LINTON & CO. v. ASSISTANT TAXING MASTER.

(DURBAN AND COAST LOCAL DIVISION.)

1972. *February* 24. MILLER, J.

Costs.—Attorney's fees.—Time spent in waiting for opposed application to be heard.—Test applicable.—Whether time necessarily spent.—Rule of Court 70, *item* E1.*—Delivery of letter rather than posting.—Fee for.—Test to be applied.*

In regard to the fees allowable to attorneys under item E1 of Rule of Court 70 for attending Motion Court for the purpose of an opposed application, once the Taxing Master is satisfied that time was necessarily spent in waiting he must apply his mind to the *quantum* of the fee to be allowed therefor which would necessarily involve also a consideration of the duration of the period necessarily spent waiting.

The plaintiff's attorney, instead of posting certain letters, had had these delivered to the recipients who were resident in the town where he was practising. The Taxing Master had disallowed delivery fees. In a review of taxation,

Held, that the test to apply should be whether in all the circumstances of the case the attorney had acted not too extravagantly or in excess of caution but with reasonable prudence and diligence in the discharge of his duty.

Review of taxation under Rule of Court 48.

MILLER, J.: This matter comes before me for review of taxation in terms of Rule 48 of the Rules of Court. It appears that the applicant was the plaintiff in an action for payment of money. It applied for summary judgment and, for reasons which need not now be described, thereafter invoked the procedure described in Rule 41 (4) for purposes of obtaining a judgment. In due course both applications were set down to be heard together but because of the congestion of the roll they were twice adjourned. Eventually the parties reached a settlement in so far as the plaintiff's claim was concerned but were unable to agree on the question of costs. That question was argued before the Court, which awarded the costs to the plaintiff. The party and party bill of costs which is the subject of this review reflects the fees and disbursements claimed by plaintiff's attorney in respect of the above-mentioned matters.

Two main points arise. The first relates to the reasonableness or otherwise of the plaintiff's attorney's conduct in delivering instead of posting eight letters in Durban, where he practises and where the recipients of the letters have their offices. The tariff fee for delivery of a letter is 50 cents; the cost of posting a letter is obviously less. The Taxing Master disallowed the fee for delivery in respect of each of the eight letters and the applicant contends that he was wrong in doing so. The second point relates to fees disallowed by the Taxing Master in respect of time spent by the applicant's attorney in waiting in Court for the matters to be called, on three occasions. It will be expedient to deal with this issue first.

Item E.1 of Rule 70 makes provision for the fees allowable to an attorney for attending Court where an advocate is employed. It is expressly provided that the rates of remuneration thus specified are not applicable in respect of time spent waiting in Court for a matter to be heard, but there is a proviso to the effect that the Taxing Master shall, in respect of time necessarily spent in waiting, allow such additional remuneration not exceeding R21 per day as he in his discretion may deem fair and reasonable. The applications in question had been set down to be heard together on 21st May, 1971, in this Division. Applicant's attorney who had instructed counsel, attended Motion Court at 10.00 a.m. on that day. As the applications were being opposed they would necessarily have featured at the end of the roll and would normally be heard only after the unopposed applications and undefended divorce actions had been disposed of. It appears that the applicant's attorney attended Court until 3.00 p.m. when it became apparent that the oppbsed applications in question would not be reached on that day and they were postponed to 28th May. A fee of R21 for time spent in waiting was claimed. On 28th May the attorney waited in Motion Court from 10.00 a.m. to 11.00 a.m. when, apparently, it was intimated that the matter could not be heard on that day and it was accordingly adjourned to the 4th June. For that period of waiting the attorney claimed a fee of R4,20. Meanwhile the parties reached a settlement on all matters except costs and that question was to be argued in Motion Court on 4th June. Plaintiff's attorney attended Court on 4th June at 10.00 a.m. and waited until 1.00 p.m. The matter was eventually called and argued at 2.00 p.m., plaintiff being successful in his contention that he be awarded costs. The fee claimed in respect of the waiting time from 10.00 a.m. to 1.00 p.m. on this occasion was R12,60. In his written submission supplemented by argument before me in Chambers, the Taxing Master explained that he disallowed the fees claimed in respect of waiting time because he regarded it as the practice in this Division not to allow such fees in respect of opposed applications set down for hearing in Motion Court. It was said by the Taxing Master that such practice is fully justified and is fair and equitable in that it very frequently happens that an attorney who has an opposed matter on the roll also has unopposed matters which precede it and that the time spent in Court until the opposed matter is called is not necessarily so spent for purposes of the opposed matter still to be heard, but is related to other matters in which the attorney has an interest and in respect of each of which he is allowed a fee for attendance. The Taxing Master also pointed out that it would be wholly impracticable for the Registrar, in conditions which prevail in Motion Court where very many applications are heard in quick succession, to keep a record of the number of unopposed matters a particular attorney had on the roll before his opposed applications were called. The point was also made that an attorney who waits for an opposed motion to be called, infrequently spends the whole time waiting in Court but utilizes that time to transact other business in the Registrar's office or elsewhere in the precincts of the Court and which would have necessitated his attending at the Supreme Court building or offices even if he were not interested in the opposed application on the

