69 Tariff of fees for legal practitioners who appear in the Superior Courts

(1) Save where the court authorizes fees consequent upon the employment of more than one advocate or attorney having right of appearance in the Superior Courts and who appears [*sic*], to be included in a party and party bill of costs, only such fees as are consequent upon the employment of one advocate or attorney having right of appearance in the Superior Courts and who appears, shall be allowed as between party and party.

(2) Where fees in respect of more than one advocate or attorney having right of appearance in tho Superior Courts and who appears [*sic*] are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate or attorney having right of appearance in the Superior Courts and who appears, shall be on a scale in terms of subrule (7), as directed by the court.

(3) . . .

[Subrule (3) substituted by GN R185 of 2 February 1990 and deleted by GN R4477 of 8 March 2024.]

(4) . . .

[Subrule (4) deleted by GN R185 of 2 February 1990.]

(5) . . .

[Subrule (5) substituted by GN R3397 of 12 May 2023 and deleted by GN R4477 of 8 March 2024.]

(6) . . .

[Subrule (6) inserted by GN R1157 of 30 October 2020 and deleted by GN R4477 of 8 March 2024.]

(7) The scales of fees contemplated by subrule (3) of rule 67A shall be:

SCALE A	SCALE B	SCALE C
R375,00 per quarter of an hour or part thereof (maximum allowed)	R750,00 per quarter of an hour or part thereof (maximum allowed)	R1125,00 per quarter of an hour or part thereof (maximum allowed)

(8) The tariff of fees to be allowed for work performed by legal practitioners in terms of this rule shall be:

TARIFF OF FEES

1.*(a)* Appearances in court for trial: a day fee inclusive of preparation, consultation and appearance on the same day.

(b) Appearances in court for opposed applications:

(i) for the first day, a day fee inclusive of preparation, consultation and appearance on the same day; and

(ii) for subsequent days, per quarter of an hour or part thereof.

2. Appearances in court: unopposed applications, per quarter of an hour or part thereof subject to a minimum fee of one hour being allowed.

3. A per quarter of an hour or part thereof for —

(a) Preparation prior to the day of hearing;

(b) Conferences: pre-trial and case-management;

(c) Drafting or settling affidavits, pleadings, heads of argument and other necessary documents;

(d) Necessary consultations;

(e) Necessary perusal; and

(f) Any inspection *in Ioco*, *in situ* or otherwise.

4. In the event that a trial or opposed application is postponed, settled or withdrawn at the instance of any party on the day of hearing or before the first day's hearing and a charge for the cancellation of the reservation of any day is levied, a reservation fee may be allowed as follows:

(a) If settled, withdrawn or postponed on the day of set down or two days before that, a full first day fee; or

(b) If settled, withdrawn or postponed three to seven days before the day of set down, two thirds of a day fee:

Provided that no reservation fee shall be allowed if a trial or opposed application is settled, postponed or withdrawn more than seven days before the day of set down.

[Rule 69 substituted by GN R4477 of 8 March 2024.]

Commentary

General. Rule 67A (dealing with costs) was inserted, and rule 69 substituted, with effect from 12 April 2024. [1] Rule 69 provides for the fees on a party and party basis of advocates and attorneys having the right of appearance in the superior courts, and should be read together with the provisions of rule 67A. The latter rule also applies to advocates referred to in s 34(2)*(a)*(ii) of the Legal Practice Act 28 of 2014, and should as far as those advocates are concerned, be read together with the relevant provisions of rule 70. In other words, rule 69 does not apply to those advocates.

Rule 67A(5) provides that taxation of fees as between party and party shall be effected by the taxing master in accordance with rules 69 and 70 and the applicable tariffs therein. Rule 67A(6) provides that where an item in the tariffs set out in rules 69 or 70 requires the taxing master to exercise a discretion in determining the amount of a fee or disbursement to be allowed for such item, the taxing master may have regard to any guidelines recommended by the Legal Practice Council.

Rule 69, read with rule 67A, is not a model of clarity as will be demonstrated in the notes below. It will probably increase the workload of judges as well as the costs for parties. This is unsatisfactory. See also the notes to rule 67A s v 'General' above.

In the notes that follow reference is made to advocates/counsel only. Pursuant to the substitution of rule 69 referred to above these notes also apply to attorneys having the right to appear in the superior courts as contemplated in the rule, and the notes should therefore be read and applied accordingly.

Subrule (1): 'Save where the court authorises.' The taxing master has no discretion to allow the fees of more than one counsel contrary to the provisions of this subrule where the case has not been heard in court and there is in consequence no order of court authorizing the fees of more than one counsel. [2] Such an order can be applied for under rule 67A(4)*(b)*.

