IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1354/2018**

In the matter between:

TERENCE EVERZARD REILLY N.O.	**1ST APPLICANT**
ELIZABETH REILLY N.O.	**2ND APPLICANT**
JAMES WEIGHTON REILLY N.O.	**3RD APPLICANT**
PETROS MGCIBELO NGOMANE N.O.	**4TH APPLICANT**

and

THE DIRECTOR OF VETERINARY & LIVESTOCK SERVICES	**1ST RESPONDENT**
THE PRINCIPAL SECRETARY FOR AGRICULTURE AND CO-OPERATIVES	**2ND RESPONDENT**
THE MINISTER OF AGRICULTURE AND CO-OPERATIVES	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation: *Terence Everzard Reilly N.O. & 3 Others v The Director of Veterinary & Livestock Services and 3 Others (1354/2018) SZHC 172 [2019] (07 October 2019).*

REVISION OF TAXING MASTER'S RULING ON TAXATION OF A BILL OF COSTS IN TERMS OF RULE 48(3)

Coram : MAPHANGA J

Date heard : 29/07/19

Date delivered : 07/10/19

Summary : *Civil Procedure – Taxation – Bill of Costs – Scale of Costs awarded on Attorney and Client Scale – Certified Costs of Counsel included in Award – Effect of award whether Counsels costs subject to taxation in terms and Rule 68 under section H of the Tariff of Advocates Fees – held. Award of punitive costs including costs of counsel without reference to Rule 68 to be construed as permitting costs of counsel to be claimed as a composite fee.*

JUDGMENT

[1] This application arises out of a costs award granted in favour of the applicants in motion proceedings before my brother, His Lordship Justice J.S Magagula, on the 13th December, 2018 which proceedings were prosecuted under the above case number. The background as regards the underlying litigation between the parties relates to a series of proceedings concerning a dispute between the applicants herein and the first respondent over a challenge to the Director of Veterinary Services' decision regulating and imposing certain conditions for the importation of certain wildlife (game) into the Kingdom. In its judgment the court granted the said costs in favour of the applicants at a punitive scale expressed as 'between attorney and client including certified costs of counsel'. It is common cause that the costs order was granted against the respondents *in solidum* jointly and severally, the one paying the other to be absolved.

[2] Subsequently the applicants drew and presented an itemised bill of costs for taxation before the Taxing Master in a bid to recover the costs award. The bill incorporated costs of counsel and in due course it was tabled and set down for taxation on the 28th February 2019. In the outcome the Taxing Master taxed off an assortment of items in the bill of costs, the bulk of which are of no moment herein in so far as the contested list of items in contention presently are limited to a few specified costs items that the respondents objected to and the Taxing Master disallowed and taxed off. I shall return to these items momentarily.

[3] Aggrieved by the Master's *allocatur* the applicants have brought this application for a review of the taxing master's ruling. The proceedings are ostensibly brought in terms of Rule 48 of the Rules of the High Court. In initiating the process it is common cause that the applicants caused to be delivered to the Master notice of their intent to challenge her ruling by way of a letter addressed by their attorneys dated 6th March 2019 wherein they set out their complaint and invite her to issue a report setting out basis for disallowing the items she declined and for taxing off the certified costs of counsel. A copy of the 'notice' was also delivered to the 4th Respondent.

[4] Pursuant to this notice the Taxing Master in her response filed and delivered a copy of a document captioned 'Taxing Master's Report' to the parties in which she briefly sets out her reasons for the ruling she made on the specified items. Furnished with the report the applicants then brought the present application in which they essentially contest the correctness of the basis of the master's ruling as pertains the items in contention on the basis that the Taxing Master's ruling was predicated on fundamental errors of law in her exercising her discretion in the taxation.

[5] The application is vehemently opposed by the respondents who contend firstly that the present application is unprocedural having been brought without due compliance with the strict provisions of Rule 48 of the Rules of the High Court as pertains review of Taxing Master's rulings. In addition they contend, on the merits, that the Master exercise of her discretion acted properly within her powers and therefore the applicants objections to her *allocatur* are without merit. I intend to return to the specific contentions of the parties. It is necessary to set out briefly the relevant principles as pertains the taxation of costs that I consider to have a direct bearing on this matter.

The Rule

[6] The applicable procedural rule regulating a challenge to a taxing master's ruling on taxation of costs is Rule 48 of the High Court Rules. Its relevant provisions are as follows:

Review of Taxation

48. (1) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within fourteen days of the *allocatur* require the taxing master to state a case for the decision of a Judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall embody any relevant findings of fact by the taxing master:

Provided that, save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed respectively, is less than E50.

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

(3) The taxing master shall thereafter make his report and supply a copy thereof to each of the parties who may within seven days of the receipt thereof submit contentions in writing thereon to the taxing master who shall forthwith lay the case together with the contentions of the parties thereon, his report and any contentions thereon before a Judge, who may then decide the matter upon the case and contentions so submitted, together with any further information which he may require from the taxing master, or may decide it after hearing, if he deems fit, the parties or their advocates or attorneys in his chambers or he may refer the case for decision to the court.

(4) Any further information to be supplied by the taxing master to the Judge under sub-rule (3) shall be supplied by him to the parties who may within seven days of the receipt thereof submit contentions in writing thereon to the taxing master who shall forthwith lay such further information together with any contentions of the parties thereon before the Judge.

(5) The Judge or court so deciding may make such order as to the costs of the case as he or it may deem fit, including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the Judge or court as and for costs.
(Amended L.N.38/1990.)

PRELIMINARY POINT

[7] At the start of the proceedings the respondents took a preliminary point against the application the essence of which is an objection that the proceedings have been brought improperly in an irregular manner without due compliance with rule 48 as pertains reviews of taxing master's rulings. In this regard it was contended that the conditions precedent for the conduct of the review under the rule have not been fulfilled and likewise the jurisdictional circumstances enabling the conduct of the proceedings; in particular the stated case contemplated by rule 48(1) setting out the items in contention and any relevant findings of fact by the taxing master for consideration of the judge.

