7 On the other hand, first respondent also filed a report by his own specialist costs consultant. Sophia Avvakoumides who severely attacked and criticised the report by Spiers. Suffice to state that Avvakoumides supported the bills as taxed by the Taxing Master and asserted that the Taxing Master had applied her mind properly to the bills and further that the bills are justified by that fact that they are based on an "Agreement and Mandate between attorney and client," which was validly concluded between the respondents and

their attorneys? It is worth mentioning that the bills of costs under attack were prepared by Avvakoumides. This in a nutshell set the scene for this application before me.

2. LEGAL SUBMISSIONS

2.1 It was argued on behalf of the applicants by Adv Segal that whatever delay there was in bringing this application for review and the setting aside of the Taxing Master's taxation of the first respondents' bills and the concomitant *allocatur* is satisfactorily explained in the application papers. Mr Segal argued that it is abundantly clear from the actions taken by the applicant's attorneys that no **mala fide** or unlawfulness can be attributed to him in failing to attend the taxation of the bills. It is clear from the papers that after he became aware of the taxed bill, Mr Sklaar tried to resolve this with the respondents' attorney. He also informed his insurers. In the process he sought and obtained legal opinion. When it became clear that the first respondent were not willing to accommodate him, he took action. With respect, I agree with Mr Segal that the applicants cannot be faulted for the delay which was caused by the applicants' attorney valiant attempts to resolve the problem amicably. To my mind the mistakes which occurred in

Mr Sklaar's office (the applicants' attorneys) which led to him not attending the taxation is the sort of mistake which occurs on a daily basis in attorney's practices. No evidence was adduced to contradict Mr Sklaar's assertion that had he known of the notice of set down for taxation, he would have attended the taxation, In my view, his failure to attend the taxation is excusable.

2.2 Regarding the actual amount taxed, Mr Segal argued vigorously that the amount taxed and allowed is so grossly excessive that it induces a sense of shock. He submitted that, had the applicants been represented during the taxation, they would have impugned a number of items on the bills which are patently exorbitant and unjustified. Furthermore, he argued that without failure, the applicants would have seriously questioned the basis on which the Taxing Master found that simply because the main application relates to a patent, **ipso facto,** the application for a postponement is also complex and deserved a higher tariff than an ordinary tariff. Mr Segal argued further that the Taxing Master seriously erred in allowing fees for both the instructing attorneys and the Johannesburg's attorney for attending together to a simple

application for postponement which, quite paradoxically, was argued by senior counsel. Another question to be raised is the necessity of having two senior, experienced attorneys attending to a postponement which was handled by a senior counsel.

2.3 The other point raised by first respondents was the fact that the applicants had already paid the taxed amount without any protest or reservation of rights to challenge it. If I understood the respondents correctly, the argument is that by paying the taxed bill, without protest, the applicants waived their rights to object to the taxation. In responding to this, Mr Segal submitted that it is clear from the facts of this case that the applicant never acquiesced in the taxed bill or waived their rights to impugn same. He argued that it is patently clear from the facts, that the applicants merely succumbed to the serious threats of imminent execution based on the taxed bill simply to avoid unnecessary inconvenience and the concomitant embarrassment. It is not in dispute that the respondents made it crystal clear that they intended to execute against the applicants property. Mr Segal argues that payment by the applicants of the taxed bill, in the circumstances, qualified to

be termed involuntary payment. For this proposition, Mr Segal placed great reliance on the dictum by De Villiers JP in Niehous v Eloff 19.13 at p 188 where the learned judge stated:

> *"Where* a *Court has ordered* a *judgment* to *be carried into execution, the mere payment* of *the amount or part thereof by the party condemned* to *pay is no doubt consistent. A fortiori it seems* to me *that where* a *person pays,* as *in this case, under pressure,* to *avoid judgment being taken against him the next day, the doctrine* of *acquiescence cannot be relied upon. The fact* of *payment is consistent with respondent's acquiescence in the taxation, but it is equally consistent with his anxiety* to *avoid judgment taken against him. In such circumstances, therefore, it cannot be said that the act is such an unequivocal one that the other party is justified in drawing the inference that there has been acquiescence in the judgment. With regard* to *the question* of *waiver, for* a *man waive* to *his rights there must be clear proof that he did* so *with*

knowledge* of *the facts, and there is* no *proof* of *that here."

