SUMMARY **REPORTABLE**

CASE NO.: A 311/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WALTER HORST KAESE v KLAUS DIETER SCHACHT and GAMIKAUB (PTY) LTD

PARKER J

[IN CHAMBERS]

Delivered to the Registrar on 2009 November 5

Costs – Taxing Master's *allocatur* – Review in terms of rule 48 of the Rules of Court – Court finding that with the coming into force of the Legal Practitioners Act, 1995 (Act No. 15 of 1995) and the various amendments to the Rules of Court, starting with the 1996 High Court Rules Amendment (Government Notice 81 of 1996), the Rules of Court prescribe a single set of tariffs for all legal practitioners, (i.e. instructing and instructed counsel) –

Consequently charges of litigious work done by all legal practitioners must be presented in terms of the prescribed tariffs - Consequently charges of litigious work done by all legal practitioners must be presented in terms of the prescribed tariffs – Court reviewing and setting aside ruling of the Taxing Master respecting three items in the *allocatur* on the basis that the Taxing Master exercised his (her) discretion improperly and also acted on a wrong principle, and furthermore that the ruling was wrong – Accordingly, Court reviewing and setting aside the Taxing Master's ruling respecting the three items – Court ordering Taxing Master to reconsider the taxation of the three items taking into account the effect of the decision of the Court.

Held, that the law knows only 'legal practitioner', as defined in s. 1 of the Legal Practitioners Act (Act No. 15 of 1995).

Held, further, that in terms of the Rules of Court all legal practitioners are also 'counsel'.

Held, further, that the statutory authorization in terms of the Rules of Court which permits a legal practitioner (instructing counsel) to employ another legal practitioner (instructed counsel) does not metamorphose the instructed counsel into anything else for the purposes of the prescribed tariffs.

Held, further, in Namibia the charges of an instructed counsel for

litigious works done are fees and not disbursements.

REPORTABLE

CASE NO.: (P) A 311/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WALTER HORST KAESE **APPLICANT**

And

KLAUS DIETER SCHACHT **1st RESPONDENT**

GAMIKAUB (PTY) LTD **2nd RESPONDENT**

CORAM: PARKER J

[IN CHAMBERS]

Delivered to the Registrar on: 2009 November 05

JUDGMENT:

PARKER J

[1] The applicant is seeking a review of the Taxing Master's *allocatur.*
The respondents have raised a point *in limine* which is basically that I should not hear Mr. Vaatz until he has paid the wasted costs which he was ordered to pay within one week after taxation of the bill of costs (see Manyarara AJ's order set out below).

[2] As I understand the order, 'within one week of taxation' means within one week of taxation if the taxation is not sought to be reviewed by the Court. It would have been a different matter if the respondents contend that Mr. Vaatz had not paid the costs and he did not require the Taxing Master to state a case for the decision of a judge within 15 days after the *allocatur* in terms of rule 48 of the Rules, or that 15 days after the judge's decision has passed and Mr. Vaatz has not made payment. In any case, upon the authority of *Christian v Metropolitan Life Namibia Retirement Annuity Fund and others* 2008 (2) NR 753 (SC), I do think I should decline to stay the present review until Mr. Vaatz has paid the costs that were ordered against him. To do so would inhibit or terminate Mr. Vaatz's ability to obtain redress in this Court of his grievance against the Taxing Master's *allocatur.* It follows that I dismiss the respondents' point *in limine.*

[3] Any persistent lingering doubt that in Namibia the two professions, i.e. of advocate and of attorney, were 'fused' – to put it mildly – on 7 September 1995 when the Legal Practitioners Act, 1995 (Act No. 15 of 1995) came into operation is put to rest if regard is had to the following passage in a judgment by the Supreme Court in *Afshani and another v Vaatz* 2007 (2) NR 381 at 385 F-H (*per* Maritz JA):

