(EASTERN CAPE DIVISION)

REPORTABLE
NOT REPORTABLE
OF INTEREST

Case No. 1078/84

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In the matter between:

TREK PETROLEUM (PROPRIETARY) LIMITED — Applicant

and

KUNDULU (PROPRIETARY) LIMITED — Respondent

REVIEW OF TAXATION

JUDGMENT

MULLINS J:

This is a review of taxation. The history of the matter, according to the taxing master's stated case, is as follows:

1. The respondent company was placed under provisional judicial management upon the application of D.E. Wilson, a director and shareholder of the company. The applicant's attorney was G.M. Nettelton Esq. On the return date of the rule nisi, Trek Petroleum (Pty) Ltd. applied for discharge of the provisional judicial management and that the respondent be placed under provisional winding-up. The applicant's attorneys in this matter were Messrs Borman and Botha.

   The orders were granted as applied for with-

   "...costs of the judicial management inclusive of the costs of the application therefor, be ranked in the liquidation equally with the costs of the liquidation."

2. Pursuant to the order for costs, the applicant submitted two bills of costs for taxation; one in the name of the attorneys at seat of the court, Messrs Borman & Botha, and the other in the name of the correspondents in King William's Town, Messrs Hutton & Cook.

   Certain items in the bill of Hutton & Cook were either diminished in quantum or disallowed in toto. A request has been made to state a case for decision by a judge in relation to these items."

A number of items in the bill of costs of Messrs Hutton & Cook were either disallowed or reduced. The case stated is for decision by a judge whether the taxing master erred in the exercise of his discretion in so disallowing or diminishing the quantum of the said items. In all amounts of R509,50 in respect of fees and R3,47 in respect of disbursements were taxed off.

The history of the litigation, as appears from the papers, is briefly as follows.

The respondent company, Kundulu (Proprietary) Limited, was placed under a provisional order of sequestration at the instance of one Wilson on 2nd February 1984. One Kidson was appointed provisional judicial manager. On the return day the present

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applicant, Trek Petroleum (Proprietary) Limi] applied, as an intervening creditor, for the discharge of the provisional judicial management order, and for a provisional winding up order of the respondent company. A provisional winding up order was granted on 29th March 1984, it being ordered that the rule be served, inter alia, by registered post on all known creditors of the respondent. A final winding up order was granted on 19 April 1984. In so far as the costs of the judicial management proceedings were concerned, it was ordered that

> "the costs of the judicial management inclusive of the costs of the application therefor, be ranked in the liquidation equally with the costs of liquidation."

I shall deal with the disputed items seriatim.

Items 9 and 10

The claim under these items were as follows:

5/3/84 9. Attend on, peruse and consider loan agreement dated 20/10/82 (31 folios) 46,50

5/3/84 10. Attend on, peruse and consider Suretyship dated 10/7/78 (13 folios) 19,50

These items were claimed at R1,50 per folio under Item B(1)(a) of the tariff, whereas the taxing master took the view that

they fe[illegible] under Item B (1)(b) for which only 0,50c per folio is provided. He accordingly taxed off the amounts of R31,00 and R13,00 respectively. In his stated case the taxing master now points out that he should have not allowed these items at all, as perusal thereof was also included under item 15 which reads:

16/3/84 15 Attend on, peruse and consider documents for annexing to affidavit (131 folios) R196,50

The taxing master contends therefore that there has been a duplication of items 9 and 10.

Item B.1 of the tariff reads:

> "1. Attending the receipt of and perusing, and considering
>
> (a) any summons, petition, affidavit, pleading, advocate's advice and drafts, report, or important letter, notice or document per folio..... 1,50
>
> (b) any formal letter, record, stock sheets in voluntary surrenders, judgments or any other material document not elsewhere specified (per folio)..... 0,50
> subject to a minimum fee of..... 1,00"

The taxing master contends that the two documents in question

while material, are not important documents.

