IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION CASE NO : 517/05

In the matter between:

NAVAL SERVICOS A VANEGCAUO LIMITADA Plaintiff

and

STRANG RENNIES METAL TERMINALS (PTY) LIMITED Defendant

JUDGMENT

SKINNER, AJ:

This is a review of three rulings made by the Taxing Mistress on taxation on a bill of costs by the Defendant (the present Applicant in the review proceedings) on 12 October 2007. In view of the potentially far reaching consequences of certain of the rulings, the matter was referred in terms of Rule 48(6)(a) to the full bench for decision.

The three rulings were:

(a) the Taxing Mistress disallowed in its entirety an item in respect of the costs of what was referred to in the bill as the

Defendant's "Australian correspondent". The disbursement in respect thereof was an amount of R198 351.49;

(b) the Taxing Mistress disallowed the costs of the Defendant's attorney in Johannesburg and ruled that the bill should be interpreted as allowing such costs "to the extent as if they were based in Richards Bay". The effect was that any extra costs incurred solely as a result of such attorneys being based in Johannesburg rather than in Richards Bay were disallowed. In argument before us, Ms van Dyke on behalf of the Defendant indicated that she was not persisting in seeking to have this ruling set aside. I accordingly do not deal with it further;

(c) in respect of two items in the bill relating to disbursements paid to counsel in the amounts of R92 169 and R71 478, the Taxing Mistress disallowed an overall amount of R78 900. The amounts were for preparation for trial and the fee for the two days for which the trial ran prior to absolution from the instance being granted in favour of the Defendant. Counsel had raised a fee (exclusive of VAT) of R16 500 for each trial day as well as 40 hours of perusing documentation and preparing for trial and 20 hours of consulting, all at R1 650 per hour (excluding VAT). The hours of consultation were settled

and did not form part of the taxation. The Taxing Mistress allowed a fee of R18 000.00 for the first day of trial inclusive of preparation (but exclusive of value added tax) and a fee of R12 000.00 (exclusive of VAT) for the second day of trial.

Rule 70(3) provides that taxation of a bill of costs is "with a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him". The approach to be adopted in matters of this nature has been set out in various judgments but perhaps most conveniently in the matter of **Visser v Gubb 1981 (3) SA753 (C) at 754 H – 755 B**:

> **"Rule of court 70 (3) clearly confers a discretion on the Taxing Master to award such costs**
>
> **'as appears to him to have been necessary or proper for the attainment of justice or defending the right of another party.'**
>
> **The court will not interfere with the exercise of such discretion unless it appears that the Taxing Master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered, or he has failed to bring his mind to bear on the question in issue, or he has acted on a wrong principle.** The court will

> **also interfere where it is of opinion that the Taxing Master was clearly wrong but it will only do so if it is in the same position as, or a better position than, the Taxing Master to determine the point in issue... The court must be of the view that the Taxing Master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal".**

Before considering how this should be applied to the two rulings that remain in issue, it is perhaps desirable to bear in mind a general approach to the issue of costs. I have already referred to the provisions of Rule 70(3) which refers to costs "necessary or proper for the attainment of justice or for defending the rights of any party".

Looked at from another perspective, there can be no doubt that any potential litigant before embarking on instituting or defending an action or application would give consideration to the so-called "downside" of being unsuccessful in such litigation. Part of such consideration would naturally be the associated legal costs. An important factor would be whether the prospective opposing party to the litigation is resident at the seat of the court and if not the reasonable and necessary need for there to be more than one set of attorneys for that litigant. Similarly a litigant who himself does not reside at the seat of the court would have to give consideration to

how many sets of attorneys it would be reasonable and necessary for him to instruct to attain justice or defend his rights.

Ms van Dyke has urged that we should adopt what was referred to in the matter of **Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk 1993 (2) SA 144 (O)** as a "realistiese en gesonde verstand-benadering", an approach which the Taxing Mistress herself indicated she had adopted. In our view this approach is preferable to that of the strict view adopted in **Sonnenburg v Moima 1987 (1) SA 571 (T)** to the effect that where a litigant for whatever reason elects not to employ a local attorney in the area in which he resides, he loses the benefit of being entitled to instruct any attorney other than one at the seat of the court.

Mr Rogerson on behalf of the Plaintiff argued that the realistic and common sense approach has not been followed as a general trend and in this regard referred to the unreported decisions of the **Stadsraad van Benoni v Meyer** (Witwatersrand Local Division case number 34133/93, a 1997 decision), **Vorster v Vorster** (Eastern Cape Division case number 1519/90), **Human v The Administrator of the Cape of Good Hope and Others** (Eastern Cape Division case number 567/95) as well as the decision in **Schoeman v Schoeman** 1990 (2) SA 37 (E) (in which various other authorities were referred to).