[8] The respondents submit that the crucial provisions as to the conduct of the proceedings in particular rule 48(2) are set in peremptory terms and therefore its non-fulfilment in so far as the non-submission of a stated case by the master renders the proceedings irregular and by extension the application dismissible on that basis. It is submitted that the cause of the lapse is the non-compliance by the applicants with rule 48(1) as regards the form and content of the notice in not procuring a stated case but a report of the taxing master, a penultimate step in terms of rule 48(3) to the parties' contentions.

[9] In their supplementary heads the applicants have in rebuttal denied the alleged irregularities in relation to the rule and urged in the alternative that even if such are existent contend the court has wide discretionary powers enabling the court to enter into the enquiry on the merits on the basis of the issues set out in the parties contentions on the merits together with the taxing master's report. It was contended further that giving the limited scope and particularity of the items in contention the report and parties respective contentions adequately frame the issues for due disposition by the court of the review.

[10] In this matter given the peculiar manner in which the proceedings have been initiated and taxing master's response thereto no stated case was made. Instead the master ostensibly responding to the applicants invitation to file a report did exactly that without seeking to follow the requirements of the rule as per r48(2). It appears to me that the rule is framed at r48(1) is framed in permissive or directory terms as opposed to a peremptory language in so far as it calls for a notice in terms of which the party seeking the review 'may' request a stated case in respect of the items in contention. But I think much on the procedure and the object of the rule turns on the nature and substance of the objection; thus on an extensive item by item challenge involving a field of objections to the ruling of the master or allocatur the stated case may be indispensable. In this case the issues are limited to 3 specified items and the nature of the objections appears to me to involve matters of principle than factual aspects that would require statement of those facts in a stated case. I think the costs

creditor's complaint in seeking the review is premised largely on the contention that the taxing master misdirected herself in terms of the principles applied and approaches adopted in regard to her ruling on the specified items.

[11] It appears to me therefore that faced with the question of non-compliance with the strict requirements of the rule the court has to determine whether it may nonetheless enter into the enquiry and be seized with the review notwithstanding the irregularities. In this view I am fortified by a similar approach taken in the case of ***Brener NO. v Sonnenberg, Murphy, Leo Burnett (Pty) Ltd (Formely D'Arcy Masins Benton & Bowless SA (Pty) Ltd*** **1999 (4) SA 503 (W)** where the court took a purposive approach to the question that emphasises the utility and substance as opposed to form in regard to the issues for determination. In am therefore of the view as the court did in the *Brener* case (in reference to similarly worded rules to do with review of taxations) that some degree of indulgence from strict compliance with rule 48 be allowed the parties and or the taxing master in the interest of a cost-effective and time efficient disposition of the matter. After all given the issues the matter may have been brought in terms of rule 53 in my view[1].

THE GENERAL LEGAL PRINCIPLES AS TO REVIEW OF TAXING MASTERS RULING

[12] It is now settled law that a court will only interfere to review a taxing masters award in exceptional circumstances where it can be shown that his/her exercise of discretion was either improper on some question or principle or where the taxing master has been clearly wrong in regard to some item. See ***Kingsborough Town Council v Thirlwell [*****1957] (4) SA 533 N**[2]; also ***Ocean Commodities Inc and Others v Standard Bank of South Africa Ltd and Others*** **[1984] (3) SA 15 (A).** The courts power in terms of Rule 48 has been characterised as being wider or broader than ordinary review as to suggest that it is more in the nature of revision of the taxing master's ruling in that the court may consider the correctness of the taxing master's decision in regard to a specific item or number of items in the taxation of a bill of costs whether in his objection to those specific items or in disallowing them. So in this sense the power encompasses both review on application of principle or in regard to the exercise of the discretion substantively[3].

[13] In ***Kock v SKF Laboratories (Pty) Ltd*** **[1962] (3) SA 764 (E)** the court echoed the above position when it held that a taxing master's discretion and ruling may only be subject to review or revision:

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[1] **TWK Agriculture Holdings (Pty) Ltd v Taxing Master of The High Court (4263/2005 (a)) [2015] SZHC 133 (20 March 2015)**

[2] See also Nathan Barnett Brink, *Uniform Rules of Court* 2nd Edition, in their commentary on what was then Rule 48 on review of taxation worded similarly to our current rule, at page 234.

[3] Nathan et al., ibid commentary at page 322 and the case *Century Trading Company v The Taxing Master* 1958 (1) SA 78 W and the view that the scope of rule on review of taxing master's taxation is not limited to review *stricto sensu but rather revision of the taxation.* but rather also revision of the taxa

a) if he has not exercised his discretion judiciously i.e., if he has exercised it improperly;

b) he has not brought his mind to bear upon a question; or

c) he has acted on the wrong principle

[14] In summary the underlying principle as pertains a review of a taxing master's decision is that the taxing master enjoys a wide discretional purview within which the courts will be loath to interfere unless it appears that master has not exercised his discretion judicially but improperly, as in when he disregards important or pertinent considerations or fails to direct his mind on a critical or relevant question in issue or takes irrelevant factors into account or acts on a wrong principle. Those cover matters of principle and procedure. However it is settled that a review under the rule is broader than questions of regularity but also the correctness on an item by item basis of the taxing master's ruling affecting his allocatur. It has been said that when he errs in the second sense and acts in a manner that the court finds he was clearly wrong again the court may interfere to determine the point in contention and thus if the court is well placed to itself decide the point and substitute its own determination or ruling. (See Erasmus B1-348 to BI-349).

[15] Erasmus in B1-349 takes the view that the procedure under the rule 48 is broader than review in the conventional sense in that the scope of the discretion the court exercises in the proceedings is wider.

