

Taxation of Litigation Costs under Uniform Rule 70: Attorneys Acting as Counsel are Entitled to Equal Reimbursement for Equal Work by Advocates

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Abstract

Unlike during the apartheid era, high courts are no longer the terrain of advocates solely. By law, qualifying attorneys have a right of audience there. When attorneys render services usually performed by advocates and they secure a party-and-party costs order for their clients, then a question arising is whether the unsuccessful litigant is liable to indemnify the successful litigant on the lower tariff ordinarily applicable to attorneys' fees under Uniform Rule 70, or the higher tariff of reasonable fees applied to advocates under Uniform Rule 69. This important issue in the law of costs forms the core subject of this article. It engages therewith through a critical analysis of the prevailing case law dealing with Uniform Rule 70(3) read with Uniform Rule 70 tariff item A(10), as well as an application of the mandatory interpretive directive in section 39(2) of the *Constitution of the Republic of South Africa*, 1996 taken with the tools of textual, contextual and purposive interpretation.

This article argues that Taxing Masters, as gatekeepers of fairness and practicality in determining the recoverability of litigation costs, cannot when taxing a party-and-party bill apply one standard or set of rules for assessing advocates' fees in relation to high court work and then apply another for assessing attorneys' fees for doing the same (or substantially the same) work. Such a situation would be inimical to the tenets of the rule of law promoting justice and equity which apply at a taxation, being a legal proceeding in a forum envisaged by section 34 of the *Constitution*. This article argues further that Taxing Masters must embrace the salutary principle that attorneys are entitled to equal pay for equal work done as counsel, and that a contrary approach would endorse the notion that advocates are more equal than attorneys, a view antithetical to the values of and fundamental rights to dignity and equality entrenched in the *Constitution*, all of which find application when a Taxing Master exercises his public powers under Uniform Rule 70(1).

Keywords

Advocate; attorney; bill of costs; counsel; legal practitioner; litigation; party-and-party costs; Uniform Rule 70; taxation; Taxing Master.

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1 Introduction

For more than a century before the *Legal Practice Act*¹ (hereafter the *LPA*) commenced, a legacy of South Africa's colonial past was that its legal profession was a "divided bar"² fragmented into the advocates' and attorneys' professions. Structurally and institutionally, the two arms of the profession were separate and unequal.³ Each arm fashioned rules of professional conduct and discipline for its own members; had its own regulatory body; and existed within its own legal framework that regulated admission, enrolment, rights and privileges for practitioners.⁴ Some apartheid-era laws also entrenched divisions between the two bars at that time. For instance, the creation of homelands in Bophuthatswana, Transkei, Venda, and Ciskei led to the passing of laws for the regulation of the two professions in the homelands,⁵ none of which were on all fours with the *Attorneys Act*⁶ and *Admission of Advocates Act*⁷ applicable to the rest of South Africa. The dichotomy between the advocates' and attorneys' professions led to members of the advocates' bar and attorneys' side bar having particular areas of focus.

Attorneys were viewed as generalist practitioners, while advocates were seen as having specialist forensic skills and expertise that capacitated them to give expert advice or opinions on matters of substantive law and procedure. In all litigation, lay clients dealt directly with attorneys who were then, and now under the *LPA*,⁸ required to possess a valid fidelity fund certificate. Attorney firms were then, and now under the *LPA*,⁹ obliged to operate a trust bank account which is subject to an annual audit for the protection of trust clients. Thus, historically, litigants entrusted the conduct

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¹ *Legal Practice Act* 28 of 2014 (hereafter the *LPA*).

² *In re: Rome* 1991 3 SA 291 (A) 305I (hereafter *In re: Rome*).

³ *Cape Bar v Minister of Justice and Correctional Services* 2020 6 SA 165 (WCC) para 2. For examples of discriminatory practices that historically plagued SA's legal profession, see Slabbert 2011 *PELJ* 212-213.

⁴ For the legal profession's regulation under the *LPA* and its antecedents, see *Ex parte Goosen* 2019 3 SA 489 (GJ); *Mavudzi v Majola* (ZAGPJHC) (unreported) case number 49039/2021 of 22 July 2022 paras 32-34.

⁵ See *Law Society of the Northern Provinces v Mabando* 2011 4 All SA 238 (SCA) paras 38-47.

⁶ *Attorneys Act* 53 of 1979.

⁷ *Admission of Attorneys Act* 74 of 1964.

⁸ *LPA*, s 84 read with s 85. Compare with ss 41 and 42 of the repealed *Attorneys Act*.

⁹ *LPA*, s 86. Compare with s 78 of the repealed *Attorneys Act*.

of a civil lawsuit to attorneys as an "advocate could not be engaged directly by litigants".¹⁰

In superior court litigation in that setting, attorneys were responsible mainly, although not entirely, for the administrative and preparatory work involved.¹¹ In the pre-1995 era, even if the requisite trial advocacy skills were possessed by an experienced practising attorney, an advocate had to be briefed. This *de facto* unsavoury situation existed because attorneys were *de jure* victims of discrimination. They were denied equal treatment under the law - the right of audience in superior courts was the sole preserve of advocates by reason of their professional status.¹² Thus, as in other Commonwealth nations, the advocates' profession developed in South Africa in the tradition of a referral profession.¹³ Advocates who undertook work without an instructing attorney as a kind of buffer to a client risked being disciplined, possibly even removed from practice.¹⁴

2 Statement of the problem and the aims of the article

The *Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution)* brought momentous changes to South Africa's legal system. This included attorneys' becoming eligible to be appointed as judges. Prior to this, only advocates could be appointed – another form of discrimination against attorneys. From 1 November 1995 and flowing from the fundamental right to equality,¹⁵ section 3 read with section 4 of the *Right of Appearance in Courts Act*¹⁶ entitled qualifying attorneys to apply for the right to appear in a high court, the Supreme Court of Appeal (SCA), and the Constitutional Court (CC).¹⁷ Since then, attorneys have appeared as counsel in the superior courts where they have obtained cost orders in their clients' favour. Although not admitted to practise as advocates, attorneys

¹⁰ *Afshani v Vaatz* (SCR01-2004) [2007] NASC 3 (18 October 2007) para 9 (hereafter *Vaatz*).

¹¹ *Rösemann v General Council of the Bar of South Africa* 2004 1 SA 568 (SCA) para 28 (hereafter *Rösemann*).

¹² *De Freitas v Society of Advocates of Natal* 2001 3 SA 750 (SCA) 760A-C (hereafter *De Freitas*).

¹³ *De Freitas* 762G-764B.

¹⁴ *Johannesburg Society of Advocates v Nthai* 2021 2 SA 343 (SCA) paras 62-63 (hereafter *Nthai*). For a catalogue of the sharp divide between the roles played by advocates and attorneys in superior court litigation, see *Rösemann* para 28 (quoted with approval in *Nthai* para 64); *Williams v Taxing Mistress, Port Elizabeth*; *In re: Williams v Road Accident Fund* 2019 3 All SA 658 (ECP) paras 7-8 (hereafter *Williams*).

¹⁵ Section 8(1) of the *Constitution of the Republic of South Africa 200 of 1993 (the interim Constitution)* reads: "Every person shall have the right to equality before the law and to equal protection of the law." This provision is the genesis of the right to equality in s 9(1) of the *Constitution of the Republic of South Africa, 1996*.

¹⁶ *Right of Appearance in Courts Act* 62 of 1995.

¹⁷ For a discussion hereof, see *ABSA Bank Ltd v Barinor New Business Venture (Pty) Ltd* 2011 6 SA 225 (WCC); *Liberty Group Ltd v Singh* 2012 5 SA 526 (KZD).

also render other litigation services in the mould of counsel (such as drafting heads of argument and legal opinions).

Liability for costs lies with a client who, as the mandator, foots the bill at a rate agreed with an attorney as the mandatee. This is known as attorney-own client costs.¹⁸ In the civil practice of the high courts, uncertainty exists as to the extent to which a victorious litigant as a cost creditor can under a party-and-party bill recover from a defeated litigant, as a cost debtor, the costs incurred for an attorney performing an advocate's function.¹⁹ Does the scale tilt towards the higher "reasonable" fee applied to advocates under Uniform Rule 69(5), or the lower attorneys' tariff prescribed by Uniform Rule 70.²⁰ Since advocates are not more equal than attorneys, this article argues that, on the principled basis of justice and equality for all, the former ought to be the answer to the vexed question posed here.