'Consequent upon the employment of more than one advocate.' The court has a discretion whether to allow the fees of more than one counsel. [3] In deciding whether or not the fees of an additional advocate should be allowed, the court has regard to whether it was a 'wise and reasonable precaution' to employ such advocate, [4] but this is not the only test: the

court will also have regard to the amount involved in the action and to the nature of the issues in dispute between the parties; [5] the length of the hearing or argument; the importance of questions of principle or of law involved; and the number of legal authorities quoted. [6] The exercise of the court's discretion turns on the circumstances of each individual case. [7] There is some authority for the proposition that the fees of two counsel may be allowed where the case 'has as its consequences an importance which transcends the narrow issues involved in the application itself.' [8] To justify the fees of a third counsel, the case must be one in which, by reason of exceptional or extraordinary difficulty, complexity, heavy documentation or multiplicity of issues, it would be reasonable to employ a third counsel, and it would be fair for the purpose of doing justice between the parties to allow a third counsel. [9]

There is no distinct scale for senior counsel. If senior counsel appears without junior counsel, no special order mentioning senior counsel is required; it is the taxing master who must decide what is a fair and reasonable fee to be allowed on taxation. [10] The scales of fees contemplated by rule 67A(3), and provided for in rule 69(7), apply to all counsel, irrespective of seniority. They also do not make a distinction between the fees of the first advocate and any additional advocate. It is left to the discretion of the court to determine an appropriate scale of fees in respect of each advocate. The tariff provided for in rule 69(8) also applies to all counsel,

irrespective of seniority. The taxing master must apply the tariff, having regard to the well-established principles of taxation, and taking into account the fact that the court allowed fees consequent upon the employment of more than one advocate, the seniority of counsel, the hours worked and the nature of the work performed, the scale of fees on which the court granted fees in terms of rule 67A(3), read with rule 69(7), the appearances in court, etc.

'Who appears.' This is a new requirement. It applies to the first (or only) advocate as well as to any additional advocate. The requirement is not a model of clarity. At first blush its effect seems to be that in the absence of an appearance, the fees for *all* work performed by an advocate in the case are not allowed as between party and party. Subrule (8), however, provides that the tariff of fees allowed for work performed by an advocate in terms of rule 69 shall be in accordance with the Tariff of Fees provided for in that subrule. The tariff clearly distinguishes between appearances in court, inclusive, in the case of trials and opposed motions, preparation and consultation on the day of the appearance (paragraphs 1 and 2), on the one hand, and non-appearances involving preparation, conferences, drafting, etc (paragraph 3), on the other hand. However, on a proper analysis of rule 69 only the fees for appearances, inclusive, in the case of trials and opposed motions, preparation and consultation on the day of the appearance, of any advocate who does not appear as contemplated in paragraphs 1 and 2 of the tariff, are not allowed. The fees in respect of work performed by an advocate as provided for in paragraph 3 of the tariff are allowed despite the non-appearance in court of that advocate.

Subrule (2): 'The fees to be permitted in respect of any additional advocate.' Prior to the substitution of rule 69 with effect from 12 April 2024, rule 69(2) provided that the fees to be permitted by the court in respect of any additional advocate 'shall not exceed one half of those allowed in respect of the first advocate'. That was in accordance with the practice approved in *SAR & H v Illovo Sugar Estates Ltd* [11] that third counsel's fees should be taxed on the same basis as those of second counsel. The provisions of the former subrule were peremptory and a taxing master was not entitled to allow junior counsel's fees at two-thirds of those allowed to senior counsel. [12] A court did not have the power to direct the taxing master to allow an additional advocate two-thirds of the fees of the first advocate, in other words, to authorize a departure from the provisions of the subrule. [13] It was held that the subrule inhibits the recovery by the successful party of his reasonable expenditure and should be reconsidered by the Rules Board for Courts of Law. [14] The subrule as currently framed by the Rules Board for Courts of Law provides that the fees permitted by the court in respect of any additional advocate 'shall be on a scale in terms of subrule (7), as directed by the court'. The provisions of the subrule are peremptory and a court does not have the power to direct the taxing master to allow an additional advocate more than the maximum scale of fees (i e more than Scale C). It is submitted that the subrule as currently framed still inhibits the recovery by the successful party of his reasonable expenditure. Why could it not simply have been left in the discretion of the taxing master, once the court has decided to authorize fees of more than one advocate, to determine the reasonable fees of any additional advocate, taking into account all relevant circumstances, as the taxing master would normally do in respect of the fees of the first advocate? Why does the court have to take over the functions of the taxing master and why, in any event, has the court's discretion to be inhibited by scales of fees determined by the Rules Board for Courts of Law? Why has there to be a deviation from the

common-law rule that the fee to be allowed to counsel on a party and party taxation is a matter within the discretion of the taxing master? [15] There accordingly seems to be no rational basis upon which the taxing master should not have jurisdiction to determine the *quantum* of the fees of any additional counsel once a court has authorized such fees as between party and party.

'Who appears.' This is a new requirement. See further the notes to subrule (1) under the same heading above.

'Only such fees as are consequent upon the employment of one advocate . . . and who appears, shall be allowed.' Having regard to the provisions of rules 67(3)*(a)* and 69(7), the scales of fees apply to all advocates who appear, irrespective of whether such appearance is alone or together with one or more additional advocates. The scales of fees do not make any distinction in this regard. The court must, accordingly, in respect of each advocate who appears, direct which scale of fees is applicable. If the scale is not indicated, then, in terms of rule 67A(3)*(c)*, scale A of rule 69(7) shall apply to the costs that the court has awarded. See further the notes to subrule (2) s v 'The fees to be permitted in respect of any additional advocate' which apply *mutatis mutandis* to the fees of the first, or only, advocate.