THE ISSUES

[16] In defining the crisp issues to be determined I must recognise that Mr Vilakati has conveniently articulated the principal questions which arise and for that this court is indebted to counsel; do however think the question require attenuation as the substantial contested sum turns largely on the taxation of the item claimed as costs of counsel; it being common cause that in awarding costs the court did not only make a special award of costs on an attorney and client scale but also ordered that such costs shall include certified costs of counsel. Therefore precise point to be decided are chiefly the following:

1. Whether costs awarded on an attorney and client scale are taxable on the basis of the prescribed tariff for the taxation of attorneys and advocates fees in terms of rule 68; and

2. If such an award includes certified costs of counsel that aspect of the costs in respect of the advocates fees is susceptible to taxation in terms of the rule and the tariff prescribed for advocates fees (section H) of the rule; consequently

3. If so whether the taxing master's allocatur in regard to the counsel fees is reviewable in the circumstances of the case.

[17] I propose to deal with these points in turn as they are the fundamental questions requiring careful consideration. Thereafter I shall address the key items in contention in the Taxing Masters ruling and the parties submissions in that regard as well as the Taxing Masters representations as set out in her Report filed in this review.

Whether Attorney and Client Costs may be taxed and on what basis.

[18] The leading case in regard to the principles and parameters for taxation of costs awarded on a punitive scale as between attorney and client and contradistinction to party and party costs is that of ***Nel v Waterberg Landbouwers Ko-operatieve Vereeniging [1947] AD 597***. It has been followed and cited with approval in this jurisdiction as setting out a correct statement of the law in this regard and therefore remains a source of persuasive authority with the same rigour as in South Africa; partly because our rule as regards the taxation of legal costs are largely similar barring a few differences[4].

[19] Generally the taxation of costs may derive from any one of three main basis. These may arise out of costs awards by the adjudicating authority of court either on a party-and-party basis or as or on a scale as attorney-and-client scale. The third scenario pertains to taxation of costs payable by a client to his or her own attorney. Each attracts a different approach to taxation of a bill of costs drawn in either context.

[20] A bill drawn for taxation on a party and party basis is dealt with and taxed strictly in accordance with a tariff. In this jurisdiction that tariff is prescribed in terms of rule 68 as set out in sections G and H of the schedule of fees annexed to the rules. The issue that arises here is on what basis are costs awarded on an attorney and client scale liable to be taxed if at all.

Attorney and Client Costs

[21] In *Nel* the principle what the practice of awarding costs on an attorney and client scale entails was succinctly by Tindall JA as follows:

> *"(t)he true explanation of awards of attorney and client costs [5] not expressly authorised by statute seems to be that, by reason of special considerations arising either for the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means f a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation"*

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[4] See Mamba J's remarks in reference to the Nel case in TWK Agriculture Holdings (Pty) Ltd v Taxing Master of the High Court (4263/2005 (a)) [2015] SZHC 133 (20 March 2015) at para 27 of the judgment in recognition of the case; AS regards the rule 68 our rule is largely drawn in pari material with the South African rule 70. I note however that in terms of our rule 68 the court reserves the power to make a special directive to the taxing master to depart from the tariff prescribed under the rule in certain extraordinary or exceptional circumstances over and above the taxing master's own discretion in this regard as conferred by rule 68(7) where he or she deems it would be inequitable to adhere to the tariff.

[22] In effect what the court alluded to was the principle of indemnity or seeking to place the successful party in a position not to be out of pocket in the matter of his own attorney and client costs – enabling him to recoup or reasonable recompense as regards those out of pocket expenses reasonably incurred in the conduct or prosecution of the litigation.

[23] In the taxation of attorney and client costs does the tariff apply? On the principles enunciated in the Nel case the simple answer to the question is that the tariff is applicable but for any departure as in exceptional or extraordinary circumstances sanctioned either by the rules or directed specifically by the court in the form of as special award. Although in either party and party or attorney and client scale taxation the tariff is applicable the difference is that in regard to the latter the taxing master has the latitude of taxing such costs on what has been termed an *intermediate* basis whereas on party and party costs taxation the tariff invariably strictly applies.

[24] The intermediate basis of taxation has been defined in deference to the decision in Nel by the court in ***Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*** .....as follows at para 61:

> ***"This means that in an inter-party taxation, on a scale as between attorney and client, any and every item on the bill can, if it has been inflated in consequence of the reprehensible conduct of the costs debtor, be taxed with greater generosity to the costs creditor than in a party and party taxation. It means that every item on the bill should receive the taxing master's consideration for that purpose"***

Again at para 62 the learned Stegmann J elaborating on the concept states:

> ***"The intermediate basis for taxation identified in Nel ....allows the costs creditor who has an order for payment by his opponent of costs taxed as between attorney and client, to recover from the costs debtor what may, depending upon the circumstances of the particular case, amount to a substantially fuller indemnity than he would could recover on a party and party taxation. Within the bounds of reasonableness in the circumstances of the case, the taxing master is expected to tax such a bill generously. He should allow rates that may reasonably exceed the tariff if the work was of some complexity and was made unduly burdensome by whatever conduct on the paty of the costs debtor caused the court to make an order for attorney and client costs"***

[25] To illustrate the position that in either party and party or attorney and client taxation the tariff is applicable, Stegmann J applying the Nel principles gives two practical examples of the intermediate mode of taxation as follows:

> *"If for instance the taxing master is satisfied that the unworthy conduct for the costs debtor caused the costs creditor reasonably to have more consultations or longer consultations with his legal advisers than would have been allowed in a party and party taxation, the costs of those extra or lengthier consultations*

should be allowed against the costs debtor in a taxation as between attorney and client, except to the extent that an injustice may be done to the costs debtor"

and further:

> *"If the legal advisers of the costs creditor charged fees at rates exceeding the tariff in rule 70 (similar to our rule 68), the taxing master should consider allowing exceeding the tariff, provided that they are not unreasonable in the particular circumstances and that they do not inflict injustice upon the costs debtor"*

[26] This is of significance in achieving absolute clarity as to the difference in the process of taxation of costs on attorney and client costs from those on an ordinary party and party scale.

[27] As a rule taxing master is invariably bound by the tariff save for permissible departures as to the sums allowed per item or additional costs occasioned by the censured conduct. In the latter instance I am in agreement with Mr Vilakati's submission that on the Nel principle the point becomes whether item by item a more generous amount may be allowed for such larger sum on the basis of the extraordinary or exceptional circumstances than in the tariff; or to allow recovery of an extra expense that would not have been recoverable strictly in terms of the tariff.