These observations are undoubtedly pertine.. in relation to the facts of any particular case. They do not, however, justify the formulation and application of a firm principle that attorneys who attend Motion Court for purposes of an opposed application which may be heard at any time after the commencement of Motion Court, are not entitled to any fee in respect of waiting time. The terms of item E.1 of Rule 70 appear to me to be reasonably clear. Once the Taxing Master is satisfied that time was necessarily spent in waiting he must apply his mind to the *quantum* of the fee to be allowed therefore which would necessarily involve also a consideration of the duration of the period necessarily spent waiting. The first enquiry therefore is whether it was necessary for the attorney to be present in Court and to wait. I am alive to the practical difficulties in regard to proof of the necessity to wait when the matter comes up for taxation some time after the event. But the circumstance that it may be difficult to decide whether it was necessary for the attorney to wait in Court on Motion Court day does not justify the placing of an embargo on all claims to a reasonable fee under this item of the tariff. If the Taxing Master remains unpersuaded that it was necessary for the attorney to wait at all, he would not only be justified but would be obliged to disallow any fee for time spent by the attorney in waiting. The tariff draws no distinction between matters heard in Motion Court and other matters. It seems to me that in considering whether it was necessary for an attorney to be present in Court at the commencement of the day's proceedings and to wait thereafter, it must always be borne in mind that where an opposed application is on the Motion roll, having been set down for 10 o'clock in the morning or so soon thereafter as counsel may be heard, the attorney may be guilty of a dereliction of duty if he is not present in Court at 10 o'clock. He may be under the strong impression that the opposed application will not be reached until much later in the day, after all unopposed matters have been dealt with, but he cannot exclude the possibility that an opposed application might be called out of its usual sequence, for various reasons, or that his presence might be required for consultation with counsel on some matter which might arise from the very state of the roll, or otherwise, or that, as very frequently happens, negotiations for a settlement of the dispute between the parties may be commenced. If after having presented himself in Court he finds that the roll is proceeding in the ordinary way and it is apparent that the matter in which he is concerned will not be called until very much later, it might well be that the Taxing Master would be fully justified in allowing him only a very limited fee for the brief period of his necessary attendance and disallowing the bulk of his fee which represents a few hours of unnecessary waiting. Similarly, the Taxing Master would no doubt in a proper case be entitled to take into account the circumstance that the attorney had in any event to be in Court throughout, or for part of the period of his alleged waiting, in connection with other matters on the roll with which he was concerned. I can find no justification, however, for the recognition of any fixed practice of disqualifying an attorney from obtaining a fee in respect of waiting time on a day in which Motion Court is held. If that has been the practice in this Division in the past (and it has been suggested that that is also the practice in other Divisions) I am of the opinion that that practice cannot be maintained for it is in conflict with the terms of Rule 70 E.1. It is therefore necessary to set aside the Taxing Master's ruling in regard to these three items and to send the matter back to him for purposes of assessing on the merits of the case, the fee, if any, to which the applicant's attorney may be entitled in terms of the Rule.

I turn now to the question of the fee for delivery of letters. The Taxing Master relied strongly on the decision of DAVIS, J., in *Trop* v. *Irish Linen Spinning and Weaving Co.*, 1938 (2) P.H. F163. It appears from the report that the learned Judge indicated that a letter

"should only be delivered (in contradistinction to posting) where there is real urgency"

and that where such urgency was not shown the charges should be disallowed. I accept the contention that a charge for delivery of a letter should not be allowed unless some adequate reason is shown to exist for the attorney's election to deliver the letter rather than post it in the ordinary way. Obviously, where a communication was necessarily required to reach the addressee in the shortest possible time, a delivery fee would be allowed. I am not sure, however, that DAVIS, J., intended strictly to limit the right to obtain a delivery fee to cases where there was great urgency in the sense that the letter had necessarily to be delivered forthwith. I can visualize circumstances in which, even though there is no great urgency in regard to time, an attorney might act not only reasonably but with necessary prudence in delivering a letter by means of a trusted messenger rather than post it. The letter might cover a document of vital importance; or it may be that the attorney has reason to believe, upon good grounds, that it is necessary to have proof of receipt by the addressee of a particular letter. In such circumstances the attorney might well be held to have acted reasonably and prudently in choosing to deliver the letter by hand. It seems to me that the test to be applied by the Taxing Master should be whether in all the circumstances of the case the attorney acted not extravagantly or in an excess of caution (as to which see Rule 70 (3)) but with reasonable prudence and diligence in the discharge of his duty. I am, with respect, of the opinion that such a test is preferable to the test of "real urgency", not only because the word "urgency" tends to limit the Taxing Master to consideration of the time-factor involved, but also because it appears to me that a rigid definition of the circumstances in which a fee for delivery of a letter might be recovered as between party and party is undesirable. The criteria of propriety and reasonableness in regard to a charge for delivery of letters would afford sufficient protection against the payment of unnecessarily incurred costs without needlessly inhibiting attorneys who conscientiously seek to discharge their duties promptly and efficiently.