As to the phrase 'who appears', see the notes to subrule (1) under the same heading above.

'Shall be on a scale in terms of subrule (7), as directed by the court.' Rule 67A(3)*(a)* provides that a costs order between party and party 'shall indicate the scale in terms of rule 69, under which costs has been granted'. In terms of rule 67A(3)*(b)* the court, in considering the factors to award an appropriate scale of costs, may have regard to:

(i) the complexity of the matter; and

(ii) the value of the claim or importance of the relief sought. [16]

This subrule, read with rule 67A(3)*(b)*, therefore makes it imperative for the court to direct on which scale under rule 69(7) fees in respect of more than one advocate that the court allows, should be taxed. It is accordingly difficult to understand the rationale behind rule 67A(3)*(c),* which provides that if the scale in terms of rule 67A(3) *(a)* is not indicated in the order, scale A of rule 69(7) shall apply to the costs that the court has awarded. This difficulty is further borne out by the fact that under rule 67(4)*(b)* an application is necessary for an order indicating 'whether the fees consequent upon the employment of more than one advocate or attorney having right of appearance in the Superior Courts and who appears, are allowed and the scale in terms of rule 69, under which such fees are allowed'. Having regard to that provision, read with this subrule, it is

inconceivable that a situation could arise where the scale of fees is not indicated in the costs order. Lastly, in the unlikely event of the costs order erroneously not stipulating the required scale of fees, a variation of the order could possibly be made in terms of rule 42. If the facts do not support an application under rule 42, the only other remedy would appear to be an application for leave to appeal against the costs order. See further the notes to rule 67A s v 'General' above.

As regards the factors to be considered by the court in awarding an appropriate scale of fees, see further the notes to rule 67A(3)*(b)* above.

For criticism of this subrule in general, see the notes s v 'The fees to be permitted in respect of any additional advocate' above.

Subrule (3). Subrule (3) was deleted by GN R4477 of 8 March 2024.

Subrule (4). Subrule (4) was deleted by GN R185 of 2 February 1990.

Subrule (5). Subrule (5) was deleted by GN R4477 of 8 March 2024.

Subrule (6). Subrule (6) was deleted by GN R4477 of 8 March 2024.

Subrule (7): 'The scale of fees contemplated by subrule (3) of rule 67A.' Having regard to the scales of fees in rule 69(7), each of the scales provides for a 'maximum allowed'. The question arises whether it is for the court or the taxing master to decide whether the maximum amount, or a lower amount than the maximum amount, is allowed. The wording of rule 67A(3)*(a)* seems to provide the answer: the costs order made by the court must only indicate the 'scale in terms of rule 69, under which costs have been granted'. It does not require of the court also to indicate in its order whether the maximum amount or a lower amount than the maximum one in the scale is allowed. See further the notes to rule 67A s v 'General' and the notes to rule 67A(3)*(b)* s v 'The court may have regard to . . . the complexity of the matter . . . and . . . the value of the claim or importance of the relief sought' above. See also the notes to rule 69(2) s v 'The fees to be permitted in respect of any additional advocate' and 'Only such fees as are consequent upon the employment of one advocate . . . and who appears, shall be allowed' above.

Unlike rule 70(3A), which provides that value-added tax may be added to all costs, fees, disbursements and tariffs in respect of which value-added tax is chargeable, neither rule 69, nor rule 67A, makes provision for value-added tax. This *lacuna* should be addressed by the Rules Board for Courts of Law.

Subrule (8): 'The tariff of fees to be allowed.' The tariff generally makes provision for fees to be allowed to counsel:

(i) for appearances in court (items 1 and 2);

(ii) for work done prior to the date of appearances in court (item 3); [17]

(iii) for reservation if a trial or opposed application is settled or withdrawn on the day of the hearing or before that day (item 4).

Unlike rule 70(3A), which provides that value-added tax may be added to all costs, fees, disbursements and tariffs in respect of which value-added tax is chargeable, neither rule 69, nor rule 67A, makes provision for value-added tax. This *lacuna* should be addressed by the Rules Board for Courts of Law.

In practice taxing masters apply the common-law rule that the fee to be allowed to counsel on a party and party taxation is a matter within the discretion of the taxing master. The factors to be taken into consideration in determining the *quantum* of counsel's fees can be summarized as follows: [18] the complexity of the matter, both as regards the facts and the

law; [19] the category to which counsel belongs (senior or junior); [20] the prevailing level of fees; [21] the actual time spent by counsel; [22] the reduced value of money, keeping in mind that for reasons of social policy a progressive increase in real earnings, while the rest of the community stays behind, cannot be tolerated. [23] The fee allowed by the taxing master must be reasonable in the circumstances; [24] in the ultimate result counsel must 'be fairly compensated as a professional man for his preparation, attendance at court, presentation of argument and all the thought, concern and responsibility that went into the matter'. [25]

It is submitted that the following principles derived from case law before the introduction of the tariff by subrule (8) could also serve as a guideline to the taxation of counsel's fees:

Affidavits. It is not the function of counsel to draft affidavits; only in very difficult and very complicated matters will it be reasonable to brief counsel to draft affidavits. [26] In those cases where it is reasonable to consult counsel on the cause of action or defence it would also be

reasonable to brief him to settle affidavits. [27] The test is that stated in rule 70(3): having regard to the issues of fact or law involved in the case, was it reasonable and not over-cautious for the attorney to brief counsel to settle affidavits filed on behalf of his client? [28]

Applications. As a general rule charges for consultation with counsel on an application are not allowed as between party and party unless the application involves complicated factual and difficult legal issues. [29] This does not, however, mean that such charges can be allowed *only* where the application is complicated and involves difficult legal issues: the question is always whether the costs were reasonably incurred and whether they were necessary or proper for the attainment of justice or for defending the rights of the party whose costs are being taxed. [30]

Contingency fees. In *Mathimba v Nonxuba* [31] a full court considered the law on contingency fees and held: [32]

- Absent compliance with the Contingency Fees Act 66 of 1997, a contingency fees agreement was void.
- The Act did not allow an advocate to sign a contingency fee agreement separately from the attorney or to conclude a contingency agreement directly with a client. Section 2 of the Act contemplated a single contingency agreement for a single matter to which all the relevant legal practitioners (which included attorneys and advocates) on contingency were party, and not separate agreements for each practitioner.
- It was this single agreement with all legal practitioners involved on contingency that was subject to the constraints in s 2 of the Act. Therefore the 25% cap (of the amount awarded) referred to in s 2(2) was not an individual cap applicable to each legal practitioner involved in a case on a contingency basis. Rather, it was a global cap applicable to all legal practitioners (including advocates) involved in a case, so that their joint fees could not exceed 25% of the amount

awarded.

- A legal practitioner could not charge the maximum permissible under the Act plus taxed costs to be paid by the other side. The maximum practitioner's fees was what the Act said — a maximum above which no fees could be lawfully recovered. The party and party costs recovered by the successful party from the unsuccessful party were what the client recovered and were due to the client. An attorney could recover from party and party costs — once he has recovered the full attorney and client fees — only the reimbursement of his out-of-pocket expenses and not fees.

Heads of argument and preparation. The modern trend in this regard is for counsel to charge a fee based on time actually expended, irrespective of whether briefed on appeal, application or trial. In *City of Cape Town v Arun Property Development (Pty) Ltd* [33] the full court, in accepting the modern trend, on appeal against an order made on review of a taxation, however, stated:

'[19] In its submissions to the judge a quo — and in its heads of argument on appeal — the principal contention advanced by the appellant was that the practice of allowing a composite fee on taxation of counsel's fees in an appeal was not a practice which was appropriate in this particular matter. Reliance was placed on *Louw v Santam Bpk* 2000 (4) SA 402 (T) and, in oral argument, also on the unreported decision of Brand J (as he then was) in *Siebert v Siebert* (CPD case No 796/99, 13 June 2000). Rather, it was argued, the approach of charging separately (and more transparently) for work actually done in preparation and then charging refresher or day fees for days engaged in court should be recognised and allowed on taxation.

[20] In the alternative, it was argued that if a composite first-day fee was regarded as appropriate, such fee should have been substantially higher than a refresher fee, and should have made provision for the reasonable time expended by counsel in drafting heads of argument and preparing for the hearing.

[21] I think it is fair to say that counsel who addressed us on behalf of the appellant placed more reliance on the alternative argument than the principal one articulated in the heads. In my view he was correct in doing so. Both *Louw* and *Siebert* were decided before the *Gauteng Lions* and *Price Waterhouse* cases, and I regard myself as bound by the *ratio* of the later decisions. I should add that I do not read *Siebert*'s case as differing in approach from that in the *Gauteng Lions* or *Price Waterhouse* cases. In para 9 Brand J expressed himself as follows:

> "As far as counsels' fees are concerned, it has been established in principle on more than one occasion that in general, counsel is not allowed to charge a separate fee for preparation of argument and for drafting heads of argument. The stated reason for this general rule is that, in general, counsel's compensation for this work is included in his appearance fee."

In the face of this and the authority of the judgments in the *Gauteng Lions* and *Price Waterhouse* cases, as well as those preceding them, such as *Scott and Another v Poupard and Another* 1972 (1) SA 686 (A); *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others (supra*) and *Administrateur, Transvaal v JD van Niekerk en Genote BK* 1995 (2) SA 241 (A), it must be accepted that, for the purpose of taxing a party and party bill, it is correct to take preparation and a refresher or day fee together for the purpose of assessing the reasonableness of counsel's fee. It makes no difference in my view that the fee was charged for an exception rather than an appeal or application, or even a trial. *Siebert* was a trial and in *City Deep (supra*) Galgut J (as he then was) said the following at 116A–B:

> "Similarly the Appellate Division Rules require heads of argument in appeals to that Division. No fee is allowed to counsel for preparing such heads. The work is regarded as being part of the preparation of argument and in practice is part of the fee charged for the appeal brief. It follows that, if no such fee is chargeable when the Rules require heads of argument, no fee is chargeable as between party and party when the Court requests such heads. In principle there can be no difference between briefs on trial and on appeal in this regard."