> The two professions were 'fused' on 7 September 1995 when the Legal Practitioners Act of 1995 came into operation. The Act, among others, repeals the Admission of Advocates Act (Act 74 of 1964) and the Attorneys Act (Act 53 of 1979) as amended (s 94); provides that persons who have been practicing as attorneys and advocates under the repealed statutes should be enrolled as legal practitioners under the Act (s 6); prescribes the qualifications for future admissions of legal practitioners (ss 4 and 5); establishes one controlling body for all legal practitioners and compulsory membership thereof (ss 40 and 43); and, to bring other legislation in line with the new dispensation created by the Act, provides in a single sweeping section (s 92 (1)) that: a reference in any other law to an advocate, a counsel or an attorney shall be construed as a reference to a legal practitioner.

[4] Thus, the two legal professions, namely, 'advocate' and 'attorney' were rendered statutorily defunct by the Legal Practitioners Act as from 7 September 1995 (i.e. the critical date). I have used the word 'defunct' advisedly: on 7 September 1995 the professions of advocate and of attorney ceased to exist in law. In their place, the law created one single, unified legal profession of legal practitioner. This conclusion is *a priori* the repeal in 'whole' by s.94, read with Schedule 2, of the Legal Practitioners Act of each and every legislation dealing with attorneys and advocates, starting with the Admission of Advocates Act, 1964 (Act No. 74 of 1964), and the repeal of s.11 of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919).

[5] In sum, the appellations 'advocate' and 'attorney' did not survive in law the incisive knife of the Legal Practitioners Act. In this regard, the point must be firmly and clearly made that s. 67(2) of the Legal Practitioners Act does not have the effect in any shade of perpetuating a bifurcated legal profession in Namibia after 7 September 1995. To put it simply, the Legal Practitioners Act is in effect the death knell of a bifurcated legal

profession that had existed in Namibia before the critical date. That being the case, the conclusion is inexorable and irrefragable that the law, as it stands now, knows of only 'legal practitioner', as defined in s. 1 of the Legal Practitioners Act.

[6] The fact that some legal practitioners have taken advantage of s. 67(2) of the Legal Practitioners Act and have chosen to use the appellation 'advocate' to describe 'the mode of their practices' (to borrow a phrase from Maritz JA in *Afshani and another v Vaatz* 2007 (2) NR 381 (SC) at 386D)) is of no consequence, legally speaking: the choice that some legal practitioners have made in that regard has therefore, not in any way resurrected a bifurcated legal profession in Namibia. The absolute fact that remains is what I have mentioned previously: the law knows only 'legal practitioner'. This conclusion is buttressed by s. 92(1) of the Legal Practitioners Act which reads:

> Subject to the provisions of this Act, a reference in any other law to an advocate, a counsel or an attorney, shall be construed as a reference to a legal practitioner.

The aforegoing conclusion is additionally reinforced by rule 12 of the Amendment of the Rules of the High Court of Namibia (Government Notice 81 of 16 April 1996) ('the 1996 High Court Rules Amendment'). For the above reasons also, it is patently clear that the Taxing Master was palpably wrong when he stated in his reasons (para. 8) that s. 92 of the Legal Practitioners Act 'has no effect whatsoever on the existing High Court Rules.' He has undoubtedly misread the said s. 92.

[7] I have taken some time to discuss the effect of the Legal Practitioners Act on the legal profession for a good reason. To start with, in his 'Review of Taxation' application, in which he requested the Taxing Master in terms of rule 48 of the Rules of Court to state a

case for the decision of a judge, counsel formulated his request in such a manner that he used terms that are defunct in terms of the Legal Practitioners Act; for example, 'instructing *attorney'* (para. 1(a)), '*advocate's* fees' (para. 2(a)), and 'the *advocate'* (para.2(c)). All these tend to obfuscate the issues in this review. The discussion above is therefore to depurate the statements by the counsel. But more important; I have done so in order to build the correct foundation on which the determination of this review should be predicated. In other words, it is a necessary prelude to determining this review.