2.4 In reply, Mr Labuschagne SC (for first respondent) argued that there is ample expert evidence by one Mr Labuschangne that the tariffs agreed upon between respondent and their attorneys were reasonable in the specialised field of patent attorneys. In the alternative, Mr Labuschangne submitted that it is incorrect to allege that the, Taxing Master did not apply his mind to the bills as it clear from copies of the bills that the Taxing Master did consider the bills and reduced some of the items reflected in the bills.

Reliance was also placed on the admission by Spiers that during the taxation, the Taxing Master asked many questions about certain items in the bills. Mr Labuschange, submitted that as were no longer tariffs applicable, the Taxing Master was correct to accept the 'Mandate and Agreement' as the starting point. He argued further that the Taxing Master was correct in regarding the application for postponement as being complex by virtue of the fact that reference had to be

made to the main application to justify the request for a postponement.

3. CONCLUSION

3.1 First respondent raised as a principal objection to this application the fact that the applicants used a wrong procedure. Mr Labuschagne argued that this matter cannot be brought to court under Rule 53 nor under Promotion of Administrative Justice Act 2000 (PAJA) as the applicants failed to set the proper factual foundation out. As a result, he argued that this application be dismissed. With respect, I disagree with Mr Labuschangne. This issue is not novel and has enjoyed the attention of our courts on various occasions. I have found considerable support and guidance in the judgment of the Road Accident Fund v Luzuko Sifimba & Others Case No 21/02 514/02 (Transkei)as yet unreported where in a similar situation, the learned Miller J expounded the requirement for such an application as follows:

"The requirements for a *rescission in matters where there has been* a *default* of *appearance are well-known; they being* (1) *that the applicant must give* a *reasonable explanation* of *its defaults* (2) *that the application must be*

bona *fide and* not *made with the intention of delaying the matter;* (3) *that* the *applicant must show that it* has *bona fide defence or in* a *matter such* as *this, that there is* a *reasonable prospect of* the *allocatur being reduced"*

Furthermore, Miller J stated the following important principle to the effect that *"The court* has *discretion in matters such* as *these and* a *measure of flexibility is required in* the *exercise of the court's discretion.* An *apparently good cause* defence *may compensate for* a *poor explanation for* the *default and vice versa."*

3.2 A similar approach was adopted in Grunder v Grunder En Andere 1990 (4) SA 680 (CP) where the correct legal position concerning the rescission of an allocatur granted by default was stated as follows at p 685 B-H:

"Na my mening is die beginsel* van *die gemenereg* wat by *die tersydestelling* van *vonnisse* by *verstek geld, ook,* van *toepassing op die tersydestelling* van *die allocatur* van n *Takseermeester. Die allocatur* van *'n Takseermeester word nie normaalweg* as *'n vonnis bestempel nie; dit word normaalweg gesien* as *'n administratiefregtelike handeling. Die uitspraak van 'n* Hof *is ook maar 'n

admimistratiefregtelike handeling, meer bepaaldelik 'n regsprekende administrtiefregtelike handeling. Die pligte van 'n Takseermeester by taksasie is *kwasie-judisieel, administratiewe handeling van regsprekende aard. Hy moet partye* of *hul regsverteenwoordigers aanhoor, desnoods self getuienis aanhoor, en 'n regterlike diskresie uitoefen. Die verrigtinge voor hom* is *'n geding in die kleine.*

Tersydestelling op gronde wat in De Wet and Others v Western Bank Ltd (supra) vermeld word, geld stellig nie ten aansien van kwasie-judisiële administratiewe handelinge oor die algemeen nie. Ek hoef my nie hieroor uit te *laat nie. Die Kwasie-judisiele handeling van die Takseermeester val egter in 'n besondere kategorie. In Bills* of *Costs (Pty) and Another v The Registrar, Cape, and Another* 1979 (3) *SA* 923 *(A) word die taksasieproses* so *beskryf:*

> *'It follows from what has been said above that traditionally taxation has been, and still is, regarded* as *an integral part* of *the judicial process and that the rights and obligations* of *the parties* to a *suit are not finally*

determined until the costs ordered by the Court have been taxed.'