[22] This is a convenient juncture at which to reiterate a point of clarification: While the language of some of the cases may suggest that it is wrong or improper for counsel to charge separately for drafting heads of argument and preparation, this is not the case. *What is being conveyed is that it is not correct to tax a party and party bill on that basis*. The modern trend — if I may call it that — of charging a fee based on time actually expended is both acceptable and in the interest of transparency. It is likely to result in fees that are less troubling than those referred to in, for example, *Ocean Commodities*.

In *Price Waterhouse* at para 15 the prevalence of this practice was acknowledged without adverse comment, thus:

> "We were also informed that it is the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related and insofar as appeals are concerned, for counsel to charge separately for preparation, heads of argument and time in court." ' (Emphasis added by the author.)

Informal inspections. Fees for informal inspections before trial are allowable provided they can, in terms of rule 70(3), be regarded as expenses reasonably incurred or necessary or appropriate. [34]

Settlement, withdrawal or postponement. If a matter is settled or withdrawn or postponed it is the function of the taxing master to determine, in his discretion, a reasonable fee for counsel as at the date when the case was settled or withdrawn or postponed. In the exercise of this discretion, the taxing master will have regard to, *inter alia*, the complexity of the matter, the amount of work required to be done and how long before the date of the trial the matter was settled. [35] The reasonableness of the fee is to be measured by the time and effort required by the task performed as well as the novelty, degree of difficulty thereof and the expertise required to accomplish it, not with regard to the relevant advocate concerned but with regard to advocates in general. The fee has to be measured against what the services are worth in the open market. [36]

It has been held [37] that a distinction must be drawn between the trial fee which an attorney may charge where a trial is settled before the trial date and the fee that counsel may charge in that respect. The reason therefor is that the structure of an advocate's profession is such that the settlement of a trial and the loss of the first day trial prejudices counsel who runs a real risk of not being compensated for reserving a day for trial. An attorney, on the other hand, in the time set aside for the first day of the hearing, can do other lucrative work. Although an attorney who is acting as counsel is entitled to a reasonable fee for preparation for a trial, it is subject to the qualification that such attorney in fact did prepare for the trial, and that he can satisfy the taxing master as to the time spent in preparation and that such preparation was

justifiable in the context of the case concerned. If that cannot be done the attorney cannot be remunerated for work not done. This must not be taken to mean that an attorney can never claim fees for time wasted during trials. Each case must be treated on its own merits and there may well be instances where such fees are justifiable and can be claimed. [38]

In *Trollip v Taxing Mistress, High Court* [39] the defendant filed an application for postponement one day before the date on which an action was set down for trial. On the trial date the matter was postponed by agreement, the defendant tendering the wasted costs of the application for postponement and the plaintiff's wasted costs. An order was granted at approximately 10:45 on the trial date. Counsel for the plaintiff subsequently charged a full first-day trial fee but half of his bill was taxed off by the taxing mistress. In a review of the taxing mistress's decision, a full court set aside the *allocatur* relevant to the first-day trial fee of counsel and replaced it with the full first-day fee that was charged by counsel. [40] The judgment can be summarized as follows:

(a) The required approach to the task of taxing a bill of costs was to do so with an open mind: where a dispute was raised or good reason existed to suspect that the services claimed for had not been performed, the taxing officer was under a duty to afford the affected party an opportunity to deal with any disputed questions of fact. While the taxing officer may not ignore evidence that may show that work that had been charged for was, in fact, not done, this did not mean that there was a duty upon practitioners to prove their claims. The legal profession was a distinguished and venerable profession and its members officers of the court; absolute personal integrity and scrupulous honesty were expected of them. It followed that a taxing officer was entitled to take counsel's fee list at face value as constituting a record of the work that had been done. The honesty and professional ethics of counsel ought not to be lightly questioned. The suggestion that an advocate, when rendering a fee for a full first-day trial fee in respect of a matter that had been settled or postponed, must necessarily demonstrate that he has turned away work and had no other work, was erroneous. A taxing officer's starting point should be that, in the absence of evidence to the contrary, advocates, as members of an honourable profession, rendered fees honestly and behaved ethically.

(b) If a matter was settled, withdrawn or postponed, the function of the taxing officer was to determine a reasonable fee for counsel, taking into account the date when the case was settled or withdrawn or postponed. The settlement or postponement of a trial prejudiced counsel if they were not properly compensated for having reserved that day for trial. No other brief may properly be accepted for the days so reserved as this would constitute double briefing. This all constituted a loss of opportunity to earn fees from other work in consequence of the acceptance of the trial brief. Counsel's chamber work would have been performed at one time or another in any event, often after hours. If counsel performed chamber work on the day of a settled or postponed trial, this did not compensate for, and should not be taken into account, in respect of the entitlement to a full-day trial fee. The only possible compensation for loss of opportunity in respect of the first day of trial would be the fortunate retention of another brief for court work accepted subsequent to it becoming apparent that the trial would not proceed. The position (as supported by case law) was therefore that an advocate was entitled to be compensated for his opportunity costs when a trial settled or was postponed, and that, generally speaking, would be on the basis of a full-day fee. If, however, they were lucky enough to be briefed

to appear on that day in another matter, they may not charge a full-day fee for the matter that did not proceed. Counsel was entitled to be fairly compensated in accordance with these principles; the taxing officer must strive to give the successful party a full indemnity in respect of costs reasonably incurred.