[8] *Accordingly*, my next logical port of call is rules 10 and 11 of the aforementioned 1996 High Court Rules Amendment. Rule 10 replaces the entire rule 69 of the Rules of Court published under Government Notice 59 of 1990 ('the 1990 Rules of Court'); and paragraph (a) of rule 11 replaces sub rule (1), and paragraph (b) of rule 11 replaces sub rule (8), of rule 70 of the 1990 Rules of Court.

[9] Doubtless, the 1996 High Court Rules Amendment aimed at repealing rule 69 which concerned tariff of maximum fees for advocates on party and party basis in certain civil matters, and also at repealing parts of rule 70 which concerned taxation and tariff of fees of attorneys. The object of the repeals was indubitably to bring the tariffs that existed before the critical date of 7 September 1995 in line with the Legal Practitioners Act because, although the 1996 High Court Rules Amendment was gazetted on 16 April 1996, the Amendment came into operation retrospectively on 7 September 1995 when, as I have said *ad nauseam,* the Legal Practitioners Act came into force.

[10] The following significant amendments to the 1990 Rules of Court brought about by the 1996 Rules of the High Court Amendment and that are relevant to this review are

noted: they hold an important key to the determination of this review. The new rule 69 is entitled 'Fees of Counsel Generally'. The word 'counsel' replaces the word 'advocate' wherever it occurred in the old rule 69. Paragraph (a) of rule 11 of the 1996 High Court Rules Amendment deletes paragraph (b) of sub rule (1) of rule 70 of the 1990 Rules of Court and replaces the word 'attorney' with the word 'counsel' in the new sub rule (1) of the said rule 70; and further, paragraph (b) of the said rule 11 replaces the word 'attorney' with the word 'counsel' in the new sub rule (8) of the said rule 70 wherever it occurs. Since the watershed amendment to the High Court Rules in 1996, there have been subsequent amendments that are relevant to the present review; they are the amendments under the Government Notices 182 of 6 July 1996, 221 of 14 November 1997, 69 of 1 April 1998, 189 of 1 August 2000, 221 of 16 December 2002 and 141 of 2006. It is this latest amendment under Government Notice 141 of 2006 that Mr. Vaatz refers to in his submission.

[11] The aforegoing statutory analysis is crucial to the determination of this review. And in determining the review, I cannot do better than to rely on the authoritative principles on review of the ruling of the taxing master enunciated with great succinctness by Maritz JA in *Afshani and another v Vaatz* supra at 393C-F:

> I am mindful that courts of law will not readily disturb a ruling of a Taxing Master falling within his or her discretion (see *Bradshaw v Florida Twin Estates (Pty) Ltd* (supra) at 316 in fine) unless he or she *(a)* has not exercised his discretion judicially but has done so improperly; *(b)* has not brought his or her mind to bear upon the question; or *(c)* has acted on a wrong principle (see e g *General Leasing Corporation Ltd v Louw* 1974 (4) SA 455 (C) at 461-462 and *Noel Lancaster Sands (Pty) Ltd v Theron and Others* 1975 (2) SA 280 (T) at 282F). In addition, given the supervisory powers the court retains to ensure fairness, reasonableness and justice in court-annexed procedures – such as the

> taxation of bills of costs (compare the authorities referred to in *Pinkster Gemeente van Namibia (previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 17B to H) – the court may also correct the Taxing Master's ruling not only on the aforementioned common-law grounds of review, but also when it is clearly satisfied that the Taxing Master was wrong (cf *Legal and General Assurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473(A) at 478G-H).

That is the manner in which I approach the determination of the instant review.