A survey of taxation reviews under Uniform Rule 48,²¹ which relates to disputed party-and-party bills, reveals that different Taxing Masters have made decisions, at times conflicting ones, on a range of common objections pertaining to claims for indemnification by attorneys for charges related to work done as counsel.²² The following are pertinent issues distilled from case law which will be dealt with as sub-enquiries in relation to the practical application of the tariff prescribed in Uniform Rule 70:

- a) can the same attorney performing work ordinarily done by attorneys covered by the tariff in Uniform Rule 70 also perform functions ordinarily done by advocates covered by Uniform Rule 69(5)?;²³

¹⁸ For the distinction between attorney-client and attorney-own client costs, see *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 1 SA 123 (W) paras 103-116 (hereafter *Aircraft Completions Centre*).

¹⁹ For a discussion of the different cost scales, see *Loots v Loots* 1974 1 SA 431 (E) 433H.

²⁰ Compare *Motor Finance Corporation (Pty) Ltd v Prinsloo* (2891/2014) [2016] ZAECGHC 105 (18 October 2016) (hereafter *MF Corporation*); *Maseka v Law Society of the Northern Provinces* (443/06) [2010] ZANWHC 13 (1 January 2010) (hereafter *Maseka*); *Matsaung v Mathedimosa* (1101/2019) [2021] ZALMPPHC 58 (30 August 2021) (hereafter *Matsaung*).

²¹ Uniform Rule (UR) 48(1) reads: "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 15 days after the *allocatur* by notice require the taxing master to state a case for the decision of a judge."

²² Cases surveyed include *MF Corporation*; *Maseka*; *Matsaung*; *Williams*; *Trollip v Taxing Mistress of the High Court* 2018 6 SA 292 (ECG) (hereafter *Trollip*); *Zanella v Harty* (31131/2020) [2022] ZAGPJHC 217 (11 April 2022) (hereafter *Zanella*); and *Van Pletzen v Taxing Master* (4992/2014) [2021] ZAFSHC 4 (15 January 2021) (hereafter *Van Pletzen*).

²³ Compare the position under UR 69(6). See the discussion below in part 5.3.

- b) if an attorney is briefed as counsel by another attorney employed at the same law firm as the former, can Uniform Rule 69(5) apply to the costs charged by the instructed attorney?;²⁴
- c) can an instructing attorney recover costs incurred for attendances arising from the briefing of an in-house counsel²⁵ (such as collating, indexing and paginating counsel's brief; perusing counsel's heads of argument; perusing counsel's fee account; and the cost of copying documents inserted into counsel's brief)?;²⁶
- d) where more than one attorney appears as co-counsel, are the costs of the additional attorneys recoverable and, if so, on what legal basis?;²⁷
- e) if an instructing and an instructed attorney briefed to appear as counsel are different persons, are the costs of both attorneys recoverable, even in the absence of a court order or agreement *inter partes* that expressly caters for the cost of two attorneys?;²⁸ and
- f) are the costs of an instructed attorney briefed as counsel recoverable under the fee column in a bill, or as disbursements?²⁹

3 Significance of the article and roadmap of the discussion

A survey of published research reveals that the issues crystallised above in part 2 have not yet been discussed in a detailed study. The paucity of literature thereon means that this article adds a new dimension to its subject area, namely, the taxation of costs. As such, it carries the potential to benefit legal practitioners, cost consultants, Taxing Masters, judicial officers, and researchers alike.

To fulfil its aims the discussion below is divided into the following parts. The legal framework under Uniform Rule 70 for taxation of an attorney's party-and-party bill of costs is explained at the onset. This lays a foundation for the discussion in the succeeding part on the general principles applying to

²⁴ See, for e.g., *Maseka* paras 47-48; *Matsaung* para 20.

²⁵ In this article, unless the context indicates otherwise, the term "in-house counsel" refers to an attorney with rights of appearance in the superior courts employed at the same firm as an instructing attorney and who is briefed to perform the functions of an advocate.

²⁶ See *Maseka* paras 45-49, 56-59.

²⁷ *Ramuhovhi v President of Republic of South Africa* 2018 2 SA 1 (CC) paras 68-69 (hereafter *Ramuhovhi*).

²⁸ Compare *Matsaung* paras 20-24 and *Maseka* paras 53-54.

²⁹ An instructing attorney is liable for the payment of an advocate's fees. A client is liable for the advocate's fees as a disbursement. See *In re: Rome* 306F-G; *Vaatz* para 10.

the proper interpretation of Uniform Rule 70 for the purposes of taxing an attorney's charges for services rendered as counsel. The relevant principles discussed are then used to answer, on a practical level, the primary research question and sub-enquiries formulated above in part 2.³⁰ Finally, the conclusion distills the thrust of the core submissions emerging from the ensuing discussion.

4 Uniform Rule 70: legal framework for taxing party-and-party bills

4.1 Party-and-party litigation costs: scope and ambit

Superior court litigation is expensive. Thus, litigation costs contribute to informing a litigant's decision whether to initiate or defend a lawsuit.³¹ At times the wealth disparities in South Africa also create an inequality of arms between litigants, a state of affairs offensive to the values of fairness and justice underpinning the fundamental right guaranteed by section 34 of the *Constitution*.³² As such, litigation costs can have the effect of denying access to justice for some, even in a democracy which is committed to promoting justice for all.³³

During litigation, the question of liability for costs always looms large. The rule of thumb is that the costs of a suit follow the result.³⁴ This rule is premised on the overarching general principle that a successful litigant ought to be indemnified for the reasonable expenses incurred, flowing from "having been unjustly compelled either to initiate or defend litigation".³⁵ Therefore, in civil litigation, a "successful party is entitled to his costs unless

³⁰ Although this article focusses on UR 70, the submissions here apply equally to party-and-party bills taxed under Rules 18 and 19 of the SCA, and Rules 22 and 23 of the CC. This is because there is uniformity in the application of the law of costs. See *President of Republic of South Africa v Gauteng Lions Rugby Union* 2002 2 SA 64 (CC) (hereafter *Gauteng Lions Rugby Union*) paras 10-11.

³¹ *Kintetsu World Express South Africa (Pty) Ltd v LDC Consultants CC* (11741/13, 13043/13, 14213/13) [2013] ZAGPJHC 241 (2 October 2013) para 16.

³² *S v S* 2019 6 SA 1 (CC) paras 40-41, 45-49. S 34 of the *Constitution* reads: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum." S 34 guarantees a fair process, not "a correct outcome" (*Eke v Parsons* 2016 3 SA 37 (CC) para 48).

³³ *AF v MF* 2019 6 SA 422 (WCC) paras 37-56. Also see Ramotsho 2018 *De Rebus* 11.

³⁴ *Maguru v Road Accident Fund* (1166/2018) [2019] ZALMPPHC 46 (4 October 2019) para 19.

³⁵ *Gauteng Lions Rugby Union* para 15; *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC* 2010 5 SA 124 (CC) para 8 (hereafter *Hennie de Beer Game Lodge*).

the court for good reason in the exercise of its discretion deprives him of those costs."³⁶

The authority to determine liability for costs vests with a court.³⁷ South African courts exercise a wide discretion on the award of costs and the scale to be applied thereto. Since "[c]ourts are all about justice and equity",³⁸ all legally relevant factors must be considered when it decides what "would be fair and just between the parties"³⁹ as regards matters related to costs. In this context, a court must guard against usurping a Taxing Master's function.⁴⁰

The only real comfort for a losing party is that costs are generally awarded on the relatively low party-and-party scale.⁴¹ On this scale costs are recouped at the tariff prescribed by the rules of court. The tariffs are part of the law.⁴² Thus, respect for them is a basic tenet of the rule of law. The

³⁶ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A) 863; *Ferreira v Levin* 1996 2 SA 621 (CC) para 3. When litigants are in a relationship of trust (such as in employment or partnership), which relationship will continue after a lawsuit is finalised, then each party is normally held liable for his own costs. See *Long v South African Breweries (Pty) Ltd* 2019 5 BCLR 609 (CC) paras 28-32. Another exception to the usual rule that costs follow the result is the *Biowatch* principle emerging from *Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 (CC). In *Harriell v University of Kwa-Zulu Natal* 2018 1 BCLR 12 (CC) para 11, the principle was explained as follows: "That rule applies in every constitutional matter involving organs of State. The rule seeks to shield unsuccessful litigants from the obligation of paying costs to the state. The underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights." This rule does not, however, apply when constitutional litigation is found to be vexatious, frivolous, or instituted in bad faith. See *Ferguson v Rhodes University* 2018 1 BCLR 1 (CC) para 27.