I do not believe that this is a correct reading of the judgment in **Schoeman (supra)**. At page 42G of the judgment the court stated:-

> **"It is, in my judgment, not correct to say that in the choice of a local attorney a litigant is necessarily restricted to an attorney practising in the town where he lives or carries on business. Much would depend on the circumstances of the case and a realistic and common sense approach should be adopted".**

Such an approach is eminently sensible, particularly as judgment after judgment has stated that each case must be judged on its merits and that no hard and fast rule can be prescribed (see for instance **Schoeman supra at 42H** and **Niceffek supra at 155B**.

It is undoubtedly so that a company for jurisdictional purposes may be "resident" in more than one place, where its registered office and principal place of business are located at different venues. Ms van Dyke relied upon the unreported judgment in **Rex Trueform Clothing Company Limited v Hutton & Cook** (Eastern Cape Division review case number 1483/96, case number 642/95) for contending that the:

> **"principal place of business, being the place of central control, would ordinarily be the place where the company would decide whether to institute or defend actions. That is also the place where the company would make decisions relating to litigation and where it would be expected to consult with its attorneys."**

This latter judgment was based on the well known case of **Bisonboard Limited v K Braun Woodworking Machinery (Pty) Limited 1991 (1) SA 482 (A)** where, albeit in a different context, the Court held at page 496 A that:

> **"A company resides at the place where its general administration is located, i.e at the seat of its general management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business".**

Ms van Dyke contended that the entire shareholding of the Defendant was held by an Australian company, that all the directors of such Australian company were resident in Australia and that all decisions by the Defendant concerning the litigation process were conducted in Australia. If regard however is had to the document upon which she relied, which was a letter from the Australian solicitors dated 11 October 2007, the position was that "policy decisions and financial decisions are made entirely by the Australian Members of the Board" and that "all decisions concerning the governance of the Company are made in Australia".

In my view this is somewhat different from the concept of principal place of business / seat of central management and control referred to in **Bisonboard (supra)**. As I understand what was being conveyed by the Australian solicitor, matters of policy in respect of the Defendant were

determined in Australia but this does not mean that the day to day "general superintendence of its affairs" took place in Australia. This would, in the nature of things, have been impossible. The day to day running of the business of the Defendant was clearly controlled by the management in Richards Bay and that is where it had its principal place of business.

Further, although it may well be (as Ms van Dyke contended) that the Plaintiff would have had some knowledge because of other litigation which is still continuing between what she referred to as "virtually the same parties, albeit clumped together in different companies", I do not believe that it can be reasonably required of a litigant, particularly one in the circumstances of the Plaintiff, to be expected, when assessing whether to institute or defend any litigation, to have regard to the shareholding of the other party. The shareholding in itself may not necessarily mean that the place where the shareholders are resident is where the principal place of business of such entity is. The shareholders may not all be resident in the same country. Similarly problems arise if regard has to be had to where the directors of a company are situate – that may mean that in the case of multi-national Corporations where directors are divided between several countries, the corporate entity concerned is entitled to instruct attorneys in each such country. It would not be realistic or adopting a common sense approach to expect a litigant in his assessment of potential cost exposure,

to investigate the whereabouts of the shareholders or directors of a company and then assess whether such reasonably entitles that litigant to instruct attorneys in the same country where the shareholding or directors are situate.

The Defendant was clearly a South African company and carried on business in Richards Bay from where its general (in the sense of "day to day") superintendence of affairs was conducted. Even applying a realistic and common sense approach, the Defendant was "resident" in Richards Bay, which place was its principal place of business. For that reason I do not believe that it was reasonable or necessary for the Defendant to instruct Australian solicitors. To the extent that the directors/shareholders of the Defendant wished to communicate a policy decision as to whether to continue with defending the litigation or not, this would naturally be conveyed instantly through a variety of means such as telefaxes, emails or telephone calls.

The decision of the Taxing Mistress to disallow the costs of the Australian legal representation was set out in her stated case as being:

> **"entirely on the basis that the company has its registered office in Richards Bay and the management of its day to day running is conducted there. Therefore the management in Richards Bay is well acquainted with the**

> **matter in dispute and should have been able to deal with the litigation without involvement of the Australian attorney. If any decisions were to be taken by the shareholders in Australia such decisions ought to have been communicated with the management in Richards Bay who will then instruct attorneys in terms of their mandate".**

It follows from what I have stated that I do not consider that this ruling by the Taxing Mistress should be interfered with on the grounds that she had not exercised her discretion judicially or had exercised it improperly. The review on the first ruling accordingly fails.