The status of the documents in question can be judged by the use to which they were put in the application. The applicant sought to have a provisional judicial management order set aside and substituted by a provisional winding-up order. As proof of its locus standi the applicant alleged that it was a creditor of the respondent in the sum of R57 306,33, based on an account, and further that respondent was indebted to applicant in the further sum of R127 353,28 being the balance owing on a loan agreement. Paragraph 12 of the founding affidavit reads:

> "That the Applicant Company, entered into a loan agreement with the Respondent Company which was signed at King William's Town on the 20th October, 1982, and in terms of which a loan of R130 000,00 was granted by the Applicant Company to the Respondent Company. It is on this loan that the sum of R127 353,28 remains owing. As Security for the debt, the Company registered a mortgage bond over Erf 2085, King William's Town, owned by the Respondent Company, and I attach hereto marked Annexure "D" a copy of the said loan agreement with annexures and Annexure "E", a copy of the said Mortgage Bond which constitutes the security held by the Applicant Company in regard to the debt owed to it by the Respondent Company."

For the purposes of the application, the contents of the loan agreement, which consists of 10 typed pages (31 folios) are of no importance whatsoever, other than to substantiate the allegation that a loan of R130 000,00 was made by applicant to respondent. To this extent it was material, and it was proper to annex it to the affidavit. I fail to see however, what importance had to be attached to the perusal or consideration thereof. It's sole function was to substantiate the allegation of the principal amount of the loan.

Similarly the suretyship agreement to which is annexed a power of attorney to pass a mortgage bond, a copy of a draft mortgage bond, and a copy of the bond itself, do no more than establish that as security for the loan of R130 000,00, property of the respondent company is bonded in favour of the applicant.

For the purposes of the application therefore, the loan agreement and surety agreement are no more than formal documents substantiating the allegation of indebtness and

the holding of security. These documents had to be perused, but all that had to be considered was the amount of the original capital loan and the security therefor. The actual amount of indebtness, viz. R127 353,28, is not derived from these documents.

The fact that a document is material does not make it important for the purposes of the tariff. Waring vs Marvis & others 1970(3) SA 594 (W) at p 597; Brivik Bros (Pty) Ltd vs Balmoral Sales Corporation (Pty) Ltd. 1978(4) SA 716 (W). A document which has no more than evidential value may be material, but I am certainly not persuaded that I should interfere with the taxing master's decision that the documents were not important, bearing in mind the principles set out in Kock vs SKF Laboratories (Pty) Ltd 1962(3) SA 764 (E).

As mentioned above, the taxing master also points out that there has been a duplication of items 9 and 10, which are also included in item 15. Furthermore he allowed the fee

for perusal of all the annexures to the affidavit, including the loan agreement and security agreement referred to above, on tariff item B.1 (a). He points out that this was an oversight on his part, and even if a second perusal fee was justified, he should have been consistent and only allowed such second perusal under tariff item B.1.(b).

I am in agreement with the taxing master that a second perusal fee was not justified. Bearing in mind the purpose for which the documents were attached to the affidavit, as set out above, I do not regard a second perusal only 11 days later as necessary or justified.

The applicant has therefore been allowed two perusal fees in respect of the said documents, once at tariff item B.1.(b), and once at tariff item B.1.(a), whereas he should only have been allowed one perusal fee at tariff item B.1.(b). However it does not seem to me that I have the power in a review of taxation under Rule of Court 48 to disallow an item which has been allowed by the taxing master, where the

matter is before me only by way of an application to increase the fees allowed by the taxing master.

The fees allowed by the taxing master in respect of items 9, 10 and 15 must therefore stand.

Item 30 Attend on telephone call from correspondents with hearing date R5,00

This item was disallowed in toto. The date of the telephone call was the 22nd March 1984. On the same date an item (No. 29) was allowed for "perusing and considering letter from Grahamstown correspondents confirming telephone discussion and enclosing copy of notice of motion and annexures". The date of hearing viz. 29th March 1984, appears in the notice of motion, and this date had in any event to coincide with the return day of the provisional judicial management order, which was known to the applicant soon after that order was granted on 2nd February 1984.