³⁷ *Graphic Laminates CC v Albar Distributors* 2005 5 SA 409 (C) 412H-I.

³⁸ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 41 (hereafter *Public Protector v SARB*).

³⁹ *Fripp v Gibbon & Co* 1913 AD 354 363. An appellate court will interfere with a lower court's decision on costs only if a material misdirection is shown to exist. See *Public Protector v SARB* para 144. In *Public Protector v CSARS* 2021 5 BCLR 522 (CC) para 31 the court held that the principle of appellate court restraint preserves judicial comity.

⁴⁰ *AD v MEC for Health and Social Development, Western Cape Provincial Government* 2017 5 SA 134 (WCC) para 9 (hereafter *AD v MEC*).

⁴¹ *Maribatsi v Minister of Police* 2021 6 SA 470 (GJ) para 14. When awarding costs on the attorney-client scale, a "true discretion" (*Public Protector v CSARS* para 31) is exercised. A higher scale "is not an appropriate response to perceived inadequacies in the rules" (*AD v MEC* para 20). As a rebuke for conduct "indicative of extreme opprobrium" (*Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of South Africa* 2016 37 ILJ 2815 (LAC) para 46), a court may award a higher scale or disallow a practitioner's fees. For a rebuke to be sustained, the procedure laid down in *Motswai v Road Accident Fund* 2014 6 SA 360 (SCA) paras 46, 59 must be followed.

⁴² *Penwill v Penwill* 2020 12 BCLR 1419 (CC) para 16. The tariff is the default position (or point of departure). See *Coetzee v Taxing Master, South Gauteng High Court* 2013 1 SA 74 (GSJ) para 14 (hereafter *Coetzee*).

tariffs are not updated regularly, and the fee rates applied for attorneys are not market-related. Thus, on a party-and-party scale, a cost creditor is not indemnified at a level equal to the actual fees incurred on an attorney-own-client basis. Under Uniform Rule 70(3), a successful litigant is, as the cost creditor, entitled to "a full indemnity for all costs reasonably incurred". This, however, falls short of a complete indemnity for all costs actually incurred during the litigation.

4.2 Due process: nature and extent of cost debtor's pre-taxation rights

A cost creditor is entitled to an indemnity for costs, either at the scale ordered or as agreed between litigants.⁴³ To this end, a bill of costs is prepared either by an attorney or by a cost consultant, and then duly certified by an attorney.⁴⁴ The bill itemises "all such payments as have been necessarily and properly made"⁴⁵ for which indemnification is sought. Due process requires that a copy of the bill is served on a cost debtor prior to a taxation being set down.⁴⁶

In terms of Uniform Rule 70(3B)(a)(i), a cost debtor is, in addition to being entitled to prior notice of a bill of costs, entitled to "inspect such documents or notes pertaining to any item on the bill". The word "any" is an indefinite word that, in this context, has the effect of casting the ambit of its subject ("item") very wide.⁴⁷ Accordingly, when interpreted linguistically and contextually, "any item" indicates that the right of inspection has an extremely wide reach. This is consistent with the purpose of the procedural right to conduct an inspection, namely, to undertake a thorough verification

⁴³ *Meer v The Taxing Master* 1967 4 SA 652 (D) 655.

⁴⁴ Uniform Rule 70 item E(3)(a).

⁴⁵ Magistrates' Court Rule 33(15)(a). Despite the wording of this sub-rule, actual (prior) payment is not a pre-requisite for a reimbursement claim. See Van Loggerenberg *Jones & Buckle* Rule 33–15.

⁴⁶ Uniform Rule 70(3B)(a) reads: "Prior to enrolling a matter for taxation, the party who has been awarded an order for costs shall, by notice as near as may be in accordance with Form 26 of the First Schedule — (i) afford the party liable to pay costs at the time therein stated, and for a period of ten (10) days thereafter, by prior arrangement, during normal business hours and on any one or more such days, the opportunity to inspect such documents or notes pertaining to any item on the bill of costs; and (ii) require the party to whom notice is given, to deliver to the party giving the notice within ten (10) days after the expiry of the period in subparagraph (i), a written notice of opposition, specifying the items on the bill of costs objected to, and a brief summary of the reason for such objection."

⁴⁷ For the meaning and effect of "any", see *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 7 BCLR 762 (CC) paras 33-35.

of all items and corresponding sums in a bill which a cost creditor seeks to recover from a cost debtor.⁴⁸

In *FMA Inc Goliath DJP* (as she then was) held, correctly so, that Uniform Rule 70(3B) confers a right of inspection that entails a right to access all material of whatsoever nature related to every item on a bill, including any relevant document or note protected from disclosure during litigation owing to legal privilege. In an era underscored by the values of openness and transparency, "Rule 70 does not provide any mechanisms to shield any bill from scrutiny or to conduct a taxation under the veil of secrecy."⁴⁹ A restriction placed on a cost debtor's rights to access and to inspect documents "is incompatible with the clear and unambiguous language of Rule 70", which envisages "a transparent process".⁵⁰

Linguistically, the phrase "shall by notice" appearing in Uniform Rule 70(3B) indicates that this sub-rule is couched in peremptory terms.⁵¹ It imposes an obligatory duty on a cost creditor to deliver a written notice of the nature indicated therein and then to permit a cost debtor an unfettered right to inspect every document and note pertaining to each and every item covered by the bill.⁵² Such a broadly construed right to access to and inspection of documents promotes the fulfilment of a pivotal goal underpinning an inspection, namely, "to undertake a thorough process of verification in relation to claims for payment made on a bill".⁵³ If the verification process is hindered through limits imposed by cost creditors for their benefit, then cost debtors would be "denied a fair opportunity to object"⁵⁴ as catered for in Uniform Rule (3B)(a)(ii).

A refusal to permit access to material relevant to an item claimed in a bill would be an effective denial of justice. This is because it would inhibit a cost debtor's ability to properly formulate grounds of objection and to find evidence that can be placed before a Taxing Master to satisfy him that, as contemplated by Uniform Rule 70 item E(3)(b)(ii), fees in a party-and-party bill are charged *inter alia* for work not actually done or at an excessive rate. Such a state of affairs would be inimical to the rule of law and is offensive to the fair hearing right entrenched in section 34 of the *Constitution*. This right applies equally in the realm of taxations before a Taxing Master.⁵⁵ Therefore, in *FMA Inc Goliath DJP* set aside an inspection at which the cost

⁴⁸ *Fareed Moosa & Associates Inc v Taxing Master, Western Cape High Court* (12607/20) [2021] ZAWCHC 134 (12 July 2021) para 25 (hereafter *FMA Inc*).

⁴⁹ *FMA Inc* para 29.

⁵⁰ *FMA Inc* para 29.

⁵¹ *FMA Inc* para 24.

⁵² *FMA Inc* para 24.

⁵³ *FMA Inc* para 25.

⁵⁴ *FMA Inc* para 26.

⁵⁵ For further discussion hereof, see Moosa 2022 SALJ 623.

debtor was, on the basis of litigation privilege, refused access to documents pertaining to various items on a disputed bill prepared on an attorney-own client scale per a court order.

Goliath DJP affirmed that where a cost creditor claims privilege over material relating to any item in a bill, then questions related to the validity of such a claim and its impact on the inspection process are matters of law falling beyond a Taxing Master's competence.⁵⁶ He is "legally handicapped"⁵⁷ from adjudicating the issue of privilege. A veil of secrecy pulled over certain paperwork has the undesirable effect of keeping a cost debtor in the dark as to its contents. As a result, a cost debtor is unable to meaningfully engage at a taxation by asserting a right of objection or by defending a position taken.⁵⁸ In such circumstances a Taxing Master ought not to proceed with the taxation until after the privilege is waived (or lifted), as was ordered in *FMA Inc*. This is to ensure that a thorough inspection can first be undertaken and a comprehensive, properly formulated objection then prepared and filed.⁵⁹ Since a taxation does not occur piecemeal,⁶⁰ a cost creditor cannot enrol a bill for taxation only in respect of those parts thereof which were not subject to any claim of privilege.