(c) The paragraphs of the *Guidelines to Taxation of Bills of Costs — Eastern Cape High Courts* that the taxing officer appeared to have relied on, were in conflict with the common law and case law, and to that extent could not be applied. She committed an irregularity in doing so. At the heart of her reasoning was her finding that counsel did other work on the day in question. There was, however, no evidence to suggest that that was so; accordingly her decision to halve counsel's fees was irrational. She also erred in placing the onus on counsel to show that he did not do other work — by which she meant chamber and not appearance work. A taxing officer should work from the premise that advocates act honestly and ethically, and do not overreach, rather than from the opposite premise; in the absence of reason to believe that counsel charged improperly, it was unnecessary for counsel to present evidence to establish the loss of opportunity to justify a full first-day fee. By halving counsel's fee on the assumption that he had 'returned to his chambers to do other work', she applied a wrong principle and committed a material error of law: whether counsel did chamber work on the day in question was entirely irrelevant to the respondent's decision. Her decision to reduce counsel's fee was therefore clearly wrong.

When a trial is postponed, it is unreasonable for counsel to levy a charge to defray the difference between what he estimates he would have earned during the trial had the case run and the amount he was able to earn from other work that he was able to obtain for that period. If counsel and his client agree that counsel would be paid such difference, there is no reason why the unsuccessful party on the other side should be saddled therewith upon taxation. [41]

Travel and accommodation costs. In *AD v MEC for Health and Social Development, Western Cape*, [42] in which an experienced junior counsel from Johannesburg was briefed to assist the plaintiffs' senior counsel in the trial in Cape Town, the court remarked that it would be going quite far to say that the plaintiffs could not have secured a competent and experienced junior in Cape Town to assist their senior counsel. The court did not feel comfortable in making a special order on that premise and left the matter to the taxing master.

In *Naidoo v MEC for Health, KwaZulu-Natal* [43] Steyn J and Dlwati J, on review of taxation, held (footnotes omitted):

'**Travelling and accommodation costs**

[21] The taxing master has dealt with the said costs on pages 39 to 42 of the record. With regard to the costs for flights to Pretoria to attend to various consultations with the various experts, we find no error by the taxing master in having taxed off these amounts. There is no reasonable explanation as to why experts or attorneys and counsel outside of the Province had to be used instead of those that are within the Province. We are mindful of the fact that the applicants or any party for that matter can instruct any expert or counsel in the country. However, this must be regarded as a luxury that they can afford and the unsuccessful party should not be burdened with such costs . . .

[24] This principle also applies to the travelling costs of an attorney and or counsel from outside this Province as there is no evidence before us or placed before the taxing master that the applicants' rights could only be enforced by lawyers from outside the Province

of KwaZulu-Natal. Put differently, there was no suggestion that there are no competent lawyers from KwaZulu-Natal that could have assisted the applicants to attain justice in these matters or that they would have suffered a substantial injustice. No evidence was placed before us that the applicants could not find a competent firm in this Province to act on a contingency basis. There is therefore no reason for our interference with these costs. The underlying principle in this regard is that unless it can be shown that there were no competent attorneys or advocates and experts of a similar standing in KwaZulu-Natal, only then should such costs be allowed.'

1 By GN R4477 of 8 March 2024 (*GG* 50272 of 8 March 2024).

2 *Windhoek Crushers (Pty) Ltd v Voigts* 1969 (1) SA 574 (SWA); *Rosenberg v Prima Toy Holders (Pty) Ltd* 1972 (3) SA 791 (C) at 794B; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 139J–140A and 141B–J; and see *Erasmus v Viljoen* 1968 (3) SA 496 (GW) at 498H–499A.

3 *Van Wyk v Rondalia* 1967 (1) SA 373 (T) at 376D; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 108H; *Jerrier v Outsurance Insurance Co Ltd* 2015 (5) SA 433 (KZP) at 449F–450A; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 139J–140A and 141B–J. See also *Ehlers v Rand Water Board* 2006 (3) SA 299 (SCA).

4 *Steenkamp v Steenkamp* 1966 (3) SA 294 (T) at 297G; *Newman v Prinsloo* 1974 (4) SA 408 (W) at 411B–F; *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T) at 453F; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 107A.

5 *Barlow Motors Investments Ltd v Smart* 1993 (1) SA 347 (W) at 352G.

6 *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (T).

7 *Lungisa v African National Congress* (unreported, ECMk case no 4211/2022 dated 14 December 2022) at paragraph 129.

8 *Newman v Prinsloo* 1974 (4) SA 408 (W) at 411D; *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T) at 453G; *Ixopo Irrigation Board v Land and Agricultural Bank of South Africa* 1991 (3) SA 233 (N) at 239F; but see *National Union of Metalworkers of South Africa v Gearmax (Pty) Ltd* 1991 (3) SA 20 (A) at 29A–C.