I agree with the taxing master that the telephone call was

unnecessary and properly disallowed.

Item 39 Perusing letter from correspondents confirming outcome of hearing and enclosing order - 3 folios R4,50.

The taxing master allowed only R1,00 under this item, treating it as 1 folio under tariff item B.1.(b), the minimum being R1,00. In my view the taxing master was correct in treating this as a formal material document, but not as an important one as envisaged by tariff item B.1. (a). The letter confirms the grant of the order, encloses a copy, advises that copies thereof had been forwarded for service, and made suggestions in regard to proof of the registered address of the respondent. These are all the formal requirements of notification to a country correspondent of the grant of a provisional order of winding up. I do not however agree that the letter was unnecessarily prolix, and I would have allowed a perusal fee for 3 folios as claimed. As this will only make a difference of the trifling amount of 0,50c however, I do not propose to interfere with the taxing master's decision. cf. Van der Walt

vs Geyser 1978 (2) SA 1 (T).

Item 41 Making copy of order for creditors (96) and client R19,70

The taxing master taxed off the amount of R10,10, and allowed 96 copies of the order at 10c each under tariff item N.1.(c) It is not clear how the amount of R19,70 was arrived at. The applicant is however apparently only objecting to the cost of making one copy for the client. As the client had already been appraised of the result of the hearing by telex, I agree with the taxing master that an additional copy of the order for the client is superfluous.

Item 42 Attend on telephone call from correspondents to discuss requirements i.t.o. order R5,00

This telephone call was apparently to arrange for the service of the order on creditors. This could have been arranged in a few words in the letter referred to under Item 39 above, in which letter service by publication and on the respondent company was referred to. I am not prepared to hold that the

taxing master was incorrect in his decision to disallow item 42 as an unnecessary duplication.

Items 43 - 236

Items 43 and 44 read as follows in the bill of costs:

43 Drafting letter to Wally's Bottle Store enclosing copy Order (1folio) R3,20

44 Attend on proof of posting R1,00

There was also a disbursement charge of 0,45c.

The following items 45 to 236 were in identical terms addressed to the other 96 creditors. The taxing master disallowed all these items in toto except for the disbursement, being the registered postage in each case.

The letter in question to each creditor reads as follows:

"This is to advise that Kundulu (Pty) Limited
was placed under a Provisional Winding-up order
on the 29th March 1984.
A copy of the relevant order is attached hereto."

The letter contains no information in addition to that contained in the order, save presumably the name and address

of applicant's attorneys. That information could easily be obtained by interested creditors, and I agree that no covering letter was necessary. The court order merely required the order to be served by registered post, and a covering letter was not necessary in order to comply with the court order. cf. ex parte Begg 1937 EDL 378.

In so far as attendance on proof of posting is concerned, such proof of posting consisted of a list of creditors comprising 6 pages, to each of which pages a single registered slip was attached in respect of the creditors on that page. The taxing master suggests that he should have allowed a perusal fee of R1,00 per page for each of these pages. He obviously did not allow such amount because there was no claim in respect of these lists of posting.

The applicant contends that even if a covering letter is not required, they are entitled to be "remunerated on a time basis, bearing in mind that some 96 envelopes had to be checked,

assembled and dispatched". This is no doubt correct, and as the taxing master points out, he would no doubt have allowed charges for drafting the list of creditors, making copies thereof, preparing registered envelopes, and attending at the post office. However, no such charges were claimed, and the applicant chose to claim only for drafting the covering letter and attending on proof of posting.

Can the matter be rectified at this stage of the proceedings? If, as suggested by applicant, remuneration should be on a time basis, how is such remuneration to be calculated? Neither the taxing master nor a judge on review is entitled or empowere to include in a bill items which have not been properly claimed, even if it is clear that the work has been done. Nor can a rightful claim for remuneration which is not claimed as an item in the bill, be substituted for another item to which the party is not entitled. A party "must stand or fall on the bill his attorneys submitted". Mcunu vs Southern Insurance Assoc. 1977 (2) SA 18 (SE) at p 20H. Each item

is an individual item, and it is not the function of a taxing master to seek to ascertain whether some other form of remuneration may be due in lieu of an item in the bill which is not established or shown to be justified.