[28] I now turn to the specific instances in regard to which the costs creditor seeks a review of the taxing masters ruling . Firstly it is necessary to summarise the taxing masters submissions to the specific complaints or allegations as pertains the contentious items in her *allocatur.*

Taxing Master's submissions

[29] In her pointed response, the taxing master has responded on each of the complaints or grounds for revising her ruling as follows:

RE: ITEM 69 APPLICANT'S DISBURSEMENTS FOR COUNSELS TRAVEL

[30] The taxing master in her report indicates that she took into consideration and favourably regarded the respondent's arguments at taxation that the applicants claim for recovery of the travelling expenses of counsel were unreasonable in that it was contended, cheaper means of travel could have been used.

RE: ITEM 70 – LEVIES INCURRED IN RESPECT OF SUBSCRIPTION FEES UPON AD HOC ADMISSION OF COUNSEL

[31] In response the taxing master indicates that she disallowed this item by reason of failure of the applicants to demonstrate clearly that this item was payment for counsel's admission in respect of the case in connection to which the order of punitive costs was obtained. This appears to me to be a question of cogency of proof or the evidence presented at taxation that this amount was actually incurred in the

course of the matter or litigation. In addition the taxing master appears to allude to the question of the liability for the subscription account or payment in that she states that the employed counsel personally tendered to settle the subscription levy required directly to the interested entity or party i.e., the Law Society of Swaziland.

RE: ITEM 71- TAXED OFF COUNSEL'S FEES

[32] The taxing master submits that she applied her discretion in the taxation of the counsels fees and in accordance with rule 68(2) which she contends is the applicable rule regulating the taxation of attorney and client costs including costs of counsel on exceptional basis as an exemption to section H of the tariff of attorneys and advocates fees. It is contended that in light of that discretion the taxing master may allow or disallow such sums claimed on grounds of reasonableness or otherwise of those claims.

DISPOSITION

ITEM 71- COUNSELS' FEES

[33] The starting point concerning the applicant's complaint is that it is predicated on an assertion that in terms of the punitive costs award obtaining in their favour they were entitled to recover as per the order 'certified costs of counsel' and that by reason of that order they are entitled to have the item presented as incurred total fees paid to counsel in the litigation in the composite figure of E110.332.16 without deduction or taxation. It is common cause that the taxing master in her consideration of this item and the counsels account itemising giving a break-down of his charge out rates on the specified attendances relating to the matter, was taxed off considerably to the figure of E73, 666.60.

[34] The Master indicates simply that regardless of the punitive scale award of the costs the counsel's fees as a cost item is subject to taxation in terms of Rule 68 (2) and therefore that the award of punitive fees costs only gives her latitude to apply or allow such larger sums than the scale set out in the tariff as she, in her discretion deems reasonable in the prosecution of the litigation.

[35] Likewise Mr Vilakati urged that the mere award of *'certified costs of counsel'* does not entail exemption of such fees incurred from taxation in terms of Rule 68(2) or the application of the tarriff as pertains Attorneys and Advocates fees in this jurisdiction per section H of the prescribed schedule of fees.

[36] It is important to reiterate the learned counsel's submission in this regard as set out in paragraph 23 of the respondents' heads:

> *"The import of rule 68(1) is that subject to sub-rule 2 where a court grants costs of counsel the bill of costs is payable in accordance with the tariff. In respect of counsel, the fees payable are set out in section H of the tariff. Thus generally where costs of counsel are awarded, the fees payable must be in accordance with the section H of the tariff".*

He goes on to urge further that:

> *"Rule 68(2) is an exception to the rule. Rule 68(2) gives the court a discretion to direct that a taxing master on taxation is not to be bound by section H of the tariff and where such direction is given the taxing master has a discretion to allow such larger amounts as he thinks reasonable"*

[37] In the instant case there is no doubt that in the way the order is worded and in so far as the court essentially awarded the costs based on the wording of the sought prayer without modification, the award of costs of counsel was granted as ***'certified costs of counsel'*** without any specific direction as envisaged in the sub-rule *viz* enabling the master the latitude 'not to be bound by the tariff and accordingly discretion to take a liberal approach as to the taxation of such fees and 'allow such larger sums as she thinks reasonable'. In fact the order makes no reference to the sub-rule at all. The question is whether in adverting to 'certified costs of counsel' in the context of awarding costs on a punitive scale as between attorney and client the court sought to bring the costs within the fold of the sub-rule. Mr Vilakati submits that this is precisely the import of the award of costs of counsel as expressed in the costs order.

This aspect of the matter pivots on two issues:

a) the meaning of to be assigned to the words 'certified costs of counsel'; and whether;

b) rule 68(2) has any application on the costs award.

[38] The applicants attorneys contend simply that in this jurisdiction a grant of certified costs of counsel obliges the taxing master to allow the amounts 'reflected in the counsel's invoice'. By way of illustration of the application of this proposition in practice he placed before the court a taxed bill in terms of which the taxing master in her *allocatur* allowed 'certified costs of counsel as per the advocates invoice'. I must say the latter illustration was given as evidence to buttress the argument that a practice has taken root in this jurisdiction in terms of which costs of counsel on the basis that such are certified have been allowed as a disbursement. That may well be, however it does not assist in determining the appropriate principle to apply on what constitutes 'certified costs of counsel' as a matter of the law of costs.