(Op 946B) Die takasie van koste is eintlik niks anders **as** ***'n kwantitisering van die aanspreeklikheid wat die kostebevel van die Hot oplê nie. Laasegenoemde word in algemene terme gegee en is, sonder die Takseermeester*** **se** ***medewerking, onvolledig en inderdaad onafwingbaar. Ek kan geen rede sien waarom*** **'n** ***litigant daardie gedeelte van*** **'n** ***vonnis teen hom wat deur die Takseermeester gekwantitiseer word,*** **as** ***dit in*** **sy** ***afwesigheid gedoen word, nie op dieselfde wyse kan aanveg*** **as** ***'n verstekvonnis wat die Hot teen hom verleen nie."***

Based on the above exposition, I am satisfied that Mr Labuschagne's submissions are wrong.

3.3 have given this matter anxious and careful consideration. Without dealing with each and every item as taxed by the Taxing Master, I am of the view that the Taxing Master seriously misdirected himself in a number of crucial issues which had an adverse and serious effect on the taxation. It is clear that the misdirection

influenced him seriously in considering the bills. To demonstrate the point, firstly it is clear to me that to a large extent the Taxing Master was influenced to regard this application for postponement as complex simply because it relates to a patent matter. In my view, this was a simple application for a postponement which required no special legal or forensic skills. The fact that it relates to a patent matter, is to my mind, an irrelevant consideration.

3.4 However it is clear that the mere fact that it relates to a patent matter was unfortunately, given undue and unnecessary weight by the Taxing Master. In all probability, this is the most important fact which unduly persuaded the Taxing Master to allow fees to two senior specialist patent attorneys attending to a postponement whilst assisted by a senior counsel. In my view, this cannot be justified. I cannot think of any logical and cogent reason why the instructing attorneys in Durban and the correspondent in Johannesburg deemed it expedient and necessary to attend court in Pretoria whilst there was a senior counsel who was breifed to

oppose a postponement. In my view, this is an abuse of the system which regrettably resulted in extremely exorbitant fees being allowed. Undoubtedly this was an unnecessary duplication of legal services. This, in my view, is an aspect which, if properly raised with the Taxing Master, can significantly reduce the taxed bill.

3.3. It is clear that the Taxing Master considered himself bound by the 'Mandate and Agreement' entered into by the parties. Inasmuch as the Taxing Master has a duty to honour such an Agreement which is properly and freely concluded by all parties, the Taxing Master has a duty to ensure that the fees taxed are justified, fair and reasonable. I do not think that the existence of the 'Mandate and Agreement' should be construed as giving any attorney a *carte blanche* to charge and levy whatever fees he or she wishes to charge. It remains an established and salutary principle of our judicial system that attorneys irrespective of status or the nature of the cases which they handle, are entitled to charge reasonable fees for services rendered. Needless to state that no attorney is entitled to over-reach his or her client under the guise of a special 'Mandate and Agreement' concluded

with client. I regret to state that such a practice, if left unchecked, would, without failure, open the doors wide for abuse. No court can countenance such a practice which will invariably precipitate the attorneys' profession into serious disrepute. Needless to state that poor litigants would be left unprotected and at the mercy and conscience of attorneys. In my view, such a state of affairs cannot be countenanced. I hold the view that the Taxing Master still retains a duty and responsibility, notwithstanding any private agreement on fees between attorneys and their clients, to determine, whether the fees charged by attorneys are reasonable or not. For very good and convincing reasons, various courts have expressed serious concern and stern warnings against allowing such a practice to flourish unchecked. This salutary warning was more pointedly articulated by Van Dykhorst J in