9 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 172H. See also *Stent and Pretoria Printing Works Ltd v Roos* 1909 TS 1054; *SAR & H v Illovo Sugar Estates Ltd* 1954 (4) SA 425 (N) at 427; *Valkin v Daggafontein Mines Ltd* 1960 (2) SA 507 (W) at 522C–D; *Grobbelaar v Havenga* 1964 (3) SA 522 (N) at 530C; *Scott v Poupard* 1972 (1) SA 686 (A) at 690F; *Lipschitz v Wolpert and Abrahams* 1977 (2) SA 732 (A) at 751B. See also *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 141B–J.

10 *Maluleko v Total SA (Pty) Ltd* (unreported, GJ case no 2019/16965 dated 24 February 2023) at paragraphs [22]–[23], referring to *City of Johannesburg v Chairman, Valuation Appeal Board* 2014 (4) SA 10 (SCA) where the following was stated (*per* Leach JA):
'[34] Secondly, the first respondent was represented in this appeal by a senior counsel who appeared alone. He asked for costs "on the scale of senior counsel". I know of no such scale. Should the complexity of a matter and the amount involved justify the employment of two counsel as a wise and reasonable precaution, a court will make a special order in that regard. Where a single counsel is employed, no special order is required and it is for the taxing master to determine a fair and reasonable fee to be allowed on taxation. Even where the matter is one deserving of the employment of senior counsel (which this clearly is) it would be wrong for a court to somehow attempt to fetter that discretion; just as it would be wrong for a taxing master not to consider the reasonableness of a senior counsel's fee in a deserving case merely as the court did not order that the fee of a senior counsel should be allowed. I therefore see no need to make any specific order as to costs.'
See also *Hangar v Robertson* (unreported, SCA case no 211/2015 dated 10 June 2016) at paragraph [21].

11 1954 (4) SA 425 (N) at 429F.

12 *Paton v Santam Insurance Co Ltd* 1967 (1) SA 98 (E) at 102E; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 140A–B.

13 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 139I–140B.

14 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 139H–141A.

15 In practice taxing masters have always applied the common-law rule that the fee to be allowed to counsel on a party and party taxation is a matter within the discretion of the taxing master (see *Malan v Witbank Colliery Ltd* 1911 TPD 123 at 125; and see, for example, the reviews of taxation reported in *Weber Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 (3) SA 962 (T); *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd* 1990 (4) SA 587 (T); *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP)).

16 A general survey of the case law indicates that in almost all instances where a direction is made, the High Court does not explicitly deal with the relevant factors and provide reasons for the direction.

17 It is to be noted that as far as paragraph *(b)* of item 3 (Conferences: pre-trial and case-management) is concerned, rule 37(9)*(b)* provides that except in respect of an attendance in terms of rule 39(8)*(a)*, no advocate's fees shall be allowed on the basis as between party and party in respect of a pre-trial conference that was held more than 10 days prior to the hearing of the case.

18 In *City of Cape Town v Arun Property Development (Pty) Ltd* 2009 (5) SA 227 (C) the full court stated (at 237A–H) that it would expect the taxing master, in considering the question of counsel's fees, to adopt an approach along the following lines:
'(a) Consider the nature and complexity of the matter: What did the matter involve? How voluminous were the papers? Were there difficult areas of law involved or was the claim of particular importance to the parties by virtue, for example, of the amount of money involved? Did it involve an unusual amount of time spent in court?
(b) Consider the work done by counsel: How difficult or complex were the matters dealt with in the heads of argument? How long did counsel spend drafting heads of argument? How long did counsel spend considering the opponent's heads of argument and authorities? How long did counsel spend preparing his or her oral address to court?
(c) Consider counsel's fees: Do they fall within the parameters familiar to the taxing master? Is it clear what is being charged for? Are all the charges covered by the costs award made?
(d) Consider what is reasonable: In this regard the consideration that the litigant must not be out of pocket in respect of party and party fees charged by counsel must be taken into account, together with the recognition that a reasonable rate coupled with reasonable time spent may not always, but certainly can, amount to a reasonable basis for the taxation of counsel's fees. If the taxing master is of the opinion that the time taken by counsel to perform a given task is reasonable on a party and party basis and the rate at which he or she charged is reasonable, then the litigant should be entitled to an indemnity in respect of such charges.
(e) Consider the totality of the fee for the matter: If the fee charged for the work done prior to the hearing is reasonable and the work done qualifies as party and party attendances, then the fee for such attendances should be added to the fee for the "refresher fee" charged. By way of example, if in this matter the taxing master determines that it was reasonable to spend 5 hours drafting or settling heads of argument, 5 hours reading and considering the respondent's heads of argument and authorities and 5 hours preparing for the oral argument, she would allow a fee on exception of the equivalent of 2 days and 15 hours. If she felt an excessive amount of time was spent on items of preparation, she should disallow a fee for such excessive time.'
See also *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 124 (CC) at 126G–127D and the authorities there referred to; *Trollip v Taxing Mistress, High Court* 2018 (6) SA 292 (ECG) at 300C–E; Jacobs & Ehlers *Law of Taxation* 110–12; Cilliers *Costs* paragraph 13.19.

19 *Scott v Poupard* 1972 (1) SA 686 (A); *Weber Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 (3) SA 962 (T) at 964C–G; *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 57C–D.

20 *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 57C–D.