[39] Suffice to say that in addition the applicants further contend that the taxing master misdirected herself and thus erred in law when she proceeded to tax off the 'certified costs of counsel' . I understand this to mean according to the applicants what the taxing master should have done on the basis of their proposition, is to simply allow the counsel's costs as a disbursement as a composite fee without scrutiny. *Is this a correct statement on the law on this matter?*

[40] In rebuttal, Mr Vilakati urged strongly that the use of the phrase 'certified costs of counsel' is a recent concept that has crept insidiously into the lexicon on costs which is vague without any definite meaning in so far as is founded neither in statutory nor common law. The respondents submit it can amount no to more than that costs of counsel are subject to taxation in terms of rule 68(2). Thus far there is logic to this

argument. If one were to follow this reasoning to its ultimate implication it means an award of certified costs *sans* reference to rule 68(2) or any directives as to exemption of such fees from the rigors of taxation under the tariff of advocates fees means such are to be taxed in terms of the subrule by default. I could not find support for this proposition. Indeed there is no reason why such an award of certified costs of counsel should not be subject to the taxing master's discretion as conferred by rule 68(7) to tax such costs in terms of the tariff subject to what items or larger sums she deems equitable on grounds of extraordinary or exceptional circumstances. Nor can the respondent's attorneys position be reconcised with another possible argument that certified costs allowed without qualification simply leaves such costs to be dealt with under rule 68(1) and be subjected to taxation under the tariff.

[41] The latter position implicitly resonates with Mr Vilakati's submission that if the court intended to bring the costs within the fold of rule 68(2) then the appropriate order enabling the non-application of section H or the tariff to counsels fees on a liberal basis, would have been to follow the example taken by the Industrial Court in ***Royal Swaziland Sugar Corporation v Swaziland Agricultural and Allied Staff Association-Simunye Branch*** **[2008] SZIC 47** where the court formulated its directive as pertains counsel's costs thus:

> *'(e) The applicant is ordered to pay costs of the consolidated application including the costs of counsel, and we direct in terms of Rule 68 (2) of the High Court Rules that the taxing master shall not be bound by section H of the tariff"*

[42] The above iteration of an award of costs of counsel notwithstanding, a review of similar orders involving the award of certified costs of counsel suggests there is yet to be uniformity or clarity as to what is meant by the phrase 'certified costs of counsel' in the orders made by our courts. For this reason not much guidance can be gained from this exercise as an explanation or definition of the term is yet to be pronounced. For an example in the case of ***The Regional Administrator, Lubombo Region v Matsenjwa and Others*** **[2016] SZSC 13** that we were referred to by Mr Vilakati the court used makes reference to costs of counsel **'as certified in terms of Rule 68(2) of the Rules of the High Court"** in conjunction with an award of costs on an ordinary scale. Likewise in the TWK case (supra) involving a review of the taxing masters ruling on a costs award there the underlying costs award leading to the taxation had been framed by his Lordship Masuku J in similar terms as **' an order of costs on the scale as between party and party, including the costs of two Counsel as certified in terms of rule 68(2) of the rules of this court"[6].** In the two further examples of the costs orders made in the cases ***Reuben Miller and Others v Government of the Kingdom of Swaziland and Others [2014] SZSC 3*** and in ***Mary-Joyce Doo Aphane v Registrar of Deeds and Others*** **[2010] SZHC 29**, cited by Mr Vilakati, the costs orders are both for 'costs of this appeal ...including costs of counsel in terms of Rule 68(2...' and certified costs of counsel in terms of High Court Rule 68".

The language used and the examples provide little guidance as to any sense of consistency or certainty as to the content of what 'certification' means in relation to

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[6] Paragraph 1 of the judgment by Mamba J in the TWK case supra.

the sub-rule *aliter* when expressed without qualification as in the order from which the taxation in the instant case leads.

[43] In his written submission the learned counsel for the costs debtors contends as follows in relation to the award of counsel costs:

> ***"In the case at hand the Taxing masters taxed off items in Counsel's bill as she was legally entitled to do. In relation to an Advocate's invoice, the instructing attorney is the costs debtor and the Advocate the costs creditor. Where an attorney seeks to recover Counsel's fees, which are invariably reflected as disbursements in the attorney's bill of costs, from the opposing litigant Counsel's fees are taxed in accordance with rule 68."***

[44] I am not certain that the proposition throws any light to the conundrum presented by an award of certified costs without any reference to rule 68 at all.

On this basis, Mr Vilakati submitted that an unqualified award of 'certified costs of counsel' incorporated into an award of costs on an attorney and client scale simply amounts to no more than costs of counsel in terms of rule 68(2) despite want of an express reference or qualification to that effect. This suggests that one would have to read in the reference to rule 68(2) into the costs order. I have difficulty in understanding this submission in light of the examples above.

Certified costs of counsel

[45] The applicants initial and main position has been this - that the grant of 'certified costs of counsel in the context of a punitive costs award on a scale between attorney and client denotes that the taxing master must allow the sums claimed as a composite disbursement figure. Mr Motsa argued that as a matter of practice it is an approach that has evolved and taken root in this jurisdiction that attorneys have claimed 'certified counsels costs' by presenting such costs in this fashion since time immemorial. By way of illustration he has referred this court to an award of costs as exemplified by Annexures G and H to the founding affidavit in this review application where this court in a recent case No. 278/17 granted certified costs of counsel and the taxing master allowed the item of counsels costs to be charged and certified in the allocatur in full as a disbursement.

[46] A modified alternative stance was however adopted by Mr Motsa during the hearing of arguments in the Rule 48 review proceedings to the effect that even if one acknowledged the taxing master's discretion to consider and scrutinise the counsels costs bill or invoice on an itemised basis, this does not entitle the taxing master to act arbitrarily in an irrational and inconsistent fashion. To this end it was submitted as regards the counsel's fee taxed off items that the taxing master had dealt with the affected items in an arbitrary and irrational basis.

[47] I think judicial notice can be had to the fact that in practice certified costs of counsel are usually reflected and claimed as disbursement to many an attorneys bill of costs. That such fees or costs have also been allowed by the taxing masters in this manner

does not answer the question as to what the correct legal position in regard to orders to pay costs of counsel on the basis of attorney and client costs awards.

[48] Mr Vilakati asserts that as a matter of principle attorney and client costs are liable to be taxed. This presupposes that counsels costs must be presented on a time based charge-out basis in an itemised bill and not as a composite item of disbursement. The further question is on what basis or structure or framework are these to be taxed. In other words what forms the basis of an item by item taxation of counsel's fees?