4.3 Uniform Rule 70: public powers of a Taxing Master

Every high court division has a Taxing Master appointed under section 11(1) of the *Superior Courts Act*.⁶¹ Taxing Masters are creations of statute. As such, they are imbued with only those powers granted by law.⁶² A Taxing Master acts *ultra vires* and thus unlawfully if he performs any act beyond the remit of an empowering provision in a law. In this context the court rules are pertinent.

The rules of court give effect to the fundamental right of litigants entrenched in section 34 of the *Constitution*.⁶³ The court rules are a species of

⁵⁶ *FMA Inc* para 27.

⁵⁷ *FMA Inc* para 30.

⁵⁸ *FMA Inc* para 26.

⁵⁹ In response to an objection a cost creditor may amend the bill under UR 28(1). In the absence of agreement between the parties, any financial prejudice caused to the cost debtor is a matter that ought to be raised at taxation. See Kruger and Mostert *Taxation of Costs* 27-28. A cost creditor may also, in accordance with UR 40(1), withdraw a notice of taxation and a bill of costs. In such instance, wasted costs ought to be tendered. See *Matsaung v Mathedimosa* (1101/2019) [2022] ZALMPPHC 33 (27 June 2022) paras 6-8

⁶⁰ *Scott v Nel* 1963 2 SA 384 (E) 387.

⁶¹ *Superior Courts Act* 10 of 2013.

⁶² See *Composting Engineering (Pty) Ltd v The Taxing Master* 1985 3 SA 249 (C) 250G-J; *Berman v Fialkov and Lumb* 2003 2 SA 674 (C) paras 22-25 (hereafter *Berman*). For a discussion of a Taxing Master's lack of competence regarding reserve cost orders, see Shiells 2018 *De Rebus* 31.

⁶³ *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 2 SA 137 (SCA) para 24.

subordinate legislation akin to regulations.⁶⁴ They are made by the Rules Board in accordance with the *Rules Board for Courts of Law Act*.⁶⁵ Uniform Rule 70(1)(a) is a key source of a Taxing Master's authority to tax a party-and-party bill of costs. It reads:

The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do.

Taxations have two primary aims. First, to assess, quantify and certify costs;⁶⁶ second, to ensure a "moderating" or "equitable"⁶⁷ balance is struck, within reasonable bounds, between the competing interests of a losing litigant, who should not be required to pay excessive charges, and those of a victorious litigant, who should not be indemnified inadequately.⁶⁸ Thus, a Taxing Master functions to keep a watchful eye over the reasonableness of charges, quantifying costs, and affixing "just remuneration"⁶⁹ on a certificate (or *allocator*). Once this certificate is issued, a Taxing Master is *functus officio*, save for supplying a stated case under Uniform Rule 48(3) in review proceedings. If a cost debtor fails to pay in accordance with the obligations arising from an *allocator*, then payment may be enforced through a writ of execution. A summons need not be issued.

Taxations do not occur in the abstract. The litigation to which a bill relates is integral to understanding the bill's context and the background to claims for payment. Although a Taxing Master is not a judicial officer, a taxation is a judicial proceeding.⁷⁰ As such, only legal practitioners with rights of appearance in superior courts have the right of audience at a taxation.⁷¹ When viewed through the lens of section 34 of the *Constitution* (quoted above in note 32), a taxation is a proceeding in an independent "forum" where a Taxing Master must act independently without fear, must tax a bill fairly and impartially without favour to anyone, must ensure that a taxation

⁶⁴ *CT v MT* 2020 3 SA 409 (WCC) para 12.

⁶⁵ *Rules Board for Courts of Law Act* 107 of 1985. See *AD v MEC* para 19; *Computer Brilliance CC v Swanepoel* 2005 4 SA 433 (T) para 36.

⁶⁶ *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* 1939 WLD 159 165.

⁶⁷ *Hennie de Beer Game Lodge* para 8. Also see *Van Pletzen* para 18.

⁶⁸ *Trollip* para 13; *Thusi v Minister of Home Affairs and 71 Other Cases* 2011 2 SA 561 (KZP) 612D-E. For the aims of taxation, see *Mouton v Martine* 1968 4 SA 738 (T) 742.

⁶⁹ *Trollip* para 19.

⁷⁰ *Olgar v Minister of Safety and Security* 2012 4 SA 127 (ECG) 134B-E. Thus, an *allocator* issued in an unopposed taxation can be set aside as a default judgment. See *Grunder v Grunder* 1990 4 SA 680 (C) 680J (hereafter *Grunder*) 680J-681B.

⁷¹ *Bill of Costs (Pty) Ltd v Registrar, Cape* 1979 3 SA 925 (A) 946B.

is conducted in an orderly and respectful way,⁷² and (iv) must apply due legal process. The latter includes but is not limited to due notice of a taxation being given to a cost debtor, and that the *audi alteram partem* principle is respected at a taxation.⁷³

Taxing Masters are public officials exercising public power.⁷⁴ All such power must be exercised within the limits of the empowering statute, the *Constitution* and the law. Taxing Masters' decisions are administrative in nature.⁷⁵ Thus, the *Promotion of the Administrative Justice Act*⁷⁶ applies thereto. Any ruling made by a Taxing Master is quasi-judicial in nature.⁷⁷ It involves the exercise of discretion to permit, reduce or disallow an item. The discretion must be exercised "judicially, fairly and reasonably having due regard to the complexity of the case, the time spent, and the reasonableness of the costs incurred".⁷⁸

If a Taxing Master fails to act according to the letter and spirit of the law, then his decision(s) are reviewable under Uniform Rule 48 (quoted in note 21).⁷⁹ Although courts have wide supervisory powers, they also exercise deference to Taxing Masters as the gatekeepers of the fairness and practicality of litigation costs. Thus, in a review, the litmus test for disturbing a decision at a taxation is—

whether there is a rational objective basis justifying the connection made by the Taxing Master between the material made available (the bill together with the grounds advanced) and the conclusion reached. The court will then consider whether a reasonable person would have arrived at the same conclusion. The court will acknowledge that they are generally not, by virtue of their office, specialist on taxation issues. The task of the reviewing judge is to primarily check the reasoning not to tax.⁸⁰

⁷² In terms of UR 70(5A)(d)(iii) read with (e), contempt of court proceedings may be initiated against anyone misbehaving at a taxation.

⁷³ *Berman* paras 21-25.

⁷⁴ *Coetzee* para 8.

⁷⁵ *Talioe v Family Advocate* (ZAFSHC) (641/2017) [2021] ZAFSHC 71 (26 February 2021) (hereafter *Talioe*) para 25.

⁷⁶ *Promotion of the Administrative Justice Act* 3 of 2000.

⁷⁷ *Grunder* 680J, cited with approval in *Unilever plc v Polagric (Pty) Ltd* 2001 2 SA 329 (C) (hereafter *Polagric*) 133E.

⁷⁸ *Road Accident Fund v Taxing Master* (10977/2013) [2019] ZAGPPHC 305 (15 July 2019) para 5. Also see *City of Cape Town v Arun Property Development (Pty) Ltd* 2009 5 SA 226 (C) 232.

⁷⁹ *Hennie de Beer Game Lodge* paras 8-9.