21 *Majola v Union and South West Africa Insurance Co Ltd* 1978 (2) SA 154 (SE) at 158E; *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd* 1990 (4) SA 587 (T) at 593H; *Kromoscope (Pty) Ltd v Rinoth* 1991 (2) SA 250 (W) at 254D where it is pointed out that this criterion must be employed with circumspection because the fees in fact allowed by the taxing master tend to confirm and so to encourage the level of marking fees.

22 This factor is not decisive (see *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 124 (CC) at 127C–D and the authorities there referred to).

23 *Kromoscope (Pty) Ltd v Rinoth* 1991 (2) SA 250 (W) at 256E. In *Algemene Balieraad van Suid-Afrika v Burger* 1993 (4) SA 510 (T) the name of an advocate was struck from the roll for charging flagrantly excessive fees. In *J D van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 602A Corbett CJ expressed concern at the excessive fees charged by counsel.

24 *Naicker v Commercial Properties (Pty) Ltd* 1978 (3) SA 992 (D) at 995; *Ndlovu v Santam Insurance Co Ltd* 1982 (2) SA 199 (T) at 201G; *Weber Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 (3) SA 962 (T) at 964C and 965B; *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 56H–I.

25 *Kromoscope (Pty) Ltd v Rinoth* 1991 (2) SA 250 (W) at 256E; *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 58A–H. In *Algemene Balieraad van Suid-Afrika v Burger* 1993 (4) SA 510 (T) the name of an advocate was struck from the roll for charging flagrantly excessive fees. In *J D van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 602A Corbett CJ expressed concern at the excessive fees charged by counsel.

26 *Duvos (Pty) Ltd v Newcastle Town Council* 1965 (4) SA 553 (N) at 557A; *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd* 1990 (4) SA 587 (T) at 589J–590B; *Mafoko Security Patrols (Pty) Ltd v University of KwaZulu-Natal* (unreported, KZD case no 9313/2020 dated 12 May 2023) at paragraphs [15]–[27].

27 *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd* 1990 (4) SA 587 (T) at 590D.

28 *Solsons Properties (Pty) Ltd v Yorkshire Clothing Industries (Pty) Ltd* 1972 (2) SA 203 (D) at 204F–205B; *Baars v Near East Rand Darts Association* 1993 (3) SA 171 (W) at 173G–174B. See also *Adamant Laboratories (Pty) Ltd v General Electric Co* 1964 (3) SA 363 (T) at 367E–H; *Miller v Hosiosky* 1973 (1) SA 113 (W) at 116E–F; *Vaatz v Law Society of Namibia* 1994 (3) SA 536 (NmHC) at 543E.

29 *Aloes Executive Cars (Pty) Ltd v Motorland (Pty) Ltd* 1990 (4) SA 587 (T) at 589D–G. This general rule has been stated in numerous cases: see, for example, *Rood's Trustee v Pretoria Estate and Market Co Ltd* 1910 TPD 1342; *African Theatres Trust Ltd v Salkinder and Melman* 1920 WLD 6; *Williams v Director of Education* 1922 TPD 498; *Adamant Laboratories (Pty) Ltd v General Electric Co* 1964 (3) SA 363 (T) at 367E–H; *Duvos (Pty) Ltd v Newcastle Town Council* 1965 (4) SA 553 (N) at 557B; *Solsons Properties (Pty) Ltd v Yorkshire Clothing Industries (Pty) Ltd* 1972 (2) SA 203 (D) at 204F–205B; *Miller v Hosiosky* 1973 (1) SA 113 (W) at 116E–G; *Baars v Near East Rand Darts Association* 1993 (3) SA 171 (W) at 173G–174B.

30 *Solsons Properties (Pty) Ltd v Yorkshire Clothing Industries (Pty) Ltd* 1972 (2) SA 203 (D) at 204F–205B; *Baars v Near East Rand Darts Association* 1993 (3) SA 171 (W) at 173F–174B; *Henpet Shades CC v Garzouzie* 1998 (3) SA 929 (O) at 936H.

31 2019 (1) SA 550 (ECG).

32 At 589F–593A.

33 2009 (5) SA 227 (C) at 234F–I. See also *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 58A–D; *Mafoko Security Patrols (Pty) Ltd v University of KwaZulu-Natal* (unreported, KZD case no 9313/2020 dated 12 May 2023) at paragraphs [39]–[45].
34 *Van Wyk v Louw* 1987 (1) SA 576 (T) at 579B–580A. See also *Williams v SA Railways and Harbours* 1976 (4) SA 946 (D).
35 *Ndlovu v Santam Insurance Co Ltd* 1982 (2) SA 199 (T) at 201H–202. See also *Naicker v Commercial Properties (Pty) Ltd* 1978 (3) SA 992 (D).
36 *Pretorius v Santam Bank* 2000 (2) SA 858 (T) at 866C–D.
37 *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W) at 756C–F.
38 *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W) at 759A–C.
39 2018 (6) SA 292 (ECG).
40 At 307A–B.
41 *Kloot v Interplan Inc* 1994 (3) SA 236 (SE) at 239J–240A.
42 2017 (5) SA 134 (WCC) at 139F–G.
43 Unreported, KZP case no 5787/16P dated 14 March 2018.