[49] Mr Vilakati relied on the South African case of **Aircraft Completions Centre (Pty) Ltd v Rossouw and Others** ***[2003] 3 ALL SA 617 (W)*** as support for the proposition that in that jurisdiction as it should be in ours, attorney and client costs are liable to be taxed albeit on a more liberal intermediate basis than party and party costs. 'Liberal' in the sense of allowing greater latitude in scope as opposed to measure or more generous basis of taxation than party and party costs bill.

[50] The upshot of the *Aircraft Completions* case is that conceptually there should be no difference in the method and basis of taxation between attorney and client and party and party costs awards and that the taxing master is required to adhere to the tariff of attorneys and advocates fees in either case. In our jurisdiction that tariff is provided for by schedule 4 scale of fees (specifically section H in respect of counsel's fees). In that case the court held that the fact that a bill of costs is between attorney and client does not mean that the fees allowed should be more liberal or that they should be on a higher scale except where such have been exempted from the rigors of the tariff enabling the master to depart therefrom.

[51] At paragraphs 84 and 85 of the judgement the court in the *Aircraft Completions* case went on to say:

> *"[84] .....That taxation of costs as between attorney and client does not necessarily justify any departure from the tariff was recognised long before Rule 70(5)(a) was promulgated. In* ***Gross v Svirsky [1923] TPD 422,*** *Curlewis J said (of a bill taxed for payment by a client to his own attorney), at 425:*
>
> > *"The Court has held that the scale of fees laid down as between party and party in the tariff of attorneys fees applies mainly as between party and party and it does not necessarily apply as between attorney and client. I cannot agree with counsel's contention that because a bill of costs is one between attorney and client, the fees allowed should be more liberal; that they should be on a higher scale, merely because it happens to be a bill between attorney and client and not between party and party"*
>
> *[85] The logic of this proposition is unassailable. It applies with equal force to taxation of a bill payable by one party to another that is to be taxed as between attorney and client. On a taxation as between attorney and client, irrespective of whether it is an attorney's own client, or the opposing party, who may be obliged to pay the amount taxed, more is required than the mere fact that it is a taxation as between attorney and client before a departure from the tariff is justified. Rule 70(5) (a) determines what more is required. The taxing master is*

bount to apply the tariff in any taxation between attorney and client unless, in the exercise of his discretion in terms of Rule 70(5)(a), he comes to the conclusion that the case is 'extraordinary or exceptional" within the meaning of that sub-rule, and that it would be inequitable to adhere strictly to the tariff"

(It is to be noted that the rule 70(5)(a) under reference in the above case is equivalent and worded similarly to our rule 68(7))

[52] It is clear that Rule 68(5) confers a discretion on the taxing master to award such costs as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party and rule 68(7) confers on him a discretion to depart from the tariff in extraordinary or exceptional instances where costs awarded in terms of the tariff would constitute fair and reasonable remuneration to the party claiming the fee.

In ***Loots v Loots* [1974] (1) SA 431 (E) at 434 C-D** it was held that 'this discretion relates perhaps in particular to attorney and client bills of costs, and is confined to extraordinary and exceptional cases'. On this reasoning it follows that these parameters should apply equally to counsels costs awarded by the court in terms of rule 68(2) where the court in exercising its discretion on the same conceptual basis concludes that on account of the peculiar or extraordinary circumstances of the case counsels fees be allowed and exempted from the application of the tariff.

Principle of Indemnity /Recompense

[53] In the case ***Ben McDonald Inc v Rudolph***[7] the court as per van Dijkhorst stated that:

> ***'1 Where the losing party in litigation is to pay attorney and client costs to the successful party, this means all reasonable costs incurred on behalf of the client although not strictly necessary or 'proper'.***
>
> ***2 Attorney and client costs, where they are to be paid by the losing party to the successful party means all costs incurred except where unreasonable. Agreed items or amounts are presumed to reasonable'***

An award of attorney and client costs it has been held, 'is meant to ensure that a successful party will recoup expenses

[54] Although decrying the use of the term, the learned counsel for the respondents was prepared to concede so much – that implicit in an order allowing 'certified costs of counsel' is a directive that the costs be brought within the fold of rule 68(2) and be taxed accordingly. But I must disagree as I am not persuaded as to the correctness of this statement on this aspect on the law of legal costs. There is simply no authority for this proposition. Suffice to say the use of the phrase 'certified' in ordering counsel costs is neither defined nor is it uniformly formulated in practice. As shown above it

[7] 1997 (4) SA 252 (T) AT 255 D.

has been used in so many variants of costs awards in both costs on an ordinary scale or to be taxed under rule 68(2). It has led to vagueness and uncertainty unless used with specific directives as to the intended taxation regime under the rules confounds the matter.

[55] To be precise and factual, in the circumstances at hand, the learned judge in awarding the costs of counsel did not give a directive in terms of rule 68(2) permitting the taxing master to depart from the tariff. Thus it is in contrast to the awards and directives indicated in the examples of the orders referred to by Mr Vilakati as the correct expression or form of such special orders e.g., as formulated in the *Royal Swazi Sugar Corporation* case. I do not think the judge intended an order as pertains to the costs of counsel as envisaged in the Royal Swazi case in that in the latter the court did not make the special order in conjunction with an attorney and client costs award. Clearly in directing his mind to the prayer for the costs, he considered it sufficient to award the costs in the precise terms set out in the prayer. Had the court had the intention of subjecting the costs to the rule 68(2) regime the it would have set out its directive in unequivocal terms to that effect. We are left with the following situation.

1. The award of costs of counsel has been granted in conjunction with or as an adjunct to a punitive costs award i.e., the court sought to recognise those special and extraordinary circumstances to exist meriting censure of the costs debtor and enabling their adversary to recoup their out of pocket expenses;

2. The taxing master asserts that she applied rule 68 (2) but it is evident that she came short of awarding the costs of counsel in terms of the rule. Her self-avowed position is that she had a discretion to allow on taxation what larger sums as she deems reasonable. As that rule was not specified she was not empowered to tax the bill on that basis but retained a discretion in terms of rule 68(7) and to take into account the peculiar circumstances of the case and the punitive nature of the award to consider with greater latitude the costs sought to be recovered as expended counsels fees with a view to indemnifying the costs creditor on a more generous or intermediate basis than the tariff permits.