Item 250 Drafting letter to Grahamstown correspondents confirming receipt of letter (1 folio) R3,20

The taxing master taxed off R1,00. The tariff under tariff item D.8 (a) is R1,00 to R3,00. The taxing master states that he decides on the complexity of each letter, and there are no grounds for interfering with his discretion. The applicant states that the taxing master normally allows R3,20. The taxing master denies that he does so, and that he treats each letter on its merits. It would be incorrect for the taxing master to allow a flat rate for all letters as suggested by the applicant.

Item 254 Attend on telephone calls from Grahamstown correspondents advising final order granted R5,00

This item was disallowed as an unnecessary duplication, the actual order having been received under cover of a letter. The date appearing on the bill of costs of attending on the telephone call and the letter is the same. There may be some substance in the argument that advice of the granting of the final order should be transmitted to the country correspondent as soon as possible, but then a telephone call must be justified on the facts of the particular case. In the present case it must be accepted, ex facie the bill of costs, that the letter enclosing the order was received by Messrs Hutton & Cook on the same day that the order was granted, viz. 19th April 1984. Such letter may well have reached them the same day by hand. If the date on the bill of costs is wrong, the applicant is to blame therefor.

Item 258 Drafting letter to provisional liquidator advising final order granted R3,20

This item, together with the disbursement on postage of 0,08c, was disallowed in toto. The taxing master contends that it is not a party and party item, not being in

furtherance of obtaining the relief sought. The applicant suggests that the provisional liquidator "has a direct interest and is a quasi client". As the rule nisi was served on the respondent company, it presumably came to the notice of the provisional liquidator, and he would know the date of the return day. On the analogy of the decision in Muller vs Matatiele Tractors (Pty) Ltd. 1971(2) SA 447(E), the appointment and functions of the provisional liquidator are the responsibility of the Master. I do not agree that he can be regarded as the quasi client of the applicant's attorneys, whatever that may mean.

Item 260 Drafting letter to Grahamstown correspondents confirming receipt of affidavit. R3,20

This item, together with the 0,08c postage, was also disallowed in full. It is not stated what affidavit is referred to, the date of drafting of the letter being 25 April 1984, and the last affidavit having been received on 17 April 1984, and which acknowledged under item 253. The applicants contend that:

> "The Taxing Master has lost sight of the fact that although two letters may bear the same date, in practice Attorneys dictate letters at different times. It occurs on occasions that a letter may be dictated on one day and typed the following day only to be followed by a further letter on the same day. In this matter two letters were in fact written and the Taxing Master has, therefore, with respect, erred in assuming a duplication."

If two letters were in fact written in respect of the affidavit received on 17th April 1984, then there has been duplication. If item 260 is in respect of another affidavit received, there is nothing to identify such affidavit to enable the taxing master to allow such item.

The taxing master has referred me to the recent decision of the Appellate Division in Ocean Commodities Inc. & others vs Standard Bank of S.A. Ltd. and others 1984 (3) SA 15 (AD) where at page 18F-G the test when the Court will interfere with the taxing master was restated in the following terms:

> "I think, with respect, that it is better to state the test to be that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him, since it indicates somewhat more clearly than does the formulation of the test by POTGIETER JA what the test actually involves,

viz. that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling."

Applying this test to all the items complained of, I am unable to come to a conclusion favourable to the applicant in respect of any of them.

I should mention finally that although the taxing master in his report referred to a number of authorities in support of his views, no authorities were referred to by the applicant in its contentions. The reviewing judge will of course do so of his own accord, but it might serve to advance the case of the applicant if contentions were supported by authority.

In view of my decision, it follows that no costs of the present review proceedings should be allowed.

The application for review fails and the taxing master's decision in respect of the items in question is confirmed.

T.M. MULLINS

JUDGE OF THE SUPREME COURT