

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

In the matter between:

**SELECT MANAGEMENT SERVICES**

**APPLICANT**

**and**

**MATLOHANG MERIAM MOSHEBI & 1381 OTHERS**

**1<sup>ST</sup> RESPONDENT**

**T.M. MAIEANE & CO**

**2<sup>ND</sup> RESPONDENT**

**KEM CHAMBERS**

**3<sup>RD</sup> RESPONDENT**

**DEPUTY SHERIFF OF THE HIGH COURT (R. MUSI)**

**4<sup>TH</sup> RESPONDENT**

**DEPUTY SHERIFF OF THE HIGH COURT (L. MIKA)**

**5<sup>TH</sup> RESPONDENT**

**DEPUTY SHERIFF OF THE HIGH COURT**

**(T. MONYAKO)**

**6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Coram : Hon. Molete J**  
**Date of hearing : 1<sup>st</sup> March 2013**  
**Date of judgment : 5<sup>th</sup> March 2013**

**SUMMARY**

*Review of Taxation – Fee for taking instructions – Principles to be applied - The inquiry is whether one service or more was performed– Court may interfere with discretion of the taxing master in appropriate circumstances – Allocation considered excessive – Court Substitutes its discretion for that of taxing Master.*

## ANNOTATIONS

### CITED CASES

**In Re Lubbe 1864(1) S.A 855 at 856 C-D**

**Hastings v The Taxing Master 1962(3) S.A 789**

**Legal and General Insurance Society Ltd v Liebrum Another (1968 (1) SA 473 (AD)**

**Minister of Labour v Port Elizabeth Municipality 1982 (2) SA 522**

### STATUTES

**High Court Rules 49(1)**

### BOOKS

**James Flynn Taxation of Costs – The Role of the Taxing Master of the Supreme and High Courts (Dublin, June 2006)**

[1] This matter has come before court on a dispute relating to taxation of the costs by the taxing master. The relevant section being **Rule 49(1)**<sup>1</sup> provides that any party who is dissatisfied with the ruling of the taxing master may within 14 days of the allocator require a taxing master to state a case for the decision of a Judge.

[2] The stated case before the Judge was as follows;

“Whether it was justifiable in law, for the taxing master to allow only the sum of M241,850-00 for taking instructions from 1383 respondents on the basis that, the instructions given were similar in respect of each respondent, as opposed to the full sum of

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<sup>1</sup> High Court Rules 1980

M414,600-00, which was based on the ground that, this was the fee actually incurred as an expense in relation to each of the respondents”.

- [3] That was the only question for determination. The Applicants however argued that it was not really a correct statement of the case. It was the contention of the Applicants that the amount was shockingly excessive; regard being had to the fact that the main application had been disposed of; and the instruction fee claimed was only in respect of the application for stay of execution.
- [4] The logical extension of this argument was that even if it is to be argued that the taxing master was correct in allocating half of the amount claimed in the main application, the application for stay would involve a substantially lesser amount. The amount allowed therefore, it was argued; was not fair and justifiable in the circumstances.
- [5] In the opinion of this Court the guiding principle in the so called class actions is the one put by **De Wet JP in Re Lubbe**<sup>2</sup> ; He stated that;
- “Where an attorney does work in connection with litigation for more than one client, the question to be determined is whether one service is performed or more than one service. If separate services are performed for different clients separate fees can be charged, but if one service is performed for more than one client only one fee can be

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<sup>2</sup> 1864(1) S.A. 855 at 856 C-D

charged. In the case of one service, each client is liable for an aliquot share of the attorney's fees....”

[6] Though not relevant to this matter, it has now been held in **Minister of Labour v Port Elizabeth Municipality**<sup>3</sup> that the costs are payable by the losing parties jointly and severally, the one paying others to be absolved. This however has not changed the basic principle regarding the service performed. We are here concerned with how the attorney should charge on a party and party scale for taking instructions.

[7] This Court is in agreement with the conclusion of De Wet JP in Re Lubbe. In other words, the Respondents had to show in order to be successful, that more than one service was performed for the many clients. The inquiry is therefore a fairly simple one, i.e. whether one service or more was performed.

[8] I am persuaded and convinced that only one service was performed. It was the service of taking of instructions to defend the Application for stay of execution. There was a single application lodged against the many clients and therefore a single service of taking instructions thereon. It may be that more work was involved; but that does not increase the number of services performed. I also agree with the contention by Applicants Counsel that because it was only an application to oppose the stay; a lot less would have been involved.

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<sup>3</sup> 1952 (2) SA 522

[9] Indeed the taxing Master recognised this. The reluctance to allow the total amount claimed and granting only half of it was on recognition that the claim was excessive. It would not even make sense for an attorney with over a thousand clients to consult each client individually for the purpose of taking instructions. The taxing master decided to therefore allocate half of the sum of M414,600-00 on this item.

[10] The leading case on when a Court can interfere with the discretion exercised by the taxing master is **Hastings v The Taxing Master**<sup>4</sup>. Milne JP in that case at 793 stated the following;

“1.....

2. that costs may be reasonably and properly incurred within the meaning of the rule, even though they may not have been strictly necessary at the time they were incurred, or at all;
3. that costs may be reasonably and properly incurred before the institution of the relative legal proceedings depending entirely on the circumstances;
4. that whilst the court will not, in general, substitute its discretion for that conferred upon the taxing master, it will interfere with the taxation if it appears that the taxing master has not exercised his discretion in the manner contemplated by the Rule.”

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<sup>4</sup> 1962(3) S.A. 798

See also **Legal and General Insurance Society Ltd v Liebrum and Another**<sup>5</sup>.

- [11] In allowing the sum equal to half of the instruction fee, the taxing master probably had the intention of awarding a figure representative of the many clients of the attorney; but was at the same time not equally mindful of the fact that one service was provided. This Court is therefore obliged to interfere.
- [12] In accordance with the authority of *Hasting v Taxing Master*, the taxing master has to consider the submissions made at the taxation and should have regard to any supporting documentation furnished in respect of the taxation. He should assess the fees having regard to the nature of the case and extent of the work as well as factors such as complexity, magnitude; and the time expected to be reasonably spent on the matter<sup>6</sup>.
- [13] The court has considered that substantially more work is involved in a case involving many clients. It may involve more consultations, primarily to confirm and verify the instructions. A cross-section or random selection of the clients may be needed for this. The attorney; may seek to at this initial stage to even meet groups or representatives of the whole body to ensure that himself and the client understand both the

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<sup>5</sup> 1968(1) SA 473 (AD)

<sup>6</sup> James Flynn Taxation of costs – The role of the taxing masters of the Supreme and High Courts (Dublin 2006)

instructions given and the nature and extent of the mandate, and failure to do this may constitute negligence on the part of the attorney.

[14] It is therefore important to take these matters into consideration, and give them their rightful place in the discretion be exercised. However the amount of M241,850-00 that was allowed is still excessive for the service.

[15] The court therefore having considered all the relevant circumstances and the principles to be applied came to the conclusion that an amount not exceeding M30,000-00 (Thirty Thousand Maloti) should have been allowed on this item. The amount allocated is therefore set aside and M30,000-00 as substituted therefor.

**L.A. MOLETE**  
**JUDGE**

**For Applicant : Mr Fraser**  
**For 1& 3<sup>rd</sup> Respondents : Mr Mosito K.C**  
**For 2<sup>nd</sup> Respondent : Mr Rafoneke**