3. Regarding the items on the bill she was obliged to scrutinise the bill and where appropriate allow a more generous level or framework of fees than she would on a party and party basis – in other words take a more permissive approach to such extra costs items on the bill or the rate of charges claimed unless these are egregious or would amount to an injustice to the costs debtor.

4. The bill was drawn and presented on a time based charge-out basis. There is nothing to suggest the bill as drawn was either embellished or bore excessive rates as not to be seen commensurate with the level of standing, expertise and experience of the Advocate retained by the costs creditor.

[56] Coming to the approach adopted by the taxing master on the facts of the matter the taxing master does not say that she disallowed the items taxed off on the basis that these were not recoverable in terms of section H of the tariff. If she was minded that there were such extra costs items or attendances stated in the bill that she deemed not permissible or should be disallowed then she would have said so in her report. Equally if she determined that the rates charged in the counsel's bill were too excessive or too generous, likewise she would have to say so and indicate the extent of the overcharge as against the measure or rate she deemed fair or reasonable. Put another way it would be reasonable for the costs creditor to proceed on the expectation is that if the taxing master is disinclined to disallow or tax down any sums claimed as an incurred expense in respect of the counsel's bill, she would have to indicate that she taxed down or disallowed the items either of these basis; that:

a) the time spent or claimed to have been spent on the relative items was overstated and thus impermissible regard being had to the complexity or otherwise of the matter; and or;

b) the item charged is an extra or additional item that was unnecessary for the litigation or that it constitutes an extraneous or unjustified activity; and or

c) the rate charged is so excessive regard being had to the skill, standing and level of experience of the Counsel.

[57] In these proceedings the taxing master had the opportunity to explain and rebut the challenge to her ruling on the counsel's bill by explaining its basis with reference to each of the items and to take this court into her confidence as to the method she followed in the exercise of her discretion and persuade the court that she applied her mind in the course of taxing down each and every item she declined. In a word, to show that her taxation can bear robust examination and scrutiny in the cold light of day.

[58] Having ruled against the preliminary (procedural) point of law of non-compliance with rule 48, I am of the settled opinion that in this review the taxing master has been afforded an opportunity and indeed has attempted to explain her ruling as set out in her report regarding the contentious items in the bill of costs for counsel's fees. However it is clear that she has eschewed to address the specificity of the taxation on an item by item basis.

[59] I am impelled to turn to and consider in more detail the items she disallowed of taxed off (ostensibly) on the basis that according to her judgment these were not reasonable. In this regard I focus the enquiry squarely on three larger items that she taxed off considerably. In these items the recurring mode is that the advocate raised a fee on a time-based charge-out basis on the itemised attendances specified. The common theme underpinning all three is that incidentally in each of the instances listed below the advocate indicates a full day dedicated to his attendance on the

matter with a narration setting out the attendance as an aggregated daily rate of R26, 000.00[8] (which is indicative of a uniform hourly or daily rate that is not specified). I have identified and set out these items in the table below. They are as follows.

DATE	NARRATION	TIME SPENT	FEE
17/11/18	Attending on perusal of papers and preparation of contempt of court application	1 day	R26,000.00
09/12/18	Attending on Research and Preparing Heads of Argument	1 day	R26,000.00
11/12/18	Attending on appearance before High Court	1 day	R26,000.00

[60] I must say I have abstracted these items for present purposes. In the actual bill they do not appear in the order or sequence in which I have presented them. Notably in the taxed bill the taxing master's annotations reveal that the first item was initially taxed down from the sum of R26,000 to R10,000 but the latter figure was deleted and altered to R4000. She then taxed the second item shown in the table above to R10,000 and the last one to R8,000.

[61] In is quite clear that the approach the master appears to have adopted was not uniform. In the absence of the basis or criteria applied in the taxation of the figures one is left with but room to reason by some inference as to her method. One would reasonably expect in applying herself judiciously she would have indicated against the item objected to or given an explanation separately indicating either a lesser time or duration on a specific time on a particular attendance that she was prepared to allow on a particular item. If she objected to the rate claimed it follows that even then she would indicate the rate she was prepared to allow. Needless to say, apart from the deleted or marked down figures and the figures she inserted in her annotations, the bill is bereft of any explanatory note. In any event as mentioned earlier even in her submissions she fails to indicate the basis for taxing down these items.

[62] In my view, the only reasonable inference to be drawn from her taxation and the report is that she made the adjustments or rulings arbitrarily without reference to any specific criteria or standard. This is best illustrated by the item that she taxed down from R26,000 to R10,000 but subsequently to R4,000. Clearly it appears somewhere along the process she changed her mind but without any explanation or reason for that change one is left to speculate. I am thus inclined to agree with Mr Motsa's submission that her taxation of the bill was riven with inconsistencies and imponderables that it leads to the inference that she undertook the exercise on an arbitrary basis.

