REPORT OF FEE DISPUTE RESOLUTION COMMITTEE OF THE SOCIETY OF ADVOCATES OF KWAZULU-NATAL

ATTORNEY: [redacted]

ADVOCATE: [redacted]

***In Re*:** [redacted]

INTRODUCTION

1. This matter has been referred to the Fee Dispute Resolution Committee of the Society of Advocates of KwaZulu-Natal by [redacted] Attorney (hereinafter referred to as 'the Complainant') to determine the reasonableness of [redacted] fees (hereinafter referred to as 'the Respondent').

2. Prior to this committee considering the matter, it came to the attention of one of the persons sitting on the committee [redacted] that he had acted for the landlord at some stage during the litigation. Both the Complainant and the Respondent were consequently asked if they wish to indicate any objection to [redacted] continuing

to sit in the matter and both parties indicated that they had no objection to doing so.

3. The complaint was delivered to the Society of Advocates' offices on 15th February 2022.

4. The Respondent delivered reply on 24th February 2022 by email.

5. The Complainant was then asked whether or not wished to reply and on 20th July 2022 indicated that waived right to deliver a reply.

THE FACTS

6. Those facts which are common cause are as follows:

6.1. the Complainant is an Attorney practising under the name and style of [redacted] Attorney;

6.2. the Respondent is an Advocate and a member of the KwaZulu-Natal Society of Advocates. [redacted] practises in Durban;

6.3. in early April 2016 (there appears to be some confusion as to the precise date but it seems to us that nothing hangs on this issue), the Complainant instructed the Respondent to draft papers and move a spoliation application on behalf of the Applicant against the landlord in the High Court in Durban;

6.4. on 4th April 2016 the application was moved and an order of some sort appears to have been granted. Although this was a spoliation application, it would seem that the relief that was drafted was in the form of a Rule Nisi in terms of which the Applicant was granted interim relief;

6.5. pursuant to the granting of that order, it was alleged by the Applicant that the landlord had not complied with terms of the order;

6.6. in consequence, and on 5th April 2016, the Complainant instructed the Respondent to draft papers and move an application in terms of which of which the landlord was to be cited in contempt of court;

6.7. on 17th April 2016 the Respondent had a further consultation with the Applicant in order to draft a replying affidavit in both

the spoliation application and in respect of the contempt of court application;

6.8. we infer that it is likely that preference was accorded to the hearing of the respective applications. On 28th April 2016 both applications were argued on the opposed roll in which the Respondent appeared and drafted heads of argument as well as a set of supplementary heads of argument pertaining to a video which was to have been shown in court;

6.9. the Respondent drafted three fee notes numbered 91/2016; 92/2016 and 93/2016, all of which are dated 29th April 2016. The fee notes in question itemise how the fees were calculated and the only area of possible confusion is that the fee notes in question have to be read together because the items on the fee notes are not in strict chronological order.

THE ISSUES

7. The Complainant raised the following issues in his affidavit of complaint:

7.1. said that instructed the Respondent in April 2016 to bring the spoliation application against the landlord, and the Applicant consulted with the Respondent on Saturday 9th April 2016 whereafter [redacted] drafted papers and the matter was eventually argued on 28th April 2016;

(It will be noted that in paragraph 4 of the affidavit the Complainant refers to having consulted with the Respondent on 9th April 2016 but in the light of the other documents furnished that must be an error).

7.2. went on to say that "*during the course of the application he and the Respondent discussed fees*" (see paragraph 5 of the Complainant's affidavit). Although the phrasing is not entirely clear, we have no difficulty in accepting that at some point during April 2016 the Complainant and the Respondent might have had a discussion with regard to fees but not necessarily at the outset.

7.3. Also in paragraph 5, the Complainant said that an agreement was reached that "*the only chance we would have of recovering our fees would be if our client was successful and the court making an order for costs against the other side*." Again, the

phrasing creates difficulties but, in the light of the manner in which we have come to our conclusion it is not necessary to deal any further with this problem.

7.4. In paragraph 6, the Complainant implies that after "*the court's ruling on 28th April 2016 bills of costs were prepared*" by both the Complainant and the landlord's Attorneys which, because they were "*almost identical*", it was then agreed to set them off against each other and that the Respondent was informed of this.

7.5. The Complainant goes on to say that "*much to [ ] surprise, contrary to the agreement that we had made, the Respondent then began demanding fees*".

7.6. The Complainant then advanced an argument at some length as to the provisions of section 35(7) of the Legal Practice Act (see paragraphs 8 and 9) but in paragraph 10 indicated that the provisions of section 35(7) of the Legal Practice Act do not apply. In the circumstances, it will not be necessary for us to address this argument.

7.7. In paragraphs 11 to 12, the Complainant advanced many arguments with respect to the Respondent's fees itemised in fee notes numbers 91, 92 and 93. Eventually concluded his arguments in paragraph 12 by saying that the Respondent's fees are not reasonable and he asks the Society to assess and review them.