⁸⁰ *Talioe* para 25. The SCA, in *RH Christie Inc v Taxing Master, Supreme Court of Appeal* (1086/2018) [2021] ZASCA 152 (27 October 2021) (hereafter *Christie Inc*) para 55, explained the position as follows: "Where he or she has acted mala fide; or from ulterior purpose or improper motives; or has not applied his mind to the matter or exercised his discretion at all; or if he disregarded regulatory prescripts, a court will be bound to interfere. A court will interfere if it is satisfied that the taxing master was clearly wrong. Of course, the court will only interfere when it is in the same or better position than the taxing master to determine the issue. This Court has stated

5 Interpretation and application of Uniform Rule 70

5.1 Uniform Rule 70 tariff item A(10): scope and ambit interpreted

As explained above in part 4, a taxation is based on fairness and practicality to produce a just outcome.⁸¹ The tariff item A(10) in Uniform Rule 70 applies whenever a Taxing Master taxes charges in a party-and-party bill related to an attorney performing an advocate's functions during high court litigation. It stipulates that "[t]he tariff under rule 69 shall apply" to an "[a]pppearance by an attorney in court or the performance by an attorney of any of the other functions of an advocate". When interpreting this provision, the ordinary rules of statutory interpretation apply. This entails construing the language of the text in the light of its context, its purpose and the normative code in section 39(2) of the *Constitution*.⁸²

An interpretive analysis of Uniform Rule 70 tariff item A(10) reveals that it is not couched in permissive language. Rather, its clear, unambiguous wording is to the effect that the Taxing Master is instructed to apply the tariff in Uniform Rule 69. As such, the Taxing Master is under a positive duty to comply with the obligation ("shall apply"), except in cases where the invocation of the discretionary power under Uniform Rule 70(5)(a) to deviate from the tariff can be justified, namely if exceptional or extraordinary circumstances exist which would lead to inequitable results if the prescribed tariff in item A(10) were to be strictly applied.⁸³

Whereas Uniform Rule 69 permits advocates' fees to be assessed on the basis of reasonableness, attorneys' fees are, under Uniform Rule 70, taxed at a low tariff amount. Thus, if attorneys' fees for services as counsel are taxed at the latter set tariff, then a cost debtor would be financially better off than if Uniform Rule 69 were applied. For cost creditors, the opposite holds true.

it will only interfere when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate his ruling." Also, see *Gauteng Lions Rugby Union* paras 13-14.

⁸¹ To ensure a bill is properly debated and taxed, and that the wrong party is not saddled for a debt to pay costs, a bill must be prepared in a form that accords with the order from which it stems. In some cases separate bills of costs for different parts of the same matter are not only desirable but necessary. See *Gauteng Lions Rugby Union* para 16.

⁸² *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 28.

⁸³ Uniform Rule 70(5)(a) reads: "The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable." For discussion hereof, see *Aircraft Completions Centre* paras 92-94. UR 70(5)(a) allows for the tariff *quantum* to be adjusted, and for items not in the tariff to be included in a bill. See *Vaatz* para 30.

Taxing Masters must strike an equitable balance in the light of all relevant facts of a matter.⁸⁴ Some flexibility is allowed. A deviation from item A(10) can occur in rare ("extraordinary or exceptional") cases when an "oppressive"⁸⁵ result would ensue owing to a strict adherence to Uniform Rule 69. A deviation, in rare cases only, accords with Uniform Rule 70(3) embodying the trite rule that cost creditors ought not to be left out of pocket to an unreasonable degree.⁸⁶ The "ultimate winner of a suit should not have the fruits of victory reduced by having to pay too high a proportion of his or her costs by way of an attorney and client bill".⁸⁷ When a taxation brings about such a result, then it has served its aim of achieving "a just balance between victory and defeat".⁸⁸

The aim of the tariff prescribed in item A(10) is to provide a level of indemnity for expenses incurred when services are rendered by an attorney which are commensurate with the indemnity afforded to cost creditors when an advocate performs the same functions. A purposive interpretation of item A(10) requires that effect be given hereto when it is applied in civil practice. Likewise, this provision must be understood in the light of its historical context and the transformation of the legal profession under the *LPA*.

As explained in part 1, during apartheid attorneys were victims of unfair discrimination – they were denied rights of audience in superior courts. Post-democracy, some levelling of the playing field occurred by the conferral of the right to appear in superior courts. The *LPA*'s transformative aims reinforce this position. Although the *LPA* unifies the legal profession, it has not fused advocates and attorneys into a single vocation. This is unlike the position in Namibia, for example.⁸⁹ Under the *LPA*, both vocations are retained as separate but equal arms of a unified legal profession. The *LPA* also gives recognition to all pre-existing rights of legal practitioners acquired under laws antecedent to it,⁹⁰ including recognition of the senior counsel status reserved for advocates,⁹¹ and the right of audience in any superior court.⁹² Subject to a three-year exclusion, the *LPA* grants attorneys admitted

⁸⁴ *Gauteng Lions Rugby Union* para 15.

⁸⁵ *Trollip* para 15.

⁸⁶ *Kloot v Interplan Inc* 1994 3 SA 236 (SECLD) 239H.

⁸⁷ *Trollip* para 15.

⁸⁸ *Zanella* para 26.

⁸⁹ See *Vaatz* para 11.

⁹⁰ *LPA*, s 114(1).

⁹¹ *LPA*, s 114(4). For the origins of the institution of silk and the constitutionality of the conferral of this Presidential honour on advocates alone, see *Mansingh v General Council of the Bar* 2014 2 SA 26 (CC).

⁹² *LPA*, s 114(5).

in terms thereof an entitlement to be conferred the right of appearance in a superior court.⁹³

The tariff item in A(10) must be interpreted against this history. This is particularly so because reference is made therein to the *LPA*. A meaning must be given to its provisions which advances the transformative goals of the *LPA*, namely, to bring about a measurable degree of equality between the attorneys and advocates arms of the legal profession. Therefore, an interpretation of tariff item A(10), which fosters the treatment of attorneys in like fashion with advocates as to costs, ought to be preferred over any interpretation, as in *MF Corporation*,⁹⁴ that does not.

The view that attorneys and advocates are to be treated on a par has received the *imprimatur* of South Africa's judiciary. In *Promine Agentskap en Konsultante Bpk v Du Plessis*,⁹⁵ Van Dijkhorst J held that the same work done by attorneys and advocates of equal seniority, experience and ability is to be compensated in an equal manner. In accordance with Van Dijkhorst J's decision, Majid J, in *Stubbs v Johnson Brothers Properties CC*,⁹⁶ held that an attorney appearing as counsel "cannot expect to be treated any differently as regards his fees for appearance than would an advocate." Similarly, Ebersohn AJ remarked in *Ndzamela v Eastern Cape Development Corporation Ltd*⁹⁷ that an attorney appearing in a high court "is entitled to similar treatment as a counsel." In *Stevens v Maloyi*,⁹⁸ Tshiki J held that an attorney appearing in a high court "is entitled to charge as though he is an Advocate." In *Ramuhovhi*⁹⁹ the Constitutional Court expressly supported Tshiki J's *dictum* and that of Van Dijkhorst J referred to above. Accordingly, the apex court rejected the contrary approach of Bloem J in *MF Corporation*¹⁰⁰ and supported Tshiki J's principled decision, "which is not to equate the professions of attorneys and those of advocates but to do justice."¹⁰¹

Based on the foregoing, when applying the tariff item A(10) an attorney rendering services as counsel in a high court is entitled as of right to be

⁹³ *LPA*, s 25(3). In terms hereof, newly admitted attorneys cannot appear in any superior court until the lapse of three years from the date of their admission or the completion of a further training course, whichever occurs first. This barrier against the acquisition of a right of audience does not apply to newly admitted advocates. S 25(3) limits the rights of certain attorneys to equality (s 9), to human dignity (s 10), and to freely practice a profession (s 22). A consideration of its constitutionality through the prism of s 36 of the *Constitution* is beyond the scope of this article.

⁹⁴ *MF Corporation* para 16.

⁹⁵ *Promine Agentskap en Konsultante Bpk v Du Plessis* 1998 JOL 3912 (T) para 9.

⁹⁶ *Stubbs v Johnson Brothers Properties CC* 2004 1 SA 22 (N) 28E.

⁹⁷ *Ndzamela v Eastern Cape Development Corporation Ltd* 2004 6 SA 378 (TkH) 386D.

⁹⁸ *Stevens v Maloyi* 2012 JDR 2548 (ECP) (hereafter *Maloyi*) para 19.

⁹⁹ *Ramuhovhi* para 68.

¹⁰⁰ See *MF Corporation* para 8.

¹⁰¹ *Maloyi* para 19.

remunerated in an amount "equivalent to what the advocate of the same experience would have justifiably charged."¹⁰² This aligns with the conclusion reached by Landman J in *Maseka*.¹⁰³ *In casu*, he held that an appearing attorney briefed in preference to an advocate who performs the functions ordinarily done by an advocate "is entitled under Rule 69 to be remunerated at the same rate as counsel." In line with Van Dijkhorst J's views endorsed by the apex court in *Ramuhovhi*, an appearing attorney ought to be compensated at the level of an advocate of similar standing to the attorney in seniority, qualification, experience, and skill.