[63] Based on the principles and case law comprehensively examined and reviewed in considerable detail by Stegmann J in the Aircraft case the abiding principle on the taxation of attorney and client costs is that the costs creditor is entitled to full indemnity of reasonable costs and out of pocket expenses incurred in respect his or her attorneys or advocates fees unless these are demonstrably extraneous or

[8] Although the sums are expressed in the South African Rands (ZAR) currency, due notice can be assumed of the parity of that currency with the eSwatini Lilangeni (SZL) as I have done for present purposes.

unnecessary as in instances where they are not sufficintly associated with the litigation as to constitute costs in pursuit thereof. Significantly as per Stegmann J the exercise of taxation of costs and more particularly attorney and client costs accords with the indemnity principle in view of the object that:

> ***"It allows the costs creditor who has an order for payment by his opponent of costs taxed as between attorney and client, to recover from the costs debtor what may, depending upon the circumstances of the particular case, amount to a substantially fuller indemnity than he could recover on a party and party taxation. Within the bounds of reasonableness in the circumstances of the case, the Taxing Master is expected to tax such a bill generously. He should allow rates that may reasonably exceed the tariff if the work was of some complexity and was made unduly burdensome by whatever conduct on the part of the costs debtor caused the Court to make an order for attorney and client costs. On the same basis, the Taxing Master should allow periods of time for consultations, and for other work ordinarily charged on a time basis, that may reasonably exceed the time that he would allow if taxing strictly as between party and party. Indeed, the Taxing Master should remain aware that it is the intention of the Court that has ordered a taxation as between attorney and client that the costs creditor should have a full indemnity for the costs to which the litigation has put him, except for luxurious, extravagant, unnecessary and other types of unreasonable expense that it would be an injustice to impose upon the costs debtor."***[9]

[64] In the circumstances of this matter I am inclined to conclude, as I hereby do, that in disallowing the above items the taxing master at best did not direct or apply her mind keenly on a matter of principle to bring to bear the relevant considerations and criteria. I am however prepared to recognise her discretion as regards the other items such as the time spent travelling and refresher on the papers as appear on the advocates account, as falling within her remit. In so far as the costs of counsel I find that the taxing master's ruling on the identified items is liable to be set aside as irregular and her allocation in that regard should be substituted with an order allowing the full sums as stated and as claimed. In effect the allocatur on costs of counsel is to be allowed at the sum of E92, 665.60.

DISBURSED TRAVELLING COSTS

[65] The applicants contend that on the basis of having been awarded costs on an attorney and client scale they are entitled to recoup the incurred travelling costs on the basis that such costs reasonable.

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[9] Para 5 in the text of the *Aircrafts Completions* judgment at p18 of 54.

[66] It is common cause that securing the attendance of the retained counsel, on account of the season, necessitated travel from Cape Town as opposed to Johannesburg where counsel maintains his chambers to the Kingdom and in the process entailed travelling costs in the figure of E14,080.00 in airfare ticket costs which the applicants' had to bear. Of this figure the taxing master only allowed a sum of E1,200.00.

[67] The taxing master's objection to this item as expressed in her report is curiously stated thus:

> "Item 69-The respondents argued that the applicant should have used other cheaper means of travelling and that argument was found to be a reasonable one by the taxing master"

[68] It is remarkable that the taxing master merely adopted the ipse dixit of the respondent's objection without applying the test or reasonableness or otherwise of the expense. It is not clear what would constitute 'cheaper means of transport' in the context of the facts of the matter given the time and distance and suitability of the mode of travel for counsel into the country for the matter. No indication as to the alternative means of transport would be. Applying the test in the *Ben McDonald Inc* case above even if it may be that the cost of travel from the Cape as opposed to Johannesburg could be perceived as not proper or necessary, and I do not agree that it is, that is not the decisive basis for taxing the costs off unless it could be shown to be unreasonable. This is not the articulate premise the taxing master has taken to tax off this claim.

[69] In my view the taxing master erred in disallowing a substantial sum of this claim and acted for an improper purpose or on an improper consideration. I determine that this sum be allowed and set aside the taxing master's ruling in this regard.

DISALLOWED LAW SOCIETY LEVY OR ADMISSION FEE

[70] It is trite that the exercise of taxing and recovering a costs award relates to reasonable costs incurred in connection with the litigation. In *The Society of Advocates of Kwazulu-Natal case*[10] Moodley J states this position crisply as follows:

> *"[8] An award of 'attorney and client costs' is meant to ensure that a successful party will recoup expenses he/she incurred as a result of the litigation. However this does not mean that all costs which the attorney is entitled to recover from his/her client or the disbursements made by the attorney on behalf of his her client and for the professional services rendered by him or her, may be recovered by the successful party from losing party in an attorney and client bill"*

[71] It is common cause that the item raised in regard to item 70 pertaining 'Disbursements paid to the law society for advocate's petition' was necessitated by

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[10] [2015] 4 All SA 213 (KZP) (6 July 2015)

the need to petition the court for the counsels ad hoc admission for a right of audience before the High Court having regard to the fact that Council is not an admitted practitioner at the local bar in the jurisdiction. I am alive also of the background as outlined by Mr Motsa that the said counsel had previously been similarly granted such admission for purposes of a related or similar proceedings involving a similar cause albeit under a different case number. Be that as it may it appears to me that in light of the objection by the respondents the applicant's attorneys conceded and deemed it expedient to bring the petition for counsel's admission thus incurring the cost of paying the requisite levies prescribed by the local Bar.

[72] Mr Vilakati in objecting to this claim maintains that this sum was contested at the taxation on the basis that it is not only remote and not arising in the litigation but also that it relates to a matter or expense that the applicants were not liable in law- such liability or obligation to pay the levies falling strictly on the practitioner or counsel as a practitioner on a matter for professional reasons. I am inclined to agree. In principle it would not be reasonable to mulch the respondents with the sum paid or disburse on a matter not directly connected with the litigation in question. In this regard it is my considered view that the taxing master correctly exercised her discretion in refusing this item although her reasons are not precisely expressed in these terms.

[73] In the result I order as follows in this review:

1. The application to set aside the Taxing Masters ruling declining the travelling costs of counsel succeeds and accordingly the taxing master's ruling is hereby set aside and substituted with an order that the item claimed as travelling costs be and is hereby allowed;

2. That the prayer for the setting aside of the taxing masters ruling on the Law Society subscription is dismissed; and

3. The taxing masters *allocatur* of costs of counsel is hereby set aside in respect of the items identified in paragraph 59 and substituted with an order that the so identified items are hereby allowed as disbursed and accordingly the claim for recovery of counsel's fee is determined in the sum of E92, 665.50.

MAPHANGA J
JUDGE OF THE HIGH COURT.

Appearances:

For the Costs Creditors:	**Mr K Motsa** **Robinson Bertram Attorneys**
For the Costs Debtors:	**Mr M Vilakazi**