[12] Keeping the aforegoing statutory analysis of the Legal Practitioners Act and the amendments since April 1996 to the Rules of Court in firm view, I now direct my attention to the items in the bill of costs which are the subject matter of the present review. The applicant, the respondents and the Taxing Master have all relied on *Afshani and another v Vaatz* supra in support of their individual contentions. Without a doubt, *Afshani and another v Vaatz* enunciates very useful principles concerning taxation. But it must be remembered that that case concerned the Supreme Court Rules, and particularly the effect of the Legal Practitioners Act on the applicable Supreme Court Rules. That is not what this review is about; this review concerns the 1990 Rules of Court, as amended by the aforementioned amendments thereto since April 1996.

[13] As I have demonstrated previously, the 1996 High Court Rules Amendment was made in order to take cognizance of the effect of the Legal Practitioners Act on the legal profession and practice of the profession under that Act; hence, the need to have amended the 1990 Rules of Court. Thus, my burden is to determine this review through the interpretation and application of the relevant provisions of the 1990 Rules of Court, as amended by the 1996 amendment and subsequent amendments thereto, and, of course,

relying on those useful and authoritative principles enunciated in *Afshani and another v Vaatz* supra and other authorities that are of assistance to the issues under consideration.

[14] The items in contention are items 31, 35 and 47 of the *allocatur* of the bill of costs that was taxed by the Taxing Master and which is the subject of this review. The bill arises from the order made by this Court (*per* Manyarara AJ) on 30 June 2008, and it reads:

> 1. That the Application to condone the late filing of the Applicant's Heads of Argument is granted.
> 2. That the matter is hereby postponed to the 22nd September 2008.
> 3. That leave is hereby granted to the Respondent to file Supplementary Heads of Argument, (five) 5 days before the date of the hearing.
> 4. That the wasted costs are to be paid by Mr. Vaatz personally, within one (1) week of Taxation.
> 5. That the Taxing Master is hereby directed to tax the wasted costs within sixty (60) days of today's date.

[15] It is important to note that the present review is limited to the grounds on which the applicant is seeking to set aside the Taxing Master's *allocatur* (*Afshani and another v Vaatz* supra).

Items 31 and 35

[16] Mr. Vaatz's submission is simply that since the Taxing Master has conceded that these costs were not party and party costs, this Court should make 'an order deleting or not allowing items 31 and 35 in the bill reflecting wasted costs on party and party basis.' The respondents' legal practitioners take an opposite view. As I understand their submission, it was obligatory in terms of Practice Directions (of 8 May 2007) that heads of argument be filed 15 days before the hearing of an opposed motion. Mr. Vaatz had

failed to do so; and therefore he brought an application for condonation of the late filing of counsel's heads of argument. Thus, according to the respondents' legal practitioners, owing to the actions of Mr. Vaatz, the respondents had to file additional heads. The legal practitioners submitted further that 'the legal practitioner/instructing counsel had to refresh his memory with regards the preliminary heads when the matter was finally heard on the 2nd of February 2009, some seven (7) months later, considering that supplementary heads (were) also filed by the respondents.'

[17] From the outset it must be made clear that neither the Taxing Master nor this Court is interested in what happened or might have happened after the date of the order by my Brother Manyarara AJ which was the subject matter of the Taxing Master's *allocatur*, which in turn is under review in the present proceedings. Indeed, it was because the matter was postponed as a result of Mr. Vaatz's inaction that was why an order for wasted costs was made by Manyarara AJ on 30 June 2008 against Mr. Vaatz *de bonis propriis*. Furthermore, if the respondents' legal practitioner refreshed his memory as regards 'the preliminary heads' 'when the matter was finally heard on 2 February 2009', then the preliminary heads did not go to waste. In any case, as I have said previously, this Court is only interested in the order of wasted costs that was made on 30 June 2008; that is, wasted costs occasioned by the postponement on that day. In this regard, it has been held that wasted costs are, in principle, the same as 'costs of the day'. (Cilliers, *Law of Costs*, 3rd edn. at para. 8.10; and the cases there cited). Thus, in my view, the wasted costs in the 30 June 2008 order are 'costs of the day', i.e. 30 June 2008.

[18] From the aforegoing, it is my view that the taxing master was wrong to have allowed items 31 and 35, as charged; and so the Taxing Master's ruling is reviewed and set aside.