8. The Respondent delivered her answer on 24th February 2022 wherein she made the following submissions and [redacted] placed in dispute many of the facts alleged by the Complainant. For reasons which we will provide below, we believe that it is neither necessary for us to identify these disputes of fact nor to try to resolve them on the papers. Suffice to state that there are some undisputed facts (in the sense that although afforded an opportunity to reply, the Complainant elected not to do so) and they can be summarised thus:

8.1. the Respondent issued summons against the Complainant claiming her fees and the trial in that matter was to have been heard on 2nd March 2022. [redacted] went on to say that the parties settled on the basis of the Complainant having tendered to "*pay all fees as deemed reasonable by the Society of Advocates*" (paragraph 2 of the Respondent's response);

8.2. in March 2018, the Complainant sent an email (a copy of which is annexed to the response) but the first three sentences appear to be particular apposite to the issues and we quote them:

> "*I am well aware of the amounts outstanding to* [redacted] *and am making every effort to ensure that they are paid sooner rather than later. I am also well aware of your call. There is really no point you talking to me about this because it is not going to resolve anything and will only serve to place me in an awkward position where I do not know how to respond.*"

DISPUTES OF FACT

9. There are a number of disputes of fact.

10. It is apparent nonetheless that the reasonableness of the Respondent's fees is in dispute and as a Committee, we are empowered to determine the reasonableness of Counsel's fees. It is not our function to endeavour to resolve any other disputes of fact, however, where the dispute can be resolved without the Committee having to make adverse factual findings, we will not hesitate to do so.

11. We can find that what is not in dispute are the submissions in the Respondent's affidavit which we identified in paragraphs 8.1 and 8.2 above.

12. Accordingly, we can find that regardless of what fee arrangements might or might not have been made by the parties in April 2016, both the Complainant and the Respondent as *ad idem* that money is owed to the Respondent and that we are required to determine what fee was reasonable in the circumstances.

REASONABLENESS OF THE FEE NOTES SUBMITTED BY THE RESPONDENT

13. We have paid close heed to the arguments advanced by the Complainant with regard to the manner in which the Respondent structured her fees. They centre around how a fee could be structured.

14. The Complainant based his argument on the premise that the fees ought to have been calculated with reference to a charge-out rate of R1200 per hour. It is clear from the contents of paragraph 11.2 of his affidavit that based this contention on the fact that the Respondent had charged a fee of R2400 for a two hour consultation. On that basis, the Complainant extrapolated what contends should have been charged for each of the Respondent's attendances, based upon the time spent in each instance.

15. It is important to note that nowhere in the Complainant's affidavit does he suggest that there was ever an agreement reached that the Respondent would charge on a fixed hourly charge-out rate. This much is evident from what the Complainant says repeatedly thereafterwards namely:

> "*<u>If</u> the Respondent's charge out rate was R1 200…"*
> (See paragraphs 11.5, 11.7, 11.12, 11.13)

16. The Complainant's view of how Advocates charge is misconceived. In terms of the Uniform Rules of Professional Ethics of the General Council of the Bar and specifically Rule 7 (which were the rules governing how Advocates were to charge at the time the events took place), a number of factors have come into play and Advocates do not charge out at a specified hourly rate. A copy of the relevant GCB rule is attached.

(Incidentally, the Code of Conduct of Legal Practitioners which was promulgated by the Legal Practice Council in terms of the Legal Practice Act, is framed in similar terms).

17. The manner in which counsel charge fees (ie. by not doing so with reference to time spent) has received the approval of the Constitutional Court. In this regard, we refer to ***<u>President of the Republic of South</u>***

***Africa and Others v Gauteng Lions Rugby Union and Another 2002 (2) SA 64 (CC)*:**

"[28] The attitude of the Courts, however, is that this rate-per-time basis is to be no more than a pointer in assessing what is a reasonable fee to allow on taxation for particular services rendered by counsel. Indeed, in *Van Niekerk's* case Corbett CJ roundly condemned this basis as putting a premium on slow and inefficient work and conducing to the charging of fees that are wholly out of proportion to the value of the services rendered. The learned Chief Justice reaffirmed the following statement in an earlier judgment of that Court, *Scott and Another v Poupard and Another*:

> 'Although not wholly irrelevant to the question of complexity and bulk, the time actually spent in preparation of an appeal cannot be a decisive criterion for determining the reasonableness, between party and party, of a fee for that work, and thus displace an objective assessment of the features of the case.'

The effect of blithely adhering to the rate-per-time basis is graphically illustrated in *Van Niekerk's* case where counsel's fees on appeal that were sought to be recovered on a party and party basis were described in the judgment as 'kommerwekkend', 'beswaarlik aanvaarbaar', 'uiters vergesog' and 'buitensporig'."

18. In the result we believe that all that remains for us, is to decide whether or not the Respondent's fees were fair and reasonable, having regard to the numerous factors referred to above.

19. We also take into account the following:

    19.1. the Respondent was admitted as an Advocate on [redacted] so as at April 2016, [redacted] was an Advocate of nearly years' standing;

    19.2. there were in fact two applications which were moved on the basis of urgency;

    19.3. the Respondent was required to consult after hours;

19.4. there were time constraints imposed in order to ensure that the matter could be argued at the end of the month on the opposed roll; and,

19.5. certainly, insofar as it pertained to an application to cite the landlord in contempt of court was concerned, it was not a simple matter.

20. Against that background, we find that the fees charged are reasonable and that the complaint is accordingly dismissed.

21. We therefore rule that the fees due, owing and payable to the Respondent must be paid by the Complainant within seven days of the publication of this report to the Complainant.

DATED AT DURBAN THIS 10th DAY OF AUGUST 2022.

AD COLLINGWOOD

R SINGH (MS)

CHAMBERS
DURBAN