In the written submissions made by the applicant in this case there is included a fairly detailed description of the circumstances in which and the reasons why each of the eight letters was delivered and not posted. I was informed by the Taxing Master that those details were not placed before him at the time of taxation. [illegible]

they been before him he might well have come to a different conclusion in respect of some of the letters at least. This circumstance might ordinarily have warranted a refusal to interfere with the Taxing Master's ruling for it seems to me that it was incumbent on the applicant to justify the fee for delivery of the letters. But against that is the consideration that the Taxing Master's view appears to have been that a delivery fee should only be allowed if there was real urgency in point of time; an approach which, for the reasons I have indicated, I do not think was entirely correct. In the circumstances it would be proper to set aside the Taxing Master's ruling in regard to the eight items relating to delivery of letters and to remit the matter to him for decision in the light of the details which have now been furnished by the applicant.

I have not been asked to make any order regarding the costs of this review. The amount involved in the dispute is not substantial and it is clear that the applicant has caused the matter to be reviewed as a matter of principle rather than for the sake of gaining the comparatively modest sum which was disallowed on taxation. This is especially true of the delivery fee charge in respect of the eight letters. Moreover, although I indicated to the parties that I did not require to hear argument but was prepared to give a decision on the written submissions, the applicant especially requested, through the Registrar of this Court, that I hear argument and counsel was briefed by the applicant to argue the matter before me. I therefore do not propose to make any order as to the costs of these review proceedings. The defendant against whom the bill was taxed did not oppose but indicated that he abided the decision of the Court.

The Taxing Master's disallowance of the three items representing fees for waiting and of the eight items representing fees for delivery of letters is set aside. The matter is remitted to the Taxing Master for reconsideration of these items in the light of what has been said in this judgment.

S. v. SHANGE.

(NATAL PROVINCIAL DIVISION.)

1972. *February* 22. MILLER and MILNE, JJ.

Juvenile offenders.—Boy aged 13 *with previous convictions convicted in magistrate's court of theft.—Magistrate ordering that he be sent to a reform school.—Probation officer having recommended a children's home.—Court on review finding boy to be "a child in need of care" in terms of Children's Act,* 33 *of* 1960.—*Remitted to magistrate to act in terms of sec.* 159 *of Act* 56 *of* 1955.

A boy of 13 years of age had been convicted in a magistrate's court on two counts of theft. He had two previous convictions for theft in respect of which he had been sentenced to cuts with a light cane. The recommendation of the probation officer was that he should be sent to a children's home established by section 39 (3) (*a*) of the Children's Act, 33 of 1960. The magistrate had, however, ordered that he be sent to a reform school on the ground, *inter alia*, that he would be likely to "contaminate the other inmates of a childern's home." On review,

Held, that "a child in need of care" in terms of the Children's Act might well be a child who had acted in a criminal or irresponsible fashion or who had been subjected to "contaminating influences",

Held, further, though the magistrate could not, of course, himself have sent the child to a children's home, that he should have acted in terms of section 159 of Act 56 of 1955.

Review.

MILNE, J.: In this automatic review case the accused was charged with two counts of theft, it being alleged on count 1 that he stole two wristwatches on 23rd November, 1971, and on count 2 that on 13th November, 1971 he stole two screwdrivers, one side-cutter, a pair of pliers and a pair of "tin snips". The accused pleaded guilty and was rightly convicted. It was proved that in May, 1971 the accused was convicted of theft and sentenced to five cuts with a light cane, and that in September, 1971 he was again convicted of theft and sentenced to six cuts with a light cane. As, however, the accused was only 13 years old the magistrate rightly called for a probation officer's report. This report revealed that, in the opinion of the probation officer, the parents of the accused were failing to exercise proper control of him and that this was partly due to the fact that they are both in employment. His report concludes

"this boy still has a chance to reform. The envionment he is living in, is conducive to his misbehaviour. His age group and home are the factors contributing to his misconduct. The parents stated that they have no far away relatives who can look after the child, that is, in a good environment where he can get education and comply with the norms and regulations of his society."

The recommendation of the probation officer was that the accused "be sent to a childrens' home to be designated by the Secretary." The magistrate did not, however, adopt the suggestion of the probation officer and ordered that the accused be sent to a reform school in terms of sec. 342 (1) (*d*) of Act 56 of 1955. For the purposes of this order the accused was "found to have been born on 10th February, 1958."