I do not think this is a proper case where this Court should correct that decision. The taxing must, in his discretion, rule as to what amount is fair as wasted costs for the day (30 June 2008) on the party and party scale.

Item 47

[19] Mr. Vaatz's argument are two-pronged: the instructed counsel is entitled to fees, 'but those fees must be presented in the manner in which any other legal practitioner must present his fees and cannot be charged on a day basis but must be charged on a half hour basis as laid down in the new tariffs application for all legal practitioners; it is 'exorbitant by any standard' for a legal practitioner to charge N$22,942.50 for 'a mere postponement, which requires the parties to be in court at the most 15 – 20 min.'

[20] The respondents' legal practitioner's submission is prefixed with what assignments the respondents' instructed counsel carried on, and from that they submitted deductively that 'the Taxing Master should have allowed the instructed counsel's fee as is, as same is reasonable under these circumstances.' And the circumstances, according to the respondents' legal practitioners, are that 'Mr. Vaatz agreed to such fees and respondents are therefore entitled to the total amount of N$22,942.50 as agreed between Mr. Vaatz and Advocate Corbett.'

[21] With the greatest deference, I am constrained to say that the argument of the respondents' legal practitioners has no merit for two main reasons. First, this Court is not privy to any agreements made or undertakings given by a party or the parties which might have preceded the taxation. Second, the amount of N$22,942.50 has not been

charged by the respondents as 'fees', as their legal practitioners now submit in the 'Respondents' Contentions', but as 'disbursements' in their bill.

[22] The question that then arises is this: Apart from the quantum of the amount ('exorbitant', Mr. Vaatz characterizes it), should the amount be allowed as disbursements; that is, should the amount be charged as fees or disbursements? In England which has a bifurcated legal profession (of barristers and solicitors, and barristers are referred to as 'counsel' in judicial proceedings) the Court accepted in *Barnato v Joel* 45 TLR 167 at 167 counsel's submission that the 'word "disbursements" had a technical meaning and meant certain items not covered by profit costs as between solicitor and client; as for example, counsel's fees'.

[23] That is in England with a bifurcated legal profession. In Namibia, as I have discussed *in extenso* previously, there is a single and fused profession of legal practitioner. However, in terms of rule 1 of the 1996 High Court Rules Amendment, '"counsel" means a legal practitioner admitted, enrolled and entitled to practise as such in the court'. Put simply, in terms of the Rules of Court, every legal practitioner is counsel in the court. Nevertheless, subject to sub rule (5) of the amended rule 69 of the Rules of Court, a legal practitioner (instructing counsel) is permitted to employ another legal practitioner (instructed counsel) in judicial proceedings for the purposes of the instructed counsel representing the instructing counsel's client in such proceedings. However, this statutory authorization does not metamorphose the instructed counsel into anything else for the purposes of the tariffs prescribed by the Rules of Court for all legal practitioners. What this means is that in Namibia the charges of an instructed counsel for litigious work done are fees and not disbursements. As regards the client, the litigious work done by the

instructed counsel was as though it was done by the instructing counsel herself or himself; *a priori*, if charges for litigious work done by instructing counsel are fees, then charges for litigious work done by his or her instructed counsel are also fees; they cannot be disbursements.

[24] From all the above, the conclusion is inescapable that in terms of the Rules of Court there are only prescribed tariffs for all legal practitioners – instructing or instructed 'counsel'; and as Mr. Vaatz correctly put it, they must all present their charges according to the tariffs prescribed by the Rules of Court. The latest prescribed tariffs are those in the Schedule to the Amendment to the High Court Rules (Government Notice 141 of 5 September 2006) ('the September 2006 Amendment of the Rules of Court'). In this connection, it is worth noting that references to Note 1 of the Annexure to the Rules of the Supreme Court in *Afshani and another v Vaatz* supra have no relevance to the interpretation and application of the Rules of this Court.