Ben Macdonald Inc and Other v Rudolph and Other 1997 (4) SA 252 (1) at 258 C where he stated the following

> ***".....My approach that in attorney and own client bills which have*** **to** ***be paid by the other party, the attorney should not be given*** **a** ***free hand, untrammelled by the frown*** **of** ***the taxing master, is in conformity with the approach*** **of** ***the Appellate***

***Division in Nel v Waterberg Landbomers Ko-operatiwe Vereeniging* 1946 *AD 597and 608. The Appellate Division, in placing its stamp* of *approval on attorney and client costs, still insists that* a *stricter approach,* on *taxation where the bill is taxed against the losing party it is essential..... to prevent injustice* to *the latter.....A court may castigate* a *party in* an *award* of, *costs, but will not countenance unjust treatment.* "**

Later at p 258 H Van Dykhorst J expressed the principle more clearly and elegantly as follows:

"There is* a *further consideration. A court awarding costs* to *be taxed on the basis* of *attorney and own client, has in mind that such costs should be reasonable and not unreasonable, exorbitant or agreed upon collusively. It follows that even faced with* a *written agreement between attorney and client* as to *the work* to *be done, or fees* to *be charged therefore, the taxing master is still empowered* to *enquire into the reasonableness* of *such agreement".

It is not without significance that in Cambridge Plan AG v Cambridge (PTY) LTD and others 1990 (2) SA 574 (T) Swart J, had reason to sound a serious warning in the following clear but colourful terms

> ***".....Any Agreement by the cost creditor*** **to** ***pay his attorney*** **at** ***rates exceeding the tariff, and particularly the reasons for such agreement, are obviously relevant*** **to** ***the question whether adherence*** **to** ***the tariff would be inequitable, and due consideration must be given*** **to** ***such agreement and the reasons for making it. But, there is, in my view,*** **no** ***rule for any general rule or practice*** **to** ***the effect that any agreement that the costs creditor may have made with his own attorney*** **to** ***pay fees,*** **at** ***rates exceeding the tariff must serve*** **as** ***the prime indicator, or principle (sic) guideline, for determining what amounts*** **to a** ***reasonable rate*** **of** ***remuneration*** **to** ***be paid by the costs debtor. Any such rate or practice would obviously be open*** **to** ***abuse and would facilitate the unjust oppression*** **of** ***the debtor inconsistently with Nel.*** **"**

3.4 I am satisfied on the facts of this matter that the Taxing Master seriously erred, in considering himself bound by the "Agreement and Mandate" in terms whereof the costs creditor agreed to pay his attorneys at a much higher rate than the one ordinarily allowed. Furthermore, I am satisfied that the Taxing Master was improperly influenced to award costs at a much higher tariff (3.5) by his acceptance of the fact that this application for postponement was made complex by the fact it related to a patent matter. It is precisely as a result of this misdirection that the Master accepted that the cost creditor was justified to be represented during the application for a postponement by two senior attorneys as well as senior counsel. I have no doubt that if the costs debtor was represented during taxation, these issues, which had a profound effect on the ultimate bill, would have been debated with the Taxing Master.

3.5 Based on the reasons adverted to above, I have no doubt that there is a strong likelihood that should the bill be re considered, it may be appreciably reduced. In the

circumstances, and for the reasons adverted to above, I am 23
of the view that justice and fairness require that the allocatur made by the Taxing Master in the applicants' absence be set aside. In the peculiar circumstances of this matter, it have no doubt that will be in the best interests of both parties that this matter be remitted to the Taxing Master for proper reconsideration where both parties will be afforded an opportunity to debate whatever issues they may wish to raise with the Taxing Master.

L.O BOSIELO
JUDGE OF THE HIGH COURT

Having given this matter careful consideration, I hereby make the following order:

1. **The taxation of the bills of costs drawn on behalf of first respondent together with the allocatur made by the Taxing Master pursuant thereto are hereby set aside.**
2. **The matter is remitted to the Taxing Master to be re enrolled for a fresh taxation.**
3. **First respondent is ordered to pay the costs of this application.**