With regard to the third ruling relating to the fees of counsel, the Taxing Mistress in her stated case had referred to the provisions of Rule 69(5) and thereafter indicated the amount of the first day fee (inclusive of preparation) and two thirds thereof for the second day fee, which she stated "was, in my view, ... reasonable under the circumstances". In her subsequent report to this court she referred to the matter of **Toxopeus v Kwanda Tile & Concrete Works ((Edms) Bpk and Others** 1988 (3) SA 440 (T), which is to the effect that preparation for hearing was to be included as part of the fee for an application and that counsel was not to charge a fee for reading papers and preparing for the hearing separately. She then reiterated that in her view the fees allowed were reasonable. (I should add in passing that I do not believe that her reliance on this case

was well founded as it dealt entirely with motion proceedings where preparation necessarily was part and parcel of the appearance fee.)

Neither her precise reasons for fixing the allowable fee in the specific amount nor precisely which factors or considerations or circumstances she took into account in making such determination appeared in the papers. In our view it would not have been in accordance with justice for the review on this aspect to have been dismissed on the basis that the lack of reasons for the decision of the Taxing Mistress meant that the defendant had failed to show that she had not exercised her discretion judicially or had adopted an improper principle. Accordingly, the hearing was adjourned and certain queries directed to the Taxing Mistress aimed at establishing fully the reasons for her ruling.

In her further response, the Taxing Mistress indicated that :

(a) she had not considered herself to be bound by the maximum amount of R20 000 appearing in the survey of senior counsel fees at the KwaZulu Natal Bar;

(b) she had never allowed a first day fee for a junior inclusive of preparation in excess of R20 000. The amount of R18 000 which she had allowed in the present case was the maximum ever allowed in this division for a junior to date;

(c) the usual first day fee she allowed in an average matter was R12 000 for senior counsel and R9 000 for junior counsel;

(d) in making her determination, she had taken regard of the complexity of the matter as well as the arguments put forward by both parties on taxation;

(e) in her view perusal of documents was part of the preparation fee which in turn formed part of the first day fee.

Ms **van Dyke** submitted that while she accepted that counsel from another division was bound by the practice of this division in matters litigated in this division, the survey of the fees charged by junior counsel at the KwaZulu Natal Bar was anomalous (since it showed that juniors were still adopting the traditional "first day fee" approach, whereas senior counsel were charging a daily rate and a separate amount for preparation) and out of line with the practice in the rest of the country. Mr **Rogerson** however submitted that the Taxing Master\Mistress in this division has not been allowing the flat rate together with a preparation fee for senior counsel, but has only been allowing the larger first day fee and a refresher fee per day thereafter.

There does not seem to be unanimity in the judgments on this aspect. In this division Magid J in **Stubbs v Johnson Brothers Properties CC and Others** 2004 (1) SA 22 (N) at 28 H stated :

"Now, an advocate does not charge separately for his preparation. That, it is understood, is done before the trial starts. There is, accordingly, what might be termed a loading on the first day's fee (termed the fee on brief) with reduced fees being charged (and allowed on taxation) as refreshers on the second and further days of the trial. This system was described by Jansen JA as 'fitting in trials' (**Scott and Another v Poupard and Another** 1972(1) SA 686 (A) at 691 G)"

In **J D van Niekerk en Genote Ing v Administrateur, Transvaal** 1994 (1) SA 595 (A) the then Appellate Division disapproved of a fee of counsel (for drawing heads in an appeal) calculated on a time basis and considered such an approach to be inappropriate because (at 601 I to 602 A) :

"Dit stel 'n premie op stadige en ondoeltreffende werk; en dit het tot gevolg dat 'n fooi gevra word wat geheel en al buite verhouding is met die waarde van die dienste wat inderdaad gelewer word."

In contrast, the Constitutional Court referred (in **President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another** 2002(2) SA 64 CC at 78 I to 79 D) to :

[27] "... counsel's fees put into the equation by the Taxing Master were charged according to debiting guidelines agreed between the Bar and the attorneys' profession. In terms of the agreement between the respective professional associations, advocates book the time actually spent in the preparation of a case and charge an hourly or daily rate for such time.

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

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

The effect of blithely adhering to the rate-per-time basis is graphically illustrated in **van Niekerk**'s case where counsel's fees on appeal that were sought to be recovered on a party and party basis were described in the judgment as 'kommerwekkend', 'beswaarlik aanvaarbaar', 'uiters vergesog' and 'buitensporig'."