[25] In para. 9 of the Taxing Master's submission, the Taxing Master makes the following deduction from a series of contentions: 'In respect of the High Court Rules, counsel's fees can be taxed as a disbursements'. One such contention is this: 'In contrast (i.e. with the Supreme Court Rules), section 92 of the Legal Practitioners Act, 1995 has no effect whatsoever on the existing High Court Rules'. And the basis for the Taxing Master's bold assertion is this: 'The latter Rules (i.e. the Rules of this Court) specifically make provision for the concept instructing and instructed counsel'. Another significantly damming contention which is as fallacious as is bold is in para. 7 of the Taxing Master's contention:

> The effect which section 92 of the Legal Practitioners Act 1995, had on the interpretation of Rule 14 of the then Rules of the Supreme Court, was that, and in that case only, the fees of an advocate could not be taxed as disbursements (i.e. and because no reference was made in the then Rules to the concepts instructing and instructed counsel).

[26] I have shown in great detail previously that the Taxing Master's contention that s. 92 of the Legal Practitioners Act has no effect 'whatsoever on the existing High Court Rules' is clearly palpably wrong: it is a dangerous fallacy. With respect, the Taxing Master misreads s. 92 of the Legal Practitioners Act. I have also concluded previously on detailed analyses that in the interpretation and application of the relevant provisions of the Legal Practitioners Act and the Rules of Court that were promulgated in response to the creation of a single, fused legal profession in Namibia by the said Act, starting with the aforementioned April 1996 High Court Rules Amendment, charges of instructed counsel for litigious work are fees, like those of any other legal practitioner, and not disbursements. The Taxing Master's misreading of the relevant provisions of the Legal Practitioners Act and the Rules of Court appears to arise from the fact that the Taxing Master fails or refuses to see that the law, as it now stands, as I have said it more than once previously, does not recognize the practice of 'advocate' *per se*: see, for instance, the fourth line of the *chapeu* of the Taxing Master's submission: 'But on item 47 *Advocate* fee: …' See also the third and fourth lines of para. 7 of the Taxing Master's submission: '… in that case only, the fees of an *advocate* could not be taxed as disbursements …'

[27] It follows from the aforegoing reasoning and conclusions that the Taxing Master has not exercised his discretion properly, and has acted on a wrong principle; and furthermore, I am satisfied that the Taxing Master's ruling respecting item 47 was wrong.

To borrow once more from Maritz, JA in *Afshani and another v Vaatz* supra at 393G, '… the (Assistant) Taxing Master acted on an indefensibly incorrect interpretation of the Act', and his reasoning respecting 'some of the applicant's objections were clearly wrong'. Accordingly, his ruling on item 47 must be set aside. As I said in respect of items 31 and 35, as respects item 47, too, this is not a proper case where this Court should correct the decision of the Taxing Master.

[28] I have held that this is not a proper case where this Court after setting aside the ruling of the Taxing Master should correct the ruling. It is my view, therefore, that the Taxing Master must tax items 31, 35 and 47 afresh against the backdrop of the aforegoing analysis, reasoning and conclusions.

[29] I now pass to deal with the question of costs in this review. Very important principles respecting costs brought about by the Legal Practitioners Act and the subsequent amendments of the Rules of Court, starting with the 1996 High Court Rules Amendment, have been enunciated; and that they may guide future taxation. In my opinion, therefore, this is a proper case where it would be fair and just that no order as to costs is made.

[30] In the result I make the following order:

(1) The taxation review of items 31, 35 and 47 succeeds.

(2) The Taxing Master's *allocatur* in respect of items 31, 35 and 47 is set aside.

(3) The Taxing Master must tax items 31, 35 and 47 afresh.

(4) There shall be no order as to costs.

PARKER J

ON BEHALF OF THE PLAINTIFF:	Andreas Vaatz & Partners
ON BEHALF OF THE DEFENDANT	Chris Brandt Attorneys