SUBMISSION ON THE TAXATION DIRECTIVE DATED 4 JANUARY 2021

1. **Introduction:**

1.1. I am a legal costs practitioner, and have been assisting my clients with the taxation of bills of costs in this division for over 30 years.

1.2. On 4 January 2021 the Judge President issued a directive in connection with the taxation of bills of costs where a matter is settled *inter partes.*

1.3. Included in this directive was the instruction to Taxing Masters:
"*Under no circumstances may a Taxing Master tax costs without a Court Order".*

1.4. I believe that this directive creates great difficulties in various instances, and will cause litigants to either have to incur significant unnecessary costs to overcome, or will be a bar to attaining justice.

1.5. There are many types of bills of costs that have traditionally been taxed by the Taxing Masters of the High Court in accordance with Rule 70(1), but where no High Court Order is possible, or is inexpensively attainable.

1.6. The types of bills of costs that are adversely affected by the directive are set out below.

2. Attorney and Own Client Bill (taxed against the client):

2.1. At any point in a litigious matter, a client has a right to request their attorney to draft and tax a bill of costs to justify their fees.

2.2. This is done without any court order.

2.3. In accordance with Section 49.7 of the Rules for the Attorney's Association (as well as Section 18.8 of the Code of Conduct for all Legal Practitioners, Candidate Practitioners and Juristic Entities), an attorney is obliged to submit an account for taxation or assessment, as the case may be, within a reasonable time after a request to do so by the Council, the client or the person purportedly liable for the payment of the fee.

2.4. However, in accordance with Section 28.1 of the Rules for the Attorney's Association, the Legal Practice Council shall not assess fees or disbursements of an attorney in instances where a state official is empowered to do so, or where work is covered by a statutory tariff.

2.5. In all High Court litigation matters, the statutory tariff contained in Rule 70 is applicable, and the Taxing Master is empowered to tax these fees by Rule 70(1).

2.6. Unless an exception to the taxation directive is made, it will no longer be possible to tax the fees of an attorney against the client, and when the client request this takes place.

3. Arbitrations:

3.1. In terms of Section 34(1) of the Arbitration Act of 1965, arbitrators and umpires may have their fees taxed by the taxing master of the court. This is always done without a court order.

3.2. Similarly, Section 35(3) of the Arbitration Act provides that where an arbitrator does not tax or settle the costs of a party to the dispute, then he taxing master of the court may tax them".

3.3. Section 35(4) of the act also provides that the court may, on making the award an order of court, direct that the costs be taxed by the taxing master.

3.4. However, the costs of approaching the court to have an arbitration award made an order of court is not unsubstantial, and is likely to cost the client between R20,000 and R50,000 for an unopposed application.

3.5. This cost would be prohibitively expensive for interim awards, or where there is no dispute about the liability, and only the quantum of the costs needs to be fixed by the Taxing Master.

3.6. In my experience, most arbitration bills of costs are taxed without having the award made an order of court, and no court order is in fact required before taxing a bill in accordance with (*inter alia) Schneir & London Ltd & others v Gluckman (II)* 1925 WLD 61 and *Burger v Cape Central Railway Co* (1888) 6 SC 131.

3.7. Unless an exception to the taxation directive is made, it will no longer be possible to tax arbitration bills of costs without incurring significant fees to launch an application.

4. Withdrawals:

4.1. Rule 41 provides a process for a party to withdraw a proceeding and incorporating a consent to pay costs.

4.2. Rule 41(1)(a) provides that …"the taxing master shall tax such costs on the request of the other party".

4.3. Rule 41(1)(b) stipulates that a consent to pay costs "shall have the effect of an order of court for such costs".

4.4. It is not yet known if the Taxing Masters will consent to tax bills presented on the strength of a notice of withdrawal, but an explicit exception to the directive may be required to ensure these taxations do take place.

4.5. Similarly, it is not known if the taxing masters would tax a bill where the notice of withdrawal specifies that the opposing party is to pay the costs, as is often the case.

5. Withdrawn Interlocutory Applications and Wasted Costs:

5.1. In many trial actions, litigants have to resort to launching interlocutory applications in order to affirm their rights, or to compel the opposing side to do something.

5.2. In many of these interlocutory applications, the opposing side complies with the action sought to be compelled before the hearing date, and tenders to pay the wasted costs, usually in the form of a letter. The interlocutory application is sometimes then withdrawn by notice with or without the costs of the application being specified in the notice.

5.3. Similarly, in many matters, postponements of a hearing date are sought by one or the other party, and the wasted costs of the postponement are

tendered, usually in the form of a letter. If there is sufficient time, the matter is then removed from the roll by notice.

5.4. Further, where a party amends a pleading in accordance with Rule 28, Rule 28(9) provides that the bringing the amendment "shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party".

5.5. All the above bills of costs have traditionally been taxed on the strength of the written tender to pay the costs, or the relevant rule, and in accordance with (*inter alia*) *Van Rensburg v Kent & others* 1956 (4) SA 346 (N).

5.6. As these examples are not the same as a settlement of a matter in its entirety, these costs tenders are unable to be made an order of court on the settlement roll. Furthermore, if it were possible, these bills are also often for very little money and it would not be cost effective to have to obtain a court order in many instances.

5.7. As such, an explicit exception to the directive will be required to ensure these taxations do take place.

6. <u>Other Courts or Tribunals:</u>

6.1. In terms of the wording of Rule 70(1), the Taxing Masters of the High Court are empowered to tax bills of costs for other courts or tribunals, such as the Competition Tribunal and Court, the Companies Tribunal, the Patent Court, the erstwhile Advertising Standards Authority, *inter alia.*

6.2. Similarly the Master of the High Court often requires attorneys who act for Executors and Liquidators to tax their bills of costs for work done for a deceased or insolvent estate. These bills have historically been taxed by the Taxing Master of the High Court without any court order.

6.3. Some of these tribunals do have their own Registrars who can tax bills, but many do not and these bills are then taxed at the High Court.

6.4. An explicit exception to the directive will be required to ensure these taxations do still take place.

7. Summary:

7.1. Whilst it is understood that the Directive may be necessary to reduce fraud or sharp practices in various RAF or Medical Malpractice matters, it has the consequence of denying justice, or driving up costs, for these matters set out above, and it would be necessary to set out the exceptions to the general rule for the Taxing Masters to follow.



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