The Supreme Court of Appeal in **Price Waterhouse Meyernel v Thoroughbred Breeders' Association** 2003(3) SA 54 SCA at 63 E – G declined both to allow a fee calculated on a time basis and to substitute its own assessment of a reasonable fee. It held :

"... determination of a reasonable fee will, in the light of the arguments raised on behalf of the defendant before us, involve having regard to fees charged in major cases in this Court over the last few years. Unquestionably the Taxing Master is in a better position than we are, on the material before us, to undertake the necessary survey and evaluation.

[26] Counsel for plaintiff also pressed upon us the submission that the Court should lend its approval to the determination of fees on taxation on a time-related basis, given the prevailing tendency in the profession to charge on that footing. In **J D van Niekerk en Genote Ing v Administrateur, Transvaal** 1994 (1) SA 595 (A) this Court disapproved of that approach to fee assessment for taxation purposes and held that the established practice was to fix a globular first day fee for heads, preparation and appearance. A departure from what was said there – and

even a re-appraisal of that practice – would require evidence and argument far beyond that with which we have been presented in this matter."

The authorities I have referred to do not in my view indicate that it would be incorrect for a Taxing Mistress to allow a fee for preparation, even though such would not have been the normal practice in the past, in exceptional cases. The approach by counsel to charging fees on a time basis has changed since the judgment in **van Niekerk**'s case (supra). It would be highly artificial, and contrary to the general approach set out in **Hastings v The Taxing Master** 1962 (3) SA 789 (N) at 793 A that the indemnity for all costs reasonably incurred is to be a full and not a partial indemnity, to ignore the widely followed method of charging on a time and thereby, in some circumstances, penalising heavily the successful party. This is however merely one factor, and not the predominant factor, to be taken into account on taxation. The Constitutional Court (**Gauteng** Lions supra at 79 B) has indicated that time spent is a relevant factor albeit "no more than a pointer" in assessing a reasonable fee. It would therefore be adopting an incorrect approach for a Taxing Mistress to fail to appreciate the importance of the time spent on preparation in an exceptional case and to regard herself as having of necessity to confine such factor within a first day fee.

The Taxing Mistress was not bound by the approach reflected in the survey of fees of junior counsel to which I have already referred and she has herself acknowledged this. She was therefore at liberty (and indeed obliged) to consider how best to comply with Rule 70(3) and to provide in her assessment of the fees "a full indemnity for all costs reasonably incurred".

Once it is accepted (as indeed it must for there is no reason to doubt that counsel did actually spend the time on preparation reflected in the fee notes) that the complexity of the case required a very large amount of preparation, the Taxing Mistress should have applied her mind to the numbers of hours that in her view would reasonably be spent on preparation and in so doing determine the extent, if any, to which the preparation time was as a result of inefficiency or lack of experience or skill (this list is not exhaustive). If in her view, a very large number of hours was reasonably required for preparation, she should then have considered whether such could reasonably be incorporated in a first day fee or whether (because of the effect an exceptionally high first day fee would have on refresher fees), it would be preferable to allow a daily rate together with a separate preparation fee.

It follows from what I have said that, in respect of her decision on counsel's fees for preparation, the Taxing Mistress has misdirected herself by applying too rigid an approach. She is however in a much better position to determine the number of hours reasonably spent (and then to rule whether this should be encompassed in a first day fee or in a separate fee for preparation) than this Court.

Costs are infrequently granted in reviews of this nature. The defendant has been partially successful. Abandonment of the review sought by it in respect of the ruling of the costs of the Johannesburg attorney was however only on the morning of the first hearing. While it has succeeded in the review of the ruling on counsel's fees, it has been unsuccessful in respect of the costs of the Australian solicitors. Further, since the decision relating to the costs of preparation by counsel was a departure from the

usual practice in this division on taxation, the opposition by the plaintiff was justified.

In all the circumstances the most appropriate order is for each party to bear its own costs in the review.

I would accordingly make an order in the following terms :

(1) ***The Review succeeds in respect of the ruling on counsel's fees.***

(2) ***The allocatur of the Taxing Mistress is set aside and the bill of costs is referred back to her for counsel's fees to be taxed afresh.***

(3) ***Each party is to bear its own costs incurred in the review.***

SKINNER, AJ

Acting Judge in the High Court

KOEN J

I agree and it is so ordered

Date of Hearing	:	25 June 2008
Date of Judgment	:	10 July 2008
Counsel for Plaintiff	:	L. Rogerson
Instructed by	:	Cliffe Dekker Attorneys
Counsel for Defendant	:	H. van Dyke
Instructed by	:	Fluxmans Attorneys