5.2 Value-based interpretation of Uniform Rule 70 tariff item A(10)

When a Taxing Master engages in a textual *cum* contextual *cum* purposive interpretation of item A(10) housed in subordinate legislation for the purposes of applying this tariff correctly in practice, the result for a party-and-party bill ought to be, as shown above in part 5.1, that the *quantum* of attorneys' fees for executing functions historically performed by advocates is to be determined on the same basis of a "reasonable fee" as applied under Uniform Rule 69 to the taxation of a counsel's fee account. However, this is not the end of the interpretive exercise. Section 39(2) of the *Constitution* also applies in this setting.¹⁰⁴ In accordance therewith, an interpretation of item A(10) must promote at least one identifiable constitutional value.¹⁰⁵ If a Taxing Master fails to interpret or apply the tariff properly, then decisions made at the taxation may be set aside on review.

None of the judgments discussed above in part 5.1 interpreted Uniform Rule 70, or the tariff under item A(10), through the prism of the *Constitution*. Section 39(2) commands that relevant fundamental rights and values imbricated in the Bill of Rights be infused into the interpretation of "any legislation". This includes any subordinate legislation, such as court rules. To promote the "spirit, purport and objects of the Bill of Rights" in the context of item A(10) requires that Taxing Masters interpret its provisions in a manner that is infused with respect for an attorney's entrenched rights to

¹⁰² *Maloyi* para 19.

¹⁰³ *Maseka* para 52.

¹⁰⁴ Section 39(2) of the *Constitution* reads: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

¹⁰⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 72.

equality¹⁰⁶ and human dignity,¹⁰⁷ as well as to the values of equality and dignity deeply engrained therein.

Section 9(3) of the *Constitution* prohibits unfair discrimination. It "provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner."¹⁰⁸ The list of prohibited grounds for discrimination stated in section 9(3) is not finite or exhaustive. Other grounds not specifically mentioned may be included within its remit if it is consistent with grounds expressly encompassed thereby. It is submitted that discrimination on the grounds of professional status would be covered.

Consequently, if the benefits flowing from an application of the tariff in Uniform Rule 69 is denied to an attorney in circumstances where the provisions of the tariff in item A(10) of Uniform Rule 70 is triggered, and such denial is based on the service provider's professional status as an attorney who is not admitted to practice as an advocate, then such denial of benefits conferred in any law would be unfair discrimination inimical to section 9 of the *Constitution*.

Any such denial of benefits is also injurious to the dignity of any affected attorney. This is because the non-conferral of the benefits arising from Uniform Rule 69 on the grounds of professional status strikes, first, at the heart of an attorney's professional identity. Secondly, it strikes at an attorney's position (or standing) in a unified profession under the *LPA*. It conveys to an attorney that his professional status is in the eyes of the law not of equal weight as that of an advocate. The effect hereof is to stigmatise attorneys and diminish their sense of self-worth. In sum, failure by a Taxing Master to apply the tariff in Uniform Rule 69 for the benefit of a particular attorney would, in the absence of compelling exceptional or extraordinary circumstances envisaged by Uniform Rule 70(5)(a) (see above in part 5.1), infringe an affected attorney's right to dignity and be offensive to the values of human dignity and equality. Thus, such a failure ought to be a reviewable error.

5.3 Practical application of Uniform Rule 70 and the tariff item A(10)

In this part answers are postulated for the sub-questions posed above in part 2, which arise in relation to the application of item A(10) when attorneys appear as counsel in high court litigation. In this regard, *Maseka* is important.

¹⁰⁶ The relevant excerpts from s 9 of the *Constitution* read: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the equal enjoyment of all rights and freedoms."

¹⁰⁷ Section 10 of the *Constitution* reads: "Everyone has inherent dignity and the right to have their dignity respected and protected."

¹⁰⁸ *Volks v Robinson* 2005 5 BCLR 446 (CC) para 79.

The material facts in *Maseka* are: Rooth and Wessels Inc were appointed as attorneys in a high court bid to strike Mr Maseka off the roll of legal practitioners. Mr Albert Lamey, an attorney employed at the firm, was briefed to act as counsel.¹⁰⁹ Mr Lamey successfully argued the case. Costs was awarded on a party-and-party scale. Mr Lamey issued an account for services rendered as counsel. Rooth and Wessels Inc's bill of costs was set down for taxation. The following items in the bill formed the cornerstone of objections made under Uniform Rule 70(3B)(a): the attorney firm's fees for perusal of documents in its office file separate from Mr Lamey's brief as counsel (such as, perusing the index, Mr Lamey's heads of argument, and his fee account);¹¹⁰ the attorney firm's fees for drawing Mr Lamey's brief, copying documents for his brief, and paginating and indexing that brief;¹¹¹ and Mr Lamey's fee account for work done as counsel (such as, fees for drafting heads, for preparation, for appearance at court, and for perusing the court order).¹¹²

In a well-reasoned judgment Landman J upheld the Taxing Master's decisions favouring the indemnification for these various charges claimed in the bill. Landman J confirmed that, as with an advocate's fee list, an attorney's account for work done as counsel must be dealt with under Uniform Rule 69.¹¹³ Therefore, the review was correctly dismissed.

Maseka is authority for the hypothesis that the tariff in Uniform Rule 69(5) applies whenever an attorney steps into the shoes of counsel, even if he works at the same law firm as that instructing him as advocate.¹¹⁴ *Maseka* is also the authority for the view that the fees of an attorney functioning as counsel may be charged as a disbursement if an account is issued to the instructing firm who is liable to settle the same, as with an advocate's account. If not, then those costs are to be included in the fee column of a bill at the rate allowed by Uniform Rule 69. The costs of any attorney who undertook work ordinarily done by attorneys also appear in the fee column but at the lower tariff under Uniform Rule 70.

¹⁰⁹ *Maseka* para 20.

¹¹⁰ *Maseka* paras 45-46 (peruse index), 57 (peruse heads), 58 (peruse fee account).

¹¹¹ *Maseka* para 49 (copies for brief), 56 (drawing brief), 59 (paginate and index brief).

¹¹² *Maseka* paras 52 (court appearance and perusal of order), 61 (preparation for hearing).

¹¹³ Uniform Rule 69(5) reads: "The taxation of advocates' fees as between party and party shall be effected by the taxing master in accordance with this rule and, where applicable, the tariff. Where the tariff does not apply, he shall allow such fees (not necessarily in excess thereof) as he considers reasonable." In *Gauteng Lions Rugby Union* para 50, it was held, in relation to determining the reasonableness of counsel's fees, that "the ultimate test is not whether the rate charged and/or the time spent is reasonable but whether the resultant amount is fair to award on a party and party basis".

¹¹⁴ *Maseka* paras 47-48.

This form of accounting applies equally to cases where, in one litigious matter, the same attorney performs the services usually done by attorneys and those ordinarily done by advocates. An instructing attorney is not a prerequisite. This aligns with the position now applicable to advocates practising with fidelity fund certificates. Under the *LPA* they are entitled to deal directly with the public and render services usually performed by attorneys.¹¹⁵ Uniform Rule 69(6) applies in such instances.¹¹⁶ Until a similar rule is legislated for attorneys who render the services of an attorney and of a counsel, the practice catered for in Uniform Rule 69(6) should be used, with the necessary contextual changes, for an attorney's party-and-party bill. This uniformity and consistency in the application of the law of costs is desirable as *inter alia* it promotes legal certainty, a tenet of the rule of law - a foundational value entrenched in section 1(c) of the *Constitution*.

Taxing Masters are duty-bound to make all necessary enquiries to ensure that charges claimed as counsel's fees are not duplicated as attorney's fees. The rule against allowing inflated or duplicated costs cannot, however, be used as a basis to deny indemnification under Uniform Rule 70 for work actually and necessarily done by a practitioner *qua* attorney, even though some attendances, such as the perusal of pleadings, may also be undertaken by an attorney briefed as counsel, for which fees are legitimately claimable in a party-and-party bill, as was held in *Maseka*. Indemnification for both claims will not, however, be permitted where the same practitioner did the same work twice.¹¹⁷

Maseka also has precedential value for the salutary principle that an appearing attorney is entitled to the same rights and privileges customarily enjoyed by an advocate, including but not limited to being supported by an attorney who *inter alia* undertakes the preparatory and other administrative work related to the litigation and attends court to assist the appearing attorney. As such, *Maseka* endorses the preferred view that when an instructing attorney briefs another attorney as counsel, whether in-house or not, then the client is entitled to a full indemnity under Uniform Rule 70(3) for the costs actually and reasonably incurred in briefing the counsel (such

¹¹⁵ *Matsaung* para 22.

¹¹⁶ Uniform Rule 69(6) reads: "For advocates referred to in section 34(2)(a)(ii) of the Legal Practice Act, 2014 ... the tariff of fees as between party and party shall be in accordance with this rule and the tariff in Rule 70, whichever tariff items are applicable to the services rendered by the advocate: Provided that where an attendance performed by an advocate constitutes a service ordinarily performed by an attorney, the tariff in Rule 70 shall apply to that attendance."

¹¹⁷ While Taxing Masters may not ignore evidence relevant to any issue arising at a taxation, this does not equate to an *onus* on legal practitioners to prove fees claimed in a bill. They are presumed to act ethically in raising or claiming charges. See *Williams* para 16.

as the costs for collating, indexing and paginating a brief,¹¹⁸ and the copying costs for documents placed in counsel's brief).¹¹⁹ The fact that the person briefed also holds the title of attorney is no bar to the recovery of such costs. In this context a discussion of *Matsaung* is necessary.

In casu Bosman Attorneys represented various litigants. At the high court hearing Mr Bosman, an attorney, appeared and argued as counsel. Ms Pretorius, an attorney from the same law firm, attended court and assisted Mr Bosman as his "instructing attorney".¹²⁰ Although she had rights of appearance, Ms Pretorius did not appear in court as counsel, nor did she render services during the hearing as counsel.

In Bosman Attorneys' party-and-party bill, it claimed Ms Pretorius' fees under Uniform Rule 70 and those of Mr Bosman under Uniform Rule 69. Ms Pretorius' fees for attending court were, wrongly so it is submitted, taxed off *in toto*. The Taxing Master based his decision on two grounds: first, there was no court order allowing the cost of two attorneys or two counsel;¹²¹ secondly, Uniform Rule 70 does not allow an attorney to appear in court as counsel with another attorney assisting him.¹²² On review Kganyago J upheld the disallowance of Ms Pretorius's fees.¹²³

It is submitted that this outcome is out of kilter with the relevant law and its application to the facts concerned. The nub of Kganyago J's decision appears *ex facie* the following extract:

Both Mr Bosman and Ms Pretorius have enrolled with the Legal Practice Council (LPC) as attorneys and have direct access to their clients. They are able to take instructions directly from their clients and they don't need a go-between. The same will apply to apply to an advocate with a fidelity fund certificate. ... There is nothing preventing more [than] one attorney assisting each other in representing one client. However, it is not given that both attorneys will be able to recover costs on party and party scale from the losing party. They will have to make application before court why the costs of more one attorney was justified in that matter, and the court must specifically make that order. [emphasis added]

The two-attorney rule applicable to party-and-party bills is regulated by Uniform Rule 70(8). It confers discretion on a Taxing Master to allow the costs of more than one attorney where he opines that a second attorney was necessarily engaged to perform services covered by the tariff. This sub-

¹¹⁸ *Maseka* paras 53, 56.

¹¹⁹ *Maseka* para 49. The costs of copying documents in counsel's brief are dealt with in UR 70(6).

¹²⁰ *Matsaung* paras 20-21.

¹²¹ *Matsaung* para 8.

¹²² *Matsaung* para 21.

¹²³ *Matsaung* paras 22-23.

rule applies where more than one attorney's firm is appointed in the same matter to render services *qua* attorney.¹²⁴

Uniform Rule 70(8) does not apply in cases such as *Maseka* and *Matsaung*, where two attorneys appeared at court to perform different functions: one as counsel and the other as attorney. Kganyago J erred in holding that where two attorneys appear in court they must apply for a special costs order. This is inconsistent with Uniform Rule 69(1) which reads:

Save where the court authorises fees consequent upon the employment of more than one advocate to be included in a party and party bill of costs, only such fees as are consequent upon the employment of one advocate shall be allowed as between party and party. [emphasis added]

In *Maseka* Landman J, correctly so it is submitted, allowed the costs of Mr Lamey, as counsel, and his instructing (correspondent) attorney. No special costs order was granted as envisaged by Uniform Rule 69(1) as no such costs order was required. The plain language of Uniform Rule 69(1) indicates that its procedural requirement applies only when more than one person is employed as an advocate. When an attorney performs the administrative, support and/or other functions usually done by an attorney, and another attorney is employed to perform an advocate's function, then the triggering requirement for the invocation of Uniform Rule 69(1) is not met.

The appearance of two attorneys at a hearing cannot be decisive in this regard, nor is the fact that both attorneys have rights of audience in a high court. The pivotal consideration is the actual function performed by the attorneys whilst in court. Only if both attorneys appeared in the role of counsel and actually performed work ordinarily done by advocates in court then, for party-and-party costs purposes then, it is submitted, judicial authorisation would be needed to recover the fees of an additional counsel. This view is supported by *Ramuhovhi*.¹²⁵

The Taxing Master's interpretation in *Matsaung* that Uniform Rule 70 does not permit an attorney to appear as counsel with another attorney assisting him is at odds with the interpretive analysis of this rule discussed above and it conflicts with *Maseka*. Landman J expressly held that attorneys appearing as counsel are entitled to be placed in the same position as advocates appearing in that role. This includes being supported, in court by an attorney. In *Matsaung* Kganyago J did not interpret Uniform Rule 70, nor did he comment on the Taxing Master's interpretation thereof, nor did he apply

¹²⁴ *AD v MEC* paras 7-13.

¹²⁵ In *Ramuhovhi* two attorneys appeared as counsel in the Constitutional Court. At para 68 the court held that the matter was sufficiently complex to warrant the utilisation of two legal practitioners as counsel. The court approved their request that the party-and-party costs order include the cost of two attorneys as counsel.

it in reaching his conclusion. As such, no judicial authority exists supporting the interpretation accorded to Uniform Rule 70 by the Taxing Master in *Matsaung*.

Although Kganyago J made a passing reference at paragraph 5 to *Maseka*, no intellectual engagement was undertaken with its import and application to the facts in *Matsaung*, which were materially on all fours with *Maseka*. Kganyago J also failed to reconcile his stance with the contrary approach in *Ramuhovhi*. There, the apex court emphasised the need for equality of treatment between practitioners appearing in similar circumstances. In *Matsaung* the advocates appearing in opposition to Mr Bosman were aided in court by instructing attorneys. Under a party-and-party costs order, those attorneys would be entitled to their appearance fees without the need for judicial authorisation. Merely because an attorney is entitled to deal directly with his client, it is submitted, contrary to Kganyago J's view, is no justification in law for an attorney in the position of Ms Pretorius to be treated unequally in comparison with their opponents. After all, as professional persons they are all equally entitled to be fairly compensated on a party-and-party basis for their preparation and attendance at court, as well as for all the thought, concern and responsibility that went into the litigation.¹²⁶

7 Conclusion

This article shows that Taxing Masters are important cogs in the wheels of justice. A taxation is a proceeding envisaged by section 34 of the *Constitution*. As such, constitutional, procedural and other applicable substantive law rights of affected role players must be respected and protected during a taxation. If not, then Taxing Masters will not properly fulfil their role as the gatekeepers of fairness, equity and justice in the determination of the recoverability of litigation costs. This article demonstrates further that when a party-and-party bill includes charges related to an attorney who performed the functions of an advocate in superior court litigation, then a Taxing Master ought not to apply a standard or set of rules to its assessment which is different from that which would be applied when assessing the fairness of an advocate's fee in relation to the same litigation work. Such a situation would be inimical to the tenets of the rule of law promoting justice, fairness, equity and equality for all.

Uniform Rule 70 must be read within its broader context of a transforming legal profession under the *LPA* whose ethos embraces a ringing rejection of the disgraceful past practices of inequality between attorneys and advocates, and whose aim includes a levelling of the playing field by promoting equality between these two vocations. The interpretation of Uniform Rule 70 advanced in this article is, in accordance with the

¹²⁶ *Trollip* para 24.

interpretive philosophy in section 39(2) of the *Constitution*, suffused with the values of human dignity, equality and the advancement of equal treatment among similarly positioned practitioners. As such, Taxing Masters ought to embrace the principle that attorneys are entitled, as of right, to equal pay for equal work done as counsel. A contrary approach would endorse the undesirable notion that advocates are, somehow, more equal than attorneys. Such a view is antithetical to constitutional values and to attorneys' fundamental rights to human dignity and equality, all of which are in play when a Taxing Master exercises his public powers at a taxation.

Bibliography

Literature

Kruger and Mostert *Taxation of Costs*

Kruger A and Mostert W *Taxation of Costs in the Higher and Lower Courts: A Practical Guide* (LexisNexis Durban 2010)

Moosa 2022 *SALJ*

Moosa F "Taxation of Legal Costs: Is a Cost Creditor Shielded by Legal Professional Privilege" 2022 *SALJ* 623-649

Ramotsho 2018 *De Rebus*

Ramotsho K "High Litigation Costs Deprive the Poor Access to Justice" 2018 Nov *De Rebus* 11

Shiells 2018 *De Rebus*

Shiells B "The Impasse of Reserved Costs: The Winning Party Does Not Take It All" 2018 March *De Rebus* 31

Slabbert 2011 *PELJ*

Slabbert M "The Requirement of Being a 'Fit and Proper' Person for the Legal Profession" 2011 *PELJ* 209-232

Van Loggerenberg *Jones & Buckle*

Van Loggerenberg DE *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa, Vol II: The Rules* 10th ed (Juta Cape Town 2022 online)

Case law

ABSA Bank Ltd v Barinor New Business Venture (Pty) Ltd 2011 6 SA 225 (WCC)

AD v MEC for Health and Social Development, Western Cape Provincial Government 2017 5 SA 134 (WCC)

AF v MF 2019 6 SA 422 (WCC)

Afshani v Vaatz (SCR01-2004) [2007] NASC 3 (18 October 2007)

- Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 1 SA 123 (W)
- Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 7 BCLR 762 (CC)
- Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC)
- Berman v Fialkov and Lumb* 2003 2 SA 674 (C)
- Bill of Costs (Pty) Ltd v Registrar, Cape* 1979 3 SA 925 (A)
- Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 (CC)
- Cape Bar v Minister of Justice and Correctional Services* 2020 6 SA 165 (WCC)
- City of Cape Town v Arun Property Development (Pty) Ltd* 2009 5 SA 226 (C)
- Coetzee v Taxing Master, South Gauteng High Court* 2013 1 SA 74 (GSJ)
- Composting Engineering (Pty) Ltd v The Taxing Master* 1985 3 SA 249 (C)
- Computer Brilliance CC v Swanepoel* 2005 4 SA 433 (T)
- Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC)
- CT v MT* 2020 3 SA 409 (WCC)
- De Freitas v Society of Advocates of Natal* 2001 3 SA 750 (SCA)
- Eke v Parsons* 2016 3 SA 37 (CC)
- Ex parte Goosen* 2019 3 SA 489 (GJ)
- Fareed Moosa & Associates Inc v Taxing Master, Western Cape High Court* (12607/20) [2021] ZAWCHC 134 (12 July 2021)
- Ferguson v Rhodes University* 2018 1 BCLR 1 (CC)
- Ferreira v Levin* 1996 2 SA 621 (CC)
- Fripp v Gibbon & Co* 1913 AD 354
- Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 2 SA 137 (SCA)
- Graphic Laminates CC v Albar Distributors* 2005 5 SA 409 (C)
- Grunder v Grunder* 1990 4 SA 680 (C)
- Harrielall v University of Kwa-Zulu Natal* 2018 1 BCLR 12 (CC)

Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC 2010 5 SA 124 (CC)

In re: Rome 1991 3 SA 291 (A)

Johannesburg Society of Advocates v Nthai 2021 2 SA 343 (SCA)

Kintetsu World Express South Africa (Pty) Ltd v LDC Consultants CC (11741/13, 13043/13, 14213/13) [2013] ZAGPJHC 241 (2 October 2013)

Kloot v Interplan Inc 1994 3 SA 236 (SECLD)

Law Society of the Northern Provinces v Mabando 2011 4 All SA 238 (SCA)

Liberty Group Ltd v Singh 2012 5 SA 526 (KZD)

Long v South African Breweries (Pty) Ltd 2019 5 BCLR 609 (CC)

Loots v Loots 1974 1 SA 431 (E)

Maguru v Road Accident Fund (1166/2018) [2019] ZALMPPHC 46 (4 October 2019)

Mansingh v General Council of the Bar 2014 2 SA 26 (CC)

Maribatsi v Minister of Police 2021 6 SA 470 (GJ)

Martens v Rand Share and Broking Finance Corporation (Pty) Ltd 1939 WLD 159

Maseka v Law Society of the Northern Provinces (443/06) [2010] ZANWHC 13 (1 January 2010)

Matsaung v Mathedimosa (1101/2019) [2021] ZALMPPHC 58 (30 August 2021)

Matsaung v Mathedimosa (1101/2019) [2022] ZALMPPHC 33 (27 June 2022)

Mavudzi v Majola (ZAGPJHC) (unreported) case number 49039/2021 of 22 July 2022

Meer v The Taxing Master 1967 4 SA 652 (D)

Motor Finance Corporation (Pty) Ltd v Prinsloo (2891/2014) [2016] ZAECGHC 105 (18 October 2016)

Motswai v Road Accident Fund 2014 6 SA 360 (SCA)

Mouton v Martine 1968 4 SA 738 (T)

Olgar v Minister of Safety and Security 2012 4 SA 127 (ECG)

Ndzamela v Eastern Cape Development Corporation Ltd 2004 6 SA 378 (TKH)

Penwill v Penwill 2020 12 BCLR 1419 (CC)

Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of South Africa 2016 37 ILJ 2815 (LAC)

President of Republic of South Africa v Gauteng Lions Rugby Union 2002 2 SA 64 (CC)

Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 1 SA 839 (A)

Promine Agentskap en Konsultante Bpk v Du Plessis 1998 JOL 3912 (T)

Public Protector v CSARS 2021 5 BCLR 522 (CC)

Public Protector v South African Reserve Bank 2019 6 SA 253 (CC)

Ramuhovhi v President of Republic of South Africa 2018 2 SA 1 (CC)

RH Christie Inc v Taxing Master, Supreme Court of Appeal (1086/2018) [2021] ZASCA 152 (27 October 2021)

Road Accident Fund v Taxing Master (10977/2013) [2019] ZAGPPHC 305 (15 July 2019)

Rösemann v General Council of the Bar of South Africa 2004 1 SA 568 (SCA)

S v S 2019 6 SA 1 (CC)

Scott v Nel 1963 2 SA 384 (E)

Stevens v Maloyi 2012 JDR 2548 (ECP)

Stubbs v Johnson Brothers Properties CC 2004 1 SA 22 (N)

Talioe v Family Advocate (ZAFSHC) (641/2017) [2021] ZAFSHC 71 (26 February 2021)

Thusi v Minister of Home Affairs and 71 Other Cases 2011 2 SA 561 (KZP)

Trollip v Taxing Mistress of the High Court 2018 6 SA 292 (ECG)

Unilever plc v Polagric (Pty) Ltd 2001 2 SA 329 (C)

Van Pletzen v Taxing Master (4992/2014) [2021] ZAFSHC 4 (15 January 2021)

Volks v Robinson 2005 5 BCLR 446 (CC)

Williams v Taxing Mistress, Port Elizabeth; In re: Williams v Road Accident Fund 2019 3 All SA 658 (ECP)

Zanella v Harty (31131/2020) [2022] ZAGPJHC 217 (11 April 2022)

Legislation

Admission of Advocates Act 74 of 1964

Attorneys Act 53 of 1979

Constitution of the Republic of South Africa 200 of 1993

Constitution of the Republic of South Africa, 1996

Legal Practice Act 28 of 2014

Promotion of the Administrative Justice Act 3 of 2000

Right of Appearance in Courts Act 62 of 1995

Rules Board for Courts of Law Act 107 of 1985

Superior Courts Act 10 of 2013

Government publications

Magistrates' Court Rules (GN R790 in GG 18052 of 6 June 1997)

Rules of the Constitutional Court (GN R1675 in GG 25726 of 31 October 2003)

Rules of the Supreme Court of Appeal (GN R 1523 in GG 19507 of 27 November 1998 as amended)

Uniform Rules (Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa) (GN R48 in GG 999 of 12 January 1965 as amended)

List of Abbreviations

CC	Constitutional Court
CSARS	Commissioner for the South African Revenue Service
LPA	Legal Practice Act 28 of 2014
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
UR